

Boston Bar Journal

May/June 2009

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in the District of Massachusetts**

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Boston Bar
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By Kathy B. Weinman

What Would Lelia J. Robinson Think?



I am writing several days after Justice David Souter announced his plans to retire from the U.S. Supreme Court at the close of the term. Rumors about Justice Souter's replacement are rampant (the nomination likely will have been announced by the time this piece is published). There appears to be a growing consensus that the next Supreme Court appointment should be a woman. Among the names mentioned

are federal and state appellate judges Kim Wardlaw, Diane Wood, Leah Ward Sears, Sonia Sotomayor and Margaret McKeon; former and current law school deans and professors Elena Kagan, Pamela Karlan and Kathleen Sullivan; and Governors Janet Napolitano, Christine Gregoire and Jennifer Granholm. A recent *New York Times* article, "Wider World of Choices to Fill Souter's Vacancy," quoted one law professor's observation that "[t]he legal landscape has been totally transformed. Obama has a lot of possibilities."

All this is a world apart from the one inhabited by Lelia J. Robinson, who became the first woman admitted to the Massachusetts bar in 1882. When Robinson graduated from law school, she was the only woman in her class and the only woman ever to complete her studies at Boston University. Turned down for admission to the bar by the Supreme Judicial Court, Robinson successfully lobbied for legislation permitting women to practice law. In her 1890 survey of women lawyers nationwide — she counted under two hundred — Robinson observed that "[i]n some places the public is slow to intrust legal business to women attorneys; in others it readily does so." She hoped that "in time, sooner or later, the lawyer everywhere who deserves success and can both work and wait to win it, is sure to achieve it, — the woman no less than the man."

The advancement of women in the legal profession over the past three decades has been dramatic. In the late 1970s, women were only 28% of law school graduates and less than 1% of the partners at the nation's largest firms. By the late 1980s, women constituted approximately 40% of graduating classes and 8% of the partners at the largest firms. Today, nearly 50% of law school students and almost 16% of large firm partners are women. In 2009 more than 200 women are federal judges (about ¼ of the bench) and over 100 women are judges serving on their states' highest court. In Massachusetts, our top courts are led by Margaret Marshall, chief justice of the Supreme Judicial Court, and Sandra Lynch, chief judge of the U.S. Court of Appeals for the First Circuit.

There is a long way to go to fulfill Lelia Robinson's prediction, however. At least as measured by leadership

roles at large law firms, success is not yet achieved equally by men and women. Although women have joined incoming classes at law firms in numbers nearly equal to men for over fifteen years, they continue to be promoted to partnership at far lower rates — a glass ceiling of approximately 15%-16% of equity partners according to surveys by the National Association of Women Lawyers and others. When *Working Mother* magazine announced the "50 Best Law Firms for Women" in 2007, the percentage of female equity partners at selected firms ranged from as low as 9%.

There are varied reasons for lower equity partnership rates, but two major issues emerge: (1) the difficulty of achieving work-family balance in private practice; and (2) the challenges of generating business for the firm. Under the auspices of the Equality Commission, cosponsored by the Boston Bar Association, Massachusetts Bar Association and the Women's Bar Association, the MIT Workplace Center conducted two surveys — of the largest 100 law firms in the state and of certain lawyers who had worked at those firms in 2001. Its 2007 report, *Women Lawyers and Obstacles to Leadership*, confirmed what many of us know from experience: Women leave firms and law firm practice at greater rates than men, often citing an inability to integrate work and family life. The pressure to work even longer hours to justify higher associate salaries and generate larger profits for the firm has made it even harder for women to progress at their law firms. The focus on revenue means that rainmaking is more important than ever. The National Association of Women Lawyers' report on *Actions for Advancing Women Into Law Firm Leadership* (2008) found that "[a] lawyer's ability to generate business is the single most determinative factor in whether a lawyer will become an equity partner."

A focused effort to advance the success of women in the legal profession is imperative. The BBA's strong recommendation in its 1999 report, *Facing the Grail: Confronting the Cost of Work-Family Imbalance*, that firms offer lawyers individualized, flexible work alternatives still holds true. My own experience of working four days a week when my children were young — and the similar experiences of other women I know — suggest that part-time work need not adversely affect a woman's long-term contributions to her firm. Concrete steps to improve women's rainmaking also are important. While generating business comes naturally to some women, others benefit from a more structured approach, including assignment to important matters with key clients, inclusion in pitch teams for client prospects and business development training and coaching. As clients increasingly make clear their preference for diverse teams of lawyers, we all benefit. ■

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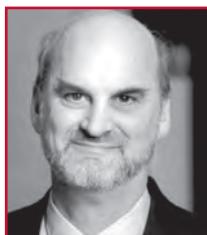
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By Madeleine M. Blake and Eric M. Gold

First Circuit Sets SOX Standard For Review



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For the first time, the U.S. Court of Appeals for the First Circuit has defined the legal standard for a Sarbanes-Oxley Act (“SOX”) whistleblower claim. SOX, enacted in 2002 in the wake of the Enron scandal, protects corporate whistleblowers by providing a private cause of action when a publicly traded company-employer takes adverse employment action against an employee “because of any lawful act done by the employee — to provide information... regarding any conduct which the employee reasonably believes constitutes a violation of [certain enumerated fraud and securities laws].” See 18 U.S.C. § 1514A. In *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009), the First Circuit provides employers and employees with guidance on how to determine when an employee “reasonably believes” there was a violation of fraud or securities laws.

The plaintiff, Kevin Day, was fired by Staples less than three months into his employment. Day had worked in Staples’ Reverse Logistics Department, which is responsible for product returns from large customers. Shortly after beginning work, Day complained that his department was engaged in corporate fraud. In particular, he alleged that Staples: (1) improperly issued credits to customers without requiring the necessary documentation; (2) withheld portions of credits owed to certain customers; and (3) improperly cancelled and then reissued pick-up orders for returns.

Staples investigated Day’s allegations and concluded that none of the practices was fraudulent. After Day disputed Staples’ conclusion, it arranged for Day to meet with increasingly senior managers. The court detailed six meetings between Day and senior Staples personnel, including the Vice President of Finance for North American Delivery, each of whom listened to Day’s complaints and explained why the practices were not fraudulent. Day ultimately was terminated four days after the sixth meeting because Staples managers had concluded that Day was inflexible, had been performing his job poorly for the two months he held it, and had “threatened not to follow his managers’ instructions.”

Day filed a SOX whistleblower complaint with the Occupational Safety and Health Administration (“OSHA”), the office designated to investigate such claims, alleging that he was fired because he complained of fraud. After OSHA found that the claim lacked merit, Day filed a complaint in federal district court. Judge Tauro granted summary judgment to Staples, concluding that Day’s “belief that he had uncovered fraud was not reasonable.” Day appealed, and the First Circuit affirmed.

In considering the appropriate legal standard for SOX claims, the First Circuit examined the Department of Labor regulations, case law from other circuits interpreting the statute, and the legislative history. Relying on the consistency among these sources, the court found that the statutory requirement that a plaintiff must have a “reasonable belief” of

fraud “has both a subjective and objective component.” Accepting that Day “ma[d]e his complaints in subjective good faith,” the court held that, to satisfy the objective component, while “[t]he employee need not reference a specific statute, or prove actual harm...he must have an objectively reasonable belief that the company intentionally misrepresented or omitted certain facts to investors, which were material and which risked loss.”

Under this standard, the court found Day’s allegations of fraud were not objectively reasonable for six reasons. First, Day’s complaints were mere “disagreement[s] with management” about internal procedures and such “complaint[s] about corporate efficiency” are not protected. Second, his complaint that “the process of canceling and reissuing return orders” was fraud was not objectively reasonable because that policy was not related to the company’s financials and was not reported to shareholders. Third, the court found the complaint that Staples “was knowingly refusing to provide its customers with monetary credit they were entitled to” was at most “a complaint related to consumer protection,” not shareholder fraud. Fourth, Day’s allegations were not accounting fraud because there were no violations of GAAP, nor even an accounting irregularity. Fifth, none of Day’s allegations was “material to shareholders,” as required for shareholder fraud. Sixth, even if Day’s allegation of fraud had been reasonable when first made, it “ceased to be reasonable after Staples’ employees reiterated the rationales for the return process, and assured [him] that no fraud was being committed.” The court, therefore, affirmed summary judgment against Day on his SOX whistleblower claim.

The court likewise affirmed summary judgment on Day’s state law claims, holding that the Code of Ethics he signed did not constitute an employment agreement, and refusing to “create a new common law cause of action under Massachusetts law” for wrongful termination of whistleblowers because SOX had been specifically “designed to address the inadequacies of state law.”

The case is significant in defining the legal standard for SOX whistleblower claims. The detailed recitation of Staples’ response to the allegations of fraud, described with apparent approval by the court, provides a good model for other companies to follow when responding to employee allegations of fraud. ■

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By Erik P. Belt and Lee C. Bromberg

Patent-Specific Local Rule Arrives in the District of Massachusetts

Last fall, the United States District Court for the District of Massachusetts (“District Court”) joined a select number of federal district courts throughout the country that have adopted patent-specific local rules. On November 4, 2008, with strong support from patent litigators and practitioners, the District Court formally adopted new Local Rule 16.6, governing Scheduling and Procedures in Patent Infringement Cases. This new rule provides readily accessible guidelines for the scheduling steps, timelines, and procedures that patent litigants are likely to encounter in the District of Massachusetts. The rule is intended to provide uniformity and predictability in patent cases and to signal that the District Court is receptive to handling patent cases.

Why a special rule for patent cases? Patent cases have certain unique procedures and issues that complicate the conduct of discovery, motion practice, and trial. These issues stem in part from a 1996 Supreme Court case, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), which held that courts, rather than juries, must interpret disputed terms in patent claims. (A patent claim is the portion of a patent, consisting of one or more numbered paragraphs at the end of the patent document, that defines the scope of legal protection for an invention and hence the line between infringement and non-infringement. As such, disputes over the meaning of claims are central to most patent cases.) This ruling, in turn, led courts to devise a special process for construing disputed claim terms, known as a “*Markman* hearing,” that has led to a wide array of procedures and scheduling issues varying from court to court and from judge to judge. The purpose of Rule 16.6 is to provide uniformity to this process and to bring more efficiency to patent litigation, thus reducing its cost.

Rule 16.6 requires that, in addition to their normal obligations under the federal and local rules of procedure, the parties must address gating issues unique to patent infringement litigation, such as the disclosure of initial infringement and invalidity positions, the process for identifying disputed claim terms, the timing and procedure for a *Markman* hearing and related briefing, and the need for technology tutorials. By mandating that these issues be addressed in the Rule 16 conference at the start of a case, Rule 16.6 permits the parties and the court to move more efficiently from discovery through motion practice and on to trial.

Rule 16.6 includes a sample scheduling order for patent infringement cases, complete with suggested timing. In a case in which the parties are moving forward expeditiously, the timelines and procedures suggested in Rule 16.6 should make it possible to proceed

to a *Markman* claim construction ruling in approximately 12 months from filing suit.

Rule 16.6 shares many similarities with patent-specific local rules in other jurisdictions, but there is at least one significant difference pertaining to the scope and flexibility of Rule 16.6. For example, in the Northern District of California, the local patent rules apply to all patent cases, favoring uniformity over flexibility. In the Eastern District of Texas, on the other hand, the local patent rules allow judges to opt out entirely, favoring flexibility over uniformity. Rule 16.6 attempts to walk a middle path. The new rule applies to all patent cases and therefore compels the parties to craft a specially tailored scheduling order, but it provides ample flexibility by setting forth recommended rather than mandatory default timelines for patent-specific procedures.

Though Rule 16.6 has only been in effect for a matter

of months, anecdotal experience indicates that it may already be having the desired impact. To date, specially tailored scheduling orders have been proposed and adopted in a number of recent patent cases. Some of these cases have adopted verbatim the suggested timelines, while others have varied the timelines to fit individual needs.

In addition to providing much needed certainty and speed in patent cases, the adoption of Rule 16.6 signals to the bar that the District of Massachusetts is ready and willing to handle patent litigation. When combined with the District Court's experienced bench and the area's sophisticated jury pool, the benefits of Rule 16.6, particularly the promise of more efficiency and less cost, should go a long way toward enticing potential patent litigants to give due consideration to filing their claims in the District Court in Boston. ■

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By Renée M. Landers

Sexual Activity Between Minors, Prostitution, and Prosecutorial Discretion: What Difference Should Age and Sex Make?



Renée M. Landers is an Associate Professor of Law at Suffolk University Law School. She was a member of the Supreme Judicial Court's Gender Bias Study Committee which published its report in 1989.

The Supreme Judicial Court and the Federal District Court recently had occasion to consider whether and how the courts should weigh gender stereotypes in evaluating the exercise of prosecutorial discretion. In both *Commonwealth v. Bernardo B.*, 453 Mass. 159 (2008), and *United States v. Robinson*, Cr. No. 08-10309-MLW (D. Mass. Jan. 20, 2009), the courts had to determine the extent to which the doctrine of prosecutorial discretion insulates prosecutorial practices from judicial review. Both cases also involved the courts in the ongoing cultural debate about sex and gender, and the criminal justice response to both. The decisions come at an interesting moment in recent legal history, for June 2009 will mark the 20th anniversary of the *Report of the Gender Bias Study of the Court System of Massachusetts*, which identified practices in the state courts that were based on stereotypical notions about “the nature, role, or capacity of men and women.”¹ The *Bernardo B.* and *Robinson* decisions permit some assessment of the extent to which judicial decisions today reflect a conscious and sophisticated consideration of societal assumptions about gender on the application of the law.

Bernardo B. and Obtaining Discovery to Show Selective Prosecution

In *Commonwealth v. Bernardo B.*, a 14-year-old boy charged with statutory rape and sexual assault successfully sought discovery to support his claim of selective prosecution, where he was charged with statutory rape and sexual assault but the 11- and 12-year old girls with whom he allegedly had engaged in consensual sexual acts were not.² 453 Mass. 158, 176 (2009). The facts underlying *Bernardo B.* strike terror into the heart of any parent of a teenager. In October 2007, the boy's father examined “text messages” on his son's cellular telephone and found a message from a girl (R.L.) stating: “I would

have given you an H[and] J[ob]if [S.C.] wasn't there.” *Bernardo*, at 161. The boy's father contacted S.C.'s mother to express concern. The mother, after speaking with her daughter and other parents, notified police that the boy had sexually assaulted S.C., R.L., and a third girl, A.L. *Id.* at 161-162. During separate videotaped interviews with a sexual assault intervention network interviewer, the girls reported incidents of oral and manual sexual contact with the boy, and reported that the boy showed them a “video clip” of a woman performing fellatio. *Id.* at 162-163.³

The boy was arrested and charged as a juvenile on nine criminal counts, including three counts of statutory rape, G. L. c. 265, § 23;⁴ three counts of indecent assault and battery of a child under the age of fourteen years, G.L. c. 265, § 13B; and one count of assault and battery, G.L. c. 265, § 13A.⁵ Thereafter, the boy's counsel twice sought unsuccessfully to have the Commonwealth charge the girls with like offenses. In addition, his counsel requested documentation of any written policy of the district attorney governing the decision whether to prosecute cases concerning sexual activity among persons under the age of sixteen. *Id.* at 165.

Next, the boy sought discovery from the Commonwealth pursuant to rule 14(a)(2) of the Rules of Criminal Procedure⁶ to investigate whether the boy had been selectively prosecuted.⁷ Copies of the police report and of the videotapes and transcripts of the interviews were submitted in support of the motion. The Juvenile Court judge allowed the motion. After the judge twice denied the Commonwealth's motions for reconsideration, the district attorney petitioned for relief pursuant to G.L. c. 211, § 3. By order entered on December 19, 2008, the SJC upheld the order of the single justice denying the

Commonwealth's petition. Thereafter, on February 6, 2009, the court issued an opinion explaining its reasons. Because the court's reasoning in *Bernardo B.* relies on several recent cases delineating the procedures for asserting and proving a claim of selective prosecution in relation to traffic stops, a brief summary of that precedent follows.

Discovery to Show Racial Profiling in Traffic Stops

In May 2008, while the defendant's counsel and the district attorney were tussling over charges and discovery in *Bernardo B.*, the SJC issued three decisions on the same day, all involving allegations of racial profiling in traffic stops and discussing the appropriate procedures for asserting claims of selective prosecution. In *Commonwealth v. Lora*, 451 Mass. 425, the court held that evidence of racial profiling is relevant to determining whether a traffic stop is the product of selective enforcement in violation of equal protection guarantees, that evidence seized in the course of a stop that violates equal protection should be excluded at trial, and that statistical evidence may be used "to raise a reasonable inference of impermissible discrimination" sufficient to shift the burden to the Commonwealth to provide a race-neutral explanation for the stop. *Id.* at 426, 442.⁸

The other two cases involved the procedures defendants may use to obtain discovery of information in support of a claim of selective prosecution. In *Commonwealth v. Betances*, the defendant sought materials relating to other vehicle stops conducted by the arresting officer, but failed to specify a basis for the discovery request. The court rejected the defendant's suggestion that the requested discovery was mandated under rule 14(a)(1) of the Rules of Criminal Procedure, and observed, in a footnote, that the defendant had not met the procedural requirements for discretionary discovery under rule 14(a)(2). 451 Mass. 457, 462 n.6.

The defendants in *Commonwealth v. Thomas* sought mandatory discovery under rule 14(a)(1)(A)(iii)⁹ of information tending to show whether the arresting officer engaged in racial profiling. 451 Mass. 451, 453. The court held that the motions should have been denied. Relying on *Betances*, the court stated that "a properly presented and documented motion under Mass. R. Crim. P. 14 (a)(2) may be an appropriate vehicle by which a defendant, who has reason to believe that he or she was subjected to a discriminatory traffic stop, may obtain statistical evidence required, under the *Lora* decision, to demonstrate that the traffic stop was made on the basis of race or ethnicity." *Thomas*, 451 Mass. at 455.

The Showing in Bernardo B.

The juvenile in *Bernardo B.* made just such a motion. While acknowledging the importance of judicial deference to

prosecutorial discretion, the court observed that "Prosecutorial discretion...is not unbounded." *Id.* at 167.¹⁰ The court stated that, because of the presumption of regularity enjoyed by decisions of prosecutors, the defendant bears the initial burden to bring forth evidence raising a "reasonable inference of impermissible discrimination." *Id.* at 168. quoting *Lora*, 451 Mass. at 437. If the defendant makes such a *prima facie* showing, then the court will dismiss the underlying complaint if the Commonwealth fails to rebut that inference. *Id.*, quoting *Lora*, 451 Mass. at 438.

In *Bernardo B.*, the court explained that statistical evidence or other data can be used to show that similarly situated suspects or defendants are treated differently by the prosecutor for impermissible reasons. *Id.* at 168. While the traffic stop cases seemed to place some burden on defendants to submit affidavits averring facts to support a claim of selective prosecution, or containing relevant statistical data, in *Bernardo B.* the court accepted the prosecutor's decision to charge the only boy among the four children involved in the alleged incidents, together with videotapes and transcripts of the interviews with the girls, as sufficient to satisfy the required threshold showing of relevance.¹¹

The court contrasted the posture of the juvenile's request for discovery, in *Bernardo B.*, with the defendant's request for suppression of evidence, in *Lora*, stating that the standard at the discovery stage was whether the defendant has made a "threshold showing of relevance" under rule 14(a)(2).¹² As the single justice observed, requiring the defendant to produce evidence of selective enforcement in order to obtain evidence of selective enforcement "put[s] the cart before the horse." *Id.*

While the court affirmed that statistical evidence demonstrating disparate treatment may be relevant and material to demonstrate selective enforcement, it reiterated the constraints outlined in *Thomas*. A request must be properly supported and may not impose undue burdens on the Commonwealth.¹³ For example, the request must cover a reasonable time period, and the Commonwealth cannot be ordered to conduct statistical analysis or make legal evaluations. The court concluded that the boy's discovery request fell within these standards because it sought data concerning the gender of complainants and accused under the age of sixteen in like cases in Plymouth County.¹⁴

***Bernardo B.* affirms Defendant's Rights to Discovery**

The majority and concurring opinions in *Commonwealth v. Lora* recognized that a defendant's burden to produce evidence of selective prosecution was "daunting" and "fraught with great difficulty." *Lora*, 451 Mass. at 446. *Lora*, 451 Mass. at 449 (Ireland, J., concurring). While the court's decision in *Bernardo B.* does not deal with the question whether the

evidence is sufficient to support a claim of selective prosecution, the decision ensures that the Commonwealth will be required to do its part to produce the information necessary to determine whether any claim of selective prosecution can effectively be made.

Words Matter

The majority and dissenting opinions in *Bernardo B.* reveal a fundamental divide in the treatment of the criminal capacity of the 14 year old boy. If the basis of the law on statutory rape is that a person under the age of 16 is unable to consent to sexual activity, how can a 14 year old be subject to criminal prosecution for the same conduct?

Highlighting this disconnect, the majority conspicuously referred to the minors as “children”, to emphasize their status as minors and their lack of legal capacity. It referred to the 14 year old male defendant as the “boy,” again to emphasize his status as a minor. *E.g.*, 453 Mass. at 172. The majority also emphasized that the boy and the girls were “friends” and remained friendly after the sexual encounters. The language described common – if misguided – behavior among young people exploring sexual activity. In contrast, the dissent portrayed the boy as having preyed on younger girls, referring to him as the “juvenile” and, once, as a “high school student who was also on the football team.” *E.g.* 453 Mass. at 176, 178.

Appropriateness of Criminal Justice Response

In *Bernardo B.*, the SJC indicated its disapproval of prosecutions of only males for statutory rape in cases where all the participants in sexual activity were underage and, implicitly at least, called into question the appropriateness of a criminal justice response to such cases. As the majority observed, the behavior of all the minors was troubling. *Bernardo B.*, 451 Mass. at 173. Providing counseling and assistance would seem a more appropriate response than criminal prosecution. However one views the evidence, it is of questionable fairness to subject the boy to serious criminal sanction for activities in which, if the statistics are accurate, other young teenagers engage.¹⁵

United States v. Robinson

In *United States v. Robinson*, a woman was prosecuted for extorting money from a prominent businessman in the Boston area after a sex-for-fee relationship. Cr. No. 08-10309-MLW. In January, the Federal District Court denied a motion brought by the Boston Globe seeking review of the United States Attorney’s decision not to identify a prominent businessman. District Judge Wolf explained his decision principally on the ground that revealing the businessman’s name would expose the businessman “to precisely the harm threatened by the defendant.” *Id.*

Words Matter

No doubt because the charge was extortion, and not prostitution, the judge’s memorandum did not mention the sad history of disparate prosecutions of prostitutes, but not male clients.¹⁶ This decision did not address the elephant in the room: that the defendant was as much a victim of the businessman’s use of her as he was a victim of her extortion. The judge’s order treated the decision of the United States Attorney to protect the businessman’s identity as virtually unreviewable.¹⁷ Throughout his decision, Judge Wolf refers to the businessman as the “victim,” to characterize the businessman as more deserving of the government’s protection. The order suggested that protecting the businessman’s privacy would encourage others subject to extortion to come forward, but does not acknowledge that it was the businessman’s own conduct, rather than the extortion, that exposed his illegal conduct to public disclosure.

Use of Precedent

The court’s heavy reliance on the Hawaii case of *United States v. Patkar*, Cr. No. 06-00250 JMS (D. Hawaii Jan. 28, 2008), a case involving the attempted extortion of Bob Awana, at the time the chief of staff to the Governor of Hawaii, who had attempted to arrange dates with women who were not his wife, seems misplaced. It did not appear that the target of the extortion in *Patkar* had engaged in any illegal activity, just activities inconsistent with his marital status. Moreover, although the *Patkar* decision withheld the name of the victim and the contents of e-mail messages, Awana’s name nonetheless became public. Finally, both *Patkar* and *Robinson* fail to recognize that, but for their attempted extortion and the resulting protective orders, both defendants could have revealed the embarrassing information with no legal penalty. It does not seem appropriate for the federal courts to be in the business of protecting embarrassing secrets.

Upper Class Justice

The federal district court in *Robinson* seemed unconcerned that the full prosecutorial power of the government was used to protect a businessman’s enjoyment of his “last hurrah” without public opprobrium, even though he violated the law by paying for sex. The tone of moral outrage in the businessman’s and the government’s briefs, that a prostitute would dare attempt to harm the reputation of one of her clients, seems misplaced. Instead, the case seems to affirm the notion that the wealthy and well-connected get better service from the justice system. That the businessman’s counsel is a former U.S. Attorney does nothing to dispel that notion.

Lessons from *Robinson* and *Bernardo B.*

Together, *Robinson* and *Bernardo B.* lift the veil that screens prosecutorial decisions from public view. They reveal how the system gives prosecutors the ability to make important life-altering decisions for complainants and the accused. The notion that prosecutors should have unreviewable discretion in charging and other decisions that precede judicial involvement of the type argued by the Plymouth County District Attorney and the United States Attorney in these cases seems inconsistent with an open society premised on constitutional values of equal protection and due process. The cases also raise important questions about the role of the legal system in policing sexual behavior.

Both *Bernardo B.* and *Robinson* also demonstrate that the proposition that “good” girls do not engage in illicit sex is alive and well. If the sexual activities in *Bernardo B.* were in fact mutual, the prosecutor in *Bernardo B.* seems to be prosecuting the boy to protect the girls from their own conduct. In *Robinson*, Judge Wolf’s opinion protects the unidentified businessman from the aggressive behavior of an “unworthy” prostitute. The irony is that a 14 year old minor who ostensibly enjoys the protection of the statutory rape law will be prosecuted, while an adult businessman who illegally paid for sex emerges with his reputation and record unscathed.

If any single lesson emerges from the Massachusetts and First Circuit studies of gender bias, it might be that the legal system should take care not to incorporate gender stereotypes into decision making. The *Bernardo B.* and *Robinson* cases indicate that, after all these years, adherence to this principle by prosecutors and courts remains a work in progress. ■

Endnotes

1 Supreme Judicial Court, Report of the Gender Bias Study of the Court System of Massachusetts, 1 (1989). June 2009 also marks the 10th anniversary of the Report of the First Circuit Gender, Race and Ethnic Bias Task Forces, which was more narrow in scope than the Massachusetts Study, but revealed areas where more work was still needed to ameliorate bias. See, United States Court of Appeals for the First Circuit, Report of the First Circuit Gender, Race and Ethnic Bias Task Forces, at iii (1999).

2 At the time of the alleged offenses, the boy was 14 and entering ninth grade, two of the girls were twelve years old and entering seventh grade, and the third girl was turning twelve years old and entering sixth grade. *Bernardo B.*, 453 Mass. at 160-161.

3 The court noted in its opinion that the Juvenile Court judge, the single justice, and the full court had reviewed the videotapes and transcripts of the interviews. *Id.* at 162 n. 9

4 Beyond the penalty of incarceration, persons convicted of the crime of statutory rape are subject to the regulations of the Commonwealth’s sex offender registry. G.L. c. 6, §§ 178C-178Q.

5 The boy was charged also with two counts of dissemination of obscene matter, G.L. c. 272, § 29, but that charge is not rel-

evant to the decision in *Bernardo B.* As a result of the arrest and charges, the boy has been suspended from school and removed from the football team. He is being tutored at home. *Id.* at 160 n.4.

6 Rule 14(a) (2) provides as follows:

Motions for Discovery. The defendant may move, and following its filing of the Certificate of Compliance the Commonwealth may move, for discovery of other material and relevant evidence not required by subdivision (a) (1) within the time allowed by Rule 13(d) (1). This provision provides for discovery in addition to the mandatory discovery required by Rule 14(a) (1).

7 The defendant’s motion requested six categories of information for the last five years: 1) the number of cases charged in Plymouth County for statutory rape and/or indecent assault and battery where the accused and the complaining witness were under 16, with ages and sex of each; 2) the number of cases with the same charges where the female was charged; 3) the number of reported cases involving an accused and a complainant under age 16; 4) the number of cases charged for the same offenses where the accused was an adult female and the ages and sex of the accused and complaining witness; 5) the number of reported cases where the accused was an adult female with the age and sex of the accused and the ages of the accused; and 6) written policies of the Plymouth County District Attorney concerning the charging of statutory rape when the accused and the complaining witness are both under 16 years old. *Bernardo B.*, 453 Mass. at 165-166, n.20. After the single justice invited the Juvenile Court judge to give further consideration to the fourth and fifth requests because they were “attenuated, at best,” the defendant waived these requests. *Id.* at 166. The Commonwealth’s appeal relates to the single justice’s order regarding the remaining requests.

8 The defendant in *Lora* sought to use statistical evidence to support a motion to suppress, but the court determined that, mainly because of flawed statistical methodologies, his evidence of discrimination was insufficient to rebut the presumption of regularity accorded law enforcement actions. *Id.* at 443 - 444.

9 Rule 14(a) (1) (A) (iii) provides for mandatory discovery of “any facts of an exculpatory nature.”

10 The court stated that judicial review of charging decisions made by prosecutors is necessary to enforce the federal and Massachusetts guarantees that the government will not proceed against individuals in an arbitrary manner or based on membership in a protected class. *Id.* at 167 -168.

11 This determination nonetheless seems consistent with the suggestion in *Betances* that a defendant can support a discovery request with details of his particular stop. *Betances*, 451 Mass. 457, 462 n.6.

12 In *Betances*, the defendant asserted that discovery of the arresting officer’s police reports was subject to automatic production under Rule 14(a) (1) (A), requiring the prosecutor to furnish facts and information relevant to the case.

13 The court in *Bernardo B.* also concluded that the defendant’s request for policies of the district attorney was not unduly burdensome and that the prosecutor’s office would be the most comprehensive and reliable source of such information from which the defendants could develop statistics relevant to a claim of selective prosecution, and that the requests did not seek disclosure of private or confidential information. *Id.* at 168-169.

14 *Cf. Lora*, 451 Mass. at 442-444 (comparison of demographics of traffic stops to demographics of town near the interstate highway, rather than demographics of traffic, was not relevant). The dis-

Endnotes continue on Page 13

By Judge R. Marc Kantrowitz and Joseph Stanton

An Introduction to the New Massachusetts Guide to Evidence



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For decades, Massachusetts attorneys and judges have followed the laborious and difficult practice of researching a myriad of constitutional provisions, statutes, appellate decisions, and court rules to identify the Commonwealth's law of evidence. Although the Federal courts and the vast majority of states have formally adopted rules of evidence, Massachusetts was one of the few states that had no organized system that clearly and precisely identified the law of evidence. This all changed with the December 2008 release of the *Massachusetts Guide to Evidence*, which promises to alter our approach to evidentiary law drastically. As retired Supreme Judicial Court Associate Justice John Greaney has opined, "[The *Guide* represents] probably the greatest change since the adoption of the Rules of Civil and Criminal Procedure. The *Guide* has consolidated scores of statutes and over two centuries of case law into one easy-to-use manual. How evidence issues are presented in court will surely change as a result."

The project was born in June of 2006, when the Supreme Judicial Court organized an Advisory Committee on Massachusetts Evidence Law and requested that it "assemble the current law in one easily usable document, along the lines of the Federal Rules of Evidence, rather than to prepare a Restatement or to propose changes in the existing law of evidence." It comes, thus, as no surprise that the *Guide* greatly resembles the Federal Rules in structure and organization. In some ways, the *Guide* goes beyond its Federal model, most notably in Articles V (Privileges) and XI (Miscellaneous Sections). Article V of the Federal Rules contains only two rules. By contrast, Article V of the *Guide* contains twenty-five sections that identify each Massachusetts evidentiary privilege and disqualification, ranging from the well-known attorney-client privilege (Section 502) to the little known sign language interpreter-client privilege (Section 521). Article XI of the Federal Rules consists of three sections, only one of which is substantive, whereas the *Guide* addresses various important evidentiary scenarios, including, Spoliation (Section 1102), Sexually Dangerous Person Proceedings (Section 1103), Witness Cooperation Agreements (Section 1104), Third-Party Culprit Evidence (Section 1105), and Abuse Prevention Act Proceedings (Sections 1106).

The *Guide* also differs from its Federal counterpart in that it contains two lengthy Introductory Notes, accompanying Articles V (Privileges) and VIII (Hearsay). The former discusses, in part, privilege as it relates to confidentiality, with numerous examples cited. The latter discusses *Crawford v. Washington*, 541 U.S. 36 (2004), and one's right to confrontation in criminal cases.

The greatest difference between the Federal Rules and the *Massachusetts Guide* is that the latter is not rules. We remain a common law state. In that fashion, the *Guide* is doubly attractive. First, it is analogous to a set of rules because the *Guide* contains the black letter law of the Commonwealth, and is endorsed by the SJC, which, like the Appeals Court, has already started citing the *Guide* as controlling authority.

As we remain a common law state, a second advantage of the *Guide* is the freedom of attorneys to argue creatively that the current state of the law needs to be altered. If courts are persuaded, the law will be changed.

The *Guide* makes no substantive changes in the law. As noted in Section 1101(a) (Applicability of Evidentiary Sections), it applies "to all actions and proceedings in the courts of the Commonwealth." Subsection 1101 (c) (3) indicates the various proceedings to which the *Guide* does not

apply. Perhaps its greatest value is in its organization, depth of detail, and clear and concise statements of governing black letter law, all of which are easily located. In total, there are ninety-two “Sections.” Each section is accompanied by a corresponding “Note” that details the pertinent authorities and provides examples of how the law has been applied in certain circumstances. Any trial attorney who spends a relatively short amount of time casually leafing through the *Guide* will easily learn that the use of business records is found in Section 803(6) (A); admissions of a party-opponent in Section 801(d) (2); and prior inconsistent statements in Section 613 (of course, for prior inconsistent statements before a grand jury, Section 801(d) (1) (A) applies). In a civil trial, if one, who is insured, subsequently repairs a banister, Sections 407 (Subsequent Remedial Measures) and 411 (Insurance) are on target.

The *Guide* should be used for one simple reason — it makes the job of every trial attorney and every judge easier. While thorough research should always be the norm, the *Guide* provides a launching pad to start one’s journey. It answers questions that inevitably arise at trial. It also remains a work in progress, which will improve with the comments of members of the bench and bar, who are encouraged to share their suggestions with us. In that vein, please direct any suggestions to Joe Stanton, the Committee’s Reporter. Please recognize that our charge in annually updating the *Guide* remains the same as it was in originally writing it – to state concisely the current state of the law. Thus, any comments concerning how the law could be improved, or what it should be, are best left to argument before the courts.

Like anything new, acceptance and use of the *Guide* will come incrementally. It is, however, the wave of the future. When originally released, the Rules of Civil and Criminal

Endnotes to *Sexual Activity Among Minors*

tribunal attorney tried to argue that because the perpetrators of sexual assaults are overwhelmingly male, the requested information would not help determine whether selective prosecution was an issue. The court seemed to be saying that the prosecutor’s characterization of the information had to be tested by the analysis of the defendant’s counsel. In a dissenting opinion, Justice Spina, joined by Justice Cowin, argued that the boy had not done the “groundwork” necessary to raise a hint of selective prosecution. The dissent rejected the notion, accepted by the majority, that the circumstances of the boy’s prosecution alone are enough to raise a claim of selective prosecution. The dissent also highlighted the differences in age among the participants in the sexual activity, suggesting that, though all were underage, the fact that the girls were younger than the boy sufficiently justified a disparate prosecutorial approach. *Bernardo B.*, 453 Mass. at 176-178 (Spina, J., dissenting).

15 The percentage of teens age 15 – 19 who had initiated sexual



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Jeffrey S. Stern

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Procedure were met by some with open arms and by others with some restraint, if not resistance. Today those Rules are firmly entrenched, fully accepted, and never ignored. So too, in a few short years, the *Massachusetts Guide to Evidence* will become a mountain in our legal landscape. As a judicial colleague commented in discussing the use of the *Guide*, “trial lawyers and judges should get on board or get run over.” It’s time to start using the *Guide*. ■

intercourse before age 14 was 8% of girls and 11% of boys in 1995 and in 2002, 6% of girls and 8% of boys. Kaiser Family Foundation, Fact Sheet on U.S. Teen Sexual Activity, 2005. In the United Kingdom, the Appellate Committee of the House of Lords recently ruled that a 15 year old boy could be charged with statutory rape of a 12 year old girl even though he was within the age range protected by the statutory rape statute. *R v. G.*, [2008] UKHL 37, ¶ 37. Interestingly, there was no challenge to the statutory rape statute which only criminalizes the conduct of males. See *id.* at ¶ 42.

16 See, e.g., *Commonwealth v. Lafaso*, 49 Mass. App. Ct. 179 (2000) (statistical evidence over four-month period showing police department prosecuted female prostitutes but not male clients).

17 In the judge’s view, unless impoundment of the businessman’s identity interferes with the rights of the defendant or becomes relevant to the court’s decision-making, the court lacks authority to compel the government to make the information public.

By Joan F. Renehan

A New Frontier: The Loss of Chance Doctrine In Medical Malpractice Cases



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For many years, and in numerous jurisdictions, there has been litigation over the use of the loss of chance doctrine in medical malpractice cases. This doctrine allows a plaintiff to seek damages for medical malpractice when he or she has been deprived of some probability of recovery or cure due to a physician's negligence. Whether there should be such a doctrine, and if so, what are its parameters, has been the subject of lively debate. Last year, these questions were addressed by our Supreme Judicial Court.

On July 23, 2008, the Supreme Judicial Court ruled, in *Matsuyama v Birnbaum*, 452 Mass 1 (2008), that Massachusetts will join at least twenty other states by adopting the "loss of chance" doctrine in medical malpractice actions.¹ Writing for a unanimous court, Chief Justice Marshall reviewed the history of this doctrine, the rationale for its use in medical malpractice cases, and spelled out (a) when the doctrine may be used, (b) the burden of proof a plaintiff must meet, (c) the measure for calculating loss of chance damages, (d) the role of expert testimony and, finally, (e) the proper test for causation in a loss of chance case.

Since the decision in *Matsuyama*, there has been increasing interest in the loss of chance doctrine. As discussed below, the plaintiff and defense bars have advanced different positions on the parameters of this doctrine. An analysis of the *Matsuyama* decision provides ammunition for both sides.

The *Matsuyama* Case

Matsuyama was a wrongful death action in which the executor of Matsuyama's estate filed an action against the decedent's primary care physician, Dr. Birnbaum, and his medical practice, alleging that Matsuyama lost a chance of survival as result of Birnbaum's failure to diagnose his gastric cancer in a timely manner. Specifically, the plaintiff argued, based on the testimony of an expert gastroenterologist, that after Matsuyama tested positive for *Helicobacter pylori* (*H. pylori*) in 1995, Birnbaum should have ordered an endoscopy with biopsy or an upper gastrointestinal series X-ray, or should have referred Matsuyama to a specialist, since there is an association between gastric cancer and *H. pylori*, and since Matsuyama's Japanese ancestry put him at increased risk for this type of cancer. The expert opined that had the appropriate tests been ordered in 1995, or the appropriate referral to a specialist made, Matsuyama's cancer "would have been diagnosed" and the cancer "would have been treated in a timely manner when his cancer might still have been curable."²

According to the expert, the failure to have ordered an endoscopy or gastrointestinal series X-ray, or to refer the patient to a specialist, was a breach of the applicable standard of care in light of the patient's known risk factors, including his Japanese ancestry and his history of smoking.³ As a result of this breach of the standard of care, the expert opined that Matsuyama's cancer was not diagnosed until 1999, at which time, the cancer had metastasized to an advanced, inoperable phase, resulting in Matsuyama's premature death.⁴

On these facts the plaintiff argued that his client "lost a chance" to be treated successfully at an earlier stage, a classic example of the use of the loss of chance doctrine.

Over the objection of the defendants, the jury was given a special question that required them to determine what stage Matsuyama's cancer was at the time of Birnbaum's negligence, if they so found, and what the probability of cure was based on the court's synthesis of the expert testimony elicited at trial regarding the stage of Matsuyama's cancer and the likelihood of cure at Stage I – Stage IV.⁵ The jury found that Birnbaum's negligence de-

prived the decedent of a less than even chance of surviving cancer, and was a “substantial contributing factor” in his death. In response to the special question, the jury found that Matsuyama was suffering from a stage 2 adenocarcinoma at the time of Birnbaum’s initial negligence, and that he had a 37.5% chance of survival at that time.⁶

The jury awarded Matsuyama’s estate \$160,000 for pain and suffering caused by the physician’s negligence, and \$328,125 to the decedent’s widow and son for the decedent’s loss of chance.⁷ The jury’s verdict was affirmed on direct appellate review by the Supreme Judicial Court.

A. Reasons Supporting Adoption of the Doctrine

The “loss of chance” doctrine, which is also known as the “lost opportunity” doctrine, views a person’s prospect for surviving a serious medical condition as something of value, even if the possibility of recovery was less than even (i.e., less than a 50% chance) prior to the physician’s allegedly tortious conduct. The court adopted this doctrine because it, “...advances the fundamental goals and principles of our tort law.”⁸ In addition, the court concluded that adopting this doctrine under the Massachusetts Wrongful Death Statute, G.L. c. 229, § 2, “...comports with the common law of wrongful death as it has developed in the Commonwealth.” In reaching this conclusion, the court rejected the argument that the Wrongful Death Statute precludes loss of chance damages.⁹

Relying on the plaintiff’s expert’s testimony, the Supreme Judicial Court noted that there are stages of gastric cancer, varying from Stage 0, in which there is a better than 90% survival rate, to Stage 4, where the survival rate is statistically less than 4%.¹⁰ The jury found that the defendant’s breach of the standard of care resulted in the failure to diagnose and treat the patient at a stage when the cancer might have been curable.

Why adopt the loss of chance doctrine? The court reviewed the history of dissatisfaction with the prevailing “all or nothing” rule of tort recovery under which a plaintiff may recover damages only by showing that the defendant’s negligence more likely than not caused the ultimate outcome (in Matsuyama’s case, his death). If the patient had a 51% chance of survival, and the misdiagnosis reduced that chance to zero, the estate is awarded full wrongful death damages; but if the patient had only a 49% chance of survival, and the misdiagnosis reduced it to zero, the plaintiff receives nothing. Thus, whenever the chance of survival is less than even, the “all or nothing” rule gives a “blanket release from liability for doctors and hospitals...regardless of how flagrant the negligence.”¹¹

B. Criticisms of the Doctrine

The injustice of the “all or nothing” rule has led

numerous courts to adopt the “loss of chance” doctrine. But, at the same time, the unsettled boundaries of the doctrine have left it open to criticism, which *Matsuyama* addressed as follows.¹²

1. Opponents of the “loss of chance” doctrine argued that the doctrine lowers the threshold of proof of causation by diluting the preponderance of the evidence standard that “has been the bedrock of the Massachusetts civil justice system.” The court flatly rejected this argument, and held that “in a case invoking loss of chance, as in any other negligence contest, a plaintiff must establish by a preponderance of the evidence that the defendant caused his injury.”¹³ Thus, the court recognized the doctrine only as a theory of injury, and not as a theory of causation. Accordingly, although the plaintiff need not prove that the physician’s negligence resulted in death, the plaintiff must prove by a preponderance of the evidence that the physician’s negligence caused the plaintiff’s likelihood of achieving a more favorable outcome to be diminished.

2. The defendants argued that the statistical likelihood of survival is a “mere possibility” and therefore speculative. The court rejected this argument by observing that “...survival rates are not random guesses. They are estimates based on data obtained and analyzed scientifically and accepted by the relevant community as part of the repertoire of diagnosis and treatment, as applied to the specific facts of the plaintiff’s case.”¹⁴

3. The defendants also contended that the medical uncertainties and complexities involved in treating cancer are such that determining loss of chance presents the fact finder with many practical problems. Because such complexities are not confined to loss of chance cases and because of the availability of expert evidence on the probabilities of survival, the court was not persuaded by the defendants’ argument.

C. Limitations on the Doctrine

The loss of chance doctrine is an aspect of tort law. Does it therefore follow that it applies in all tort cases? The answer is “no.” The court stressed that the doctrine is limited to medical malpractice actions¹⁵ because reliable expert evidence is more likely available than in other domains. In addition, the court expressly left open the question whether the doctrine is available in cases where the ultimate harm (such as death) had not yet occurred.¹⁶

D. Proving Causation under the Doctrine

In both *Matsuyama* and *Renzi v. Paredes*, 452 Mass. 38 (2008), the court considered the “substantial contributing factor” test, which is useful in cases of multiple causes or cases with multiple tortfeasors. In *Renzi*, which involved two alleged tortfeasors, the court ruled that the substantial contributing factor test was appropriate.¹⁷ In *Matsuyama*, the court decided that “the proper test in a loss of

chance case concerning the conduct of a single defendant is whether that conduct was the but for cause of the loss of chance.”¹⁸

Considering both *Matsuyama* and *Renzi*, what would the rule be in a case in which there are two defendants, but in which the negligence of each defendant was distinct? Analytically, *Matsuyama* should govern whenever there is a single claim against a single defendant even if there is a separate claim against another defendant.

E. Proving the Elements of the Doctrine

The SJC made it unmistakably clear that the evidence required to establish that the plaintiff lost an opportunity to show that his or her condition was in fact amenable to restoration must come from experts. Such testimony is required (a) to show what measure of a more favorable outcome is medically appropriate (e.g., a five year survival as in *Matsuyama*); (b) to determine the statistical rates of survival that apply under the circumstances (e.g., a 25% chance of survival); and (c) to apply these rates in the particular clinical circumstances of the patient.

To the objection by defendants that reliance on statistical evidence is, “generally disfavored in the law,” the court responds with a firm “not true.” Simply put, the battleground in a loss of chance case becomes a duel between experts where the defense challenges the statistical evidence.

F. Measuring Damages under the Doctrine

The decision to treat the loss of chance as a separate, compensable component of damages raises various issues concerning how to measure loss of chance damages. The first issue is to determine what is being valued. In *Matsuyama*, the patient’s prospect for achieving a more favorable outcome was measured in terms of the patient’s likelihood of surviving for a number of years specified by the relevant medical standard; for gastric cancer, the five-year survival rate. The test to be used in any particular case must inevitably depend on the available medical evidence as described by experts.

In essence, the doctrine requires expert testimony in order to measure the value of the diminution of life. The plaintiffs’ bar will likely argue that the shortened life expectancy, as evidence by statistical survival rates, should be the yardstick for damages. The defendants will counter that life expectancy statistics are population based, not personal to the individual plaintiff, and it is speculative to assume that the loss of chance plaintiff would meet the average life expectancy provided in the statistics. The defendants will also argue that it is not just the shortened life expectancy, but also the quality of life during the missed years, which must be considered.

What is it the expert can say about the quality of life? Is five year survival with constant medical treatment the same as five years of a relatively active, pain free life? The answer certainly should be “no,” and the experts should

be cross-examined on quality of life issues, along with challenges to the statistical evidence regarding the diminution of life.

The second issue is to determine how to calculate the monetary value for the lost chance. While courts have used different methods for calculating damages, the most popular choice, and the one adopted by the SJC, is the “proportional damages” approach.¹⁹ Under this approach, loss of chance damages are measured by “the percentage probability by which the defendant’s tortious conduct diminished the likelihood of achieving some more favorable outcome.... The formula aims to ensure that a defendant is liable in damages only for the monetary value of the portion of the plaintiff’s prospects that the defendant’s negligence destroyed. In applying this method, the Court must first measure the monetary value of the patient’s full life expectancy and, if relevant, work life expectancy, as it would in any wrongful death case. But the defendant must then be held liable only for the portion of that value that the defendant’s negligence destroyed...”²⁰

A third issue is whether pain and suffering is awarded under the loss of chance proportional damages approach or as part of the conventional negligence damages. The plaintiffs and defendants should be in agreement that this issue requires close attention and carefully drafted jury instructions. The instructions must make it clear that there should be no recovery for any pain and suffering that would have occurred absent the physician’s negligent conduct, and must also distinguish between pain and suffering awarded under a conventional negligence theory and pain and suffering awarded as part of proportional damages under the loss of chance doctrine.

G. Gross negligence and punitive damages in cases involving the Doctrine

The trial judge charged the jury on gross negligence; but the jury rejected *Matsuyama*’s claim of gross negligence. The SJC noted that its decision to affirm the verdict “should not be construed to suggest that a finding of gross negligence and an award of punitive damages cannot be secured in a loss of chance case. Where gross negligence is found in a loss of chance case, the fact finder will determine an amount of punitive damages exactly as in any other gross negligence case. Punitive damages are not part of the proportional loss of chance damage calculus.”²¹

It is likely that loss of chance plaintiffs will more frequently pursue gross negligence claims where damages will not be subject to the proportional damages calculation.

II. The Defense Bar’s Reaction to *Matsuyama*

At the risk of understatement, it is fair to say that the defense bar has not welcomed the decision in *Matsuyama*. See, e.g., *Loss of Chance in Medical Malpractice: The Need*

For Caution; 4 Mass. Law Review 3 (Summer 2002). Nevertheless, defendants in future loss of chance cases will have two legal areas to emphasize.

First, the *Matsuyama* decision rejects the substantial contributing factor test as to cause in a loss of chance case in which one defendant's malpractice alone is alleged to have caused a diminished likelihood of a more favorable outcome, or in cases where there are two defendants, but discreet acts of negligence. Rather, the court adopts as the proper test whether the defendant's conduct was the "but for" cause of the patient's loss of chance.

Are the defendants correct in their assertion that "but for" causation has replaced the "substantial contributing factor" test, even in cases where loss of chance is not alleged? The answer is yes. The court has relegated the "substantial contributing factor" test to second place, to be used only when it is literally not possible to make a precise calculation of causation among joint tortfeasors, such as in cases of a mass tort, like *O'Connor v Raymark Industries*, 401 Mass. 586, 587 (1988), an asbestos case in which there were claims against 17 defendants. In this sense, the plaintiffs' apparent victory in *Matsuyama* may prove to be beneficial to the defense bar, since "but for" causation is a more difficult standard to prove. Requests for a "but for" jury instruction should become routine in future cases, including negligence cases where loss of chance is not alleged.

Second, the logic of the court's decision in *Matsuyama* stresses the critical importance of medical experts. In future cases, a major emphasis of the defense will be on the reliability and admissibility of the testimony of a plaintiff's expert, as well as on the expansive use of defense experts in rebuttal. As a practical matter the defense bar will raise the ante by increasing the number of defense experts, and by the more frequent use of *Daubert* motions to attack the plaintiff's experts. Plaintiffs will have to be more prepared than ever and should expect that their experts' opinions will be placed under a microscope, with defendants challenging the assertion that a loss of chance occurred, and arguing that the quality of the diminished life must be considered in conjunction with any award of damages for the loss of chance.

III. The Plaintiffs' Bar's Reaction To *Matsuyama*

The defense bar's unhappiness with *Matsuyama* is counter balanced by the excitement in the plaintiffs' bar over the decision. See, e.g., *The President's Message*, Mass. Academy of Trial Attorneys, Jan. 29, 2009, which extols the end of the "all or nothing" rule. Future cases by plaintiffs should explore at least three issues.

First, *Matsuyama* was a loss of chance case where damages were sought under the wrongful death statute. The plaintiffs' bar will now be looking for examples of loss of chance cases where death did not result. What kind of proof, from an expert or otherwise, will be required for the plaintiff to meet her burden? With no post *Matsuyama*

appellate opinion, the bar is faced with questions for which the answers are not yet clear. It will be particularly instructive to see cases where the patient's survival odds were less than 50% before the malpractice.

Second, *Matsuyama* held that punitive damages sought for gross negligence are not part of the proportional loss of chance damage calculus. Since the jury rejected *Matsuyama's* claim of gross negligence, future court decisions will have to clarify precisely when punitive damages may be granted in connection with a finding of gross negligence in a loss of chance action, and the practical application of the SJC's ruling that punitive damages are not subject to the proportional damages calculus.

Third, plaintiffs, like defendants, will do battle in the all important area of expert testimony which will determine which statistical rates of survival apply and in which circumstances.

Of note, despite the excitement in the plaintiffs' bar over the loss of chance doctrine, there have not been any published Superior Court decisions since Chief Justice Marshall's opinion in *Matsuyama*.

Conclusion

Matsuyama is a significant development in the law of medical malpractice. Despite the many clear rulings in the case, however, it seems likely that there will be more litigation over the loss of chance doctrine. Time will tell whether this new-to-Massachusetts legal doctrine proves to be of genuine value to plaintiffs, or a serious danger to the medical profession. ■

(Endnotes)

- 1 The court decided *Renzi v Paredes*, 452 Mass. 38 (2008), that same day, also approving the "loss of chance" doctrine. *Renzi* was remanded, however, because of erroneous jury instructions on damages.
- 2 *Matsuyama v Birnbaum*, 452 Mass. 1, 7 (2008).
- 3 *Id.* at 7.
- 4 *Id.* at 7-8.
- 5 *Id.* at 32-33.
- 6 *Id.* at 25 n. 40.
- 7 *Id.* at 4.
- 8 *Id.*
- 9 The SJC rejected this argument after a careful analysis of the history of G.L. c. 229, and the court's prior holding in *Gaudette v Webb*, 362 Mass. 60, 71 (1972).
- 10 *Matsuyama*, supra at 8.
- 11 *Id.* at 12-13.
- 12 *Id.*
- 13 *Id.* at 16.
- 14 *Id.* at 17, citing *Glicklich v Spievack*, 16 Mass. App. Ct. 488, 494 n.4 (1983).
- 15 *Matsuyama*, 452 Mass. at 19.
- 16 *Id.* at 20, n.33.
- 17 See *Renzi*, supra at 44, 45 n.12.
- 18 *Matsuyama*, supra at 31. The court further concluded that, although the jury was not instructed on "but for" causation, the defendant was not harmed, and the verdict was affirmed.
- 19 *Id.* at 26.
- 20 *Id.* at 26.
- 21 *Id.* at 847 n. 61.

By Kwamina T. Williford and Steven H. Wright

Tips for Managing Client Relationships During Challenging Economic Times



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These are challenging times, but there is hope for those who adhere to the fundamentals as we weather this economic storm. Anne Mulcahy, Chairman and CEO of Xerox Corp., said it best during a luncheon recently sponsored by the Greater Boston Chamber of Commerce. Mulcahy is known for pulling Xerox through the tumultuous times of the early 2000s and transforming the company into one that is stronger and more profitable than ever. When asked what companies should focus on in order to sustain and thrive through these tumultuous times, Mulcahy's response was succinct: focus on employees, clients, and return to the fundamentals. This article will not address employees, even though they are our firm's most important assets and warrant very significant institutional investment; instead, it will focus on clients and adhering to the fundamentals.

A. Focus on Clients

The tendency during down times is to try to increase one's business by looking for new clients and casting a wider net. However, it is more effective to strengthen current client relationships. How do we do this? It is critical that we understand our clients' pressures and demands. The more we truly understand what challenges our clients face, the better the position we will be in to offer valuable solutions. We must remember that clients are our business partners. It is imperative that we understand their business objectives and business needs, and then work to tailor our approach and services to best fit those needs.

Clients are looking for true business partners who provide differentiated value and deliver innovative strategies. In the current economic environment, we can provide differentiated value in our services with a multi-disciplinary approach to our clients' needs. For example, many clients are trying to navigate recent regulations and policies in connection with the American Recovery and Investment Act (the "Act"). The Obama Administration and the new Congress are adopting numerous plans to reform the entire U.S. financial market system including building upon the new Troubled Asset Relief Program ("TARP"), and the Act. These initiatives will have far-reaching impact. Our clients understand that these efforts will transform the business and political landscape of the financial, banking, housing/finance, real estate industries and global markets for the foreseeable future. It will create opportunities and pitfalls that we can assist our clients in navigating.

Many clients are waiting in the wings, anticipating how this will affect them. They are searching for answers in these turbulent times and we are in the best position to assist clients in finding those answers. In response to these objective needs and concerns, Holland & Knight developed a Financial Recovery Team to assist clients with the dramatic and unprecedented developments in the global financial markets. The team takes an interdisciplinary approach by assembling lawyers and professionals from around the country with significant experience in banking regulations, government contracts, creditor's rights, finance, government relations, real estate, business issues and litigation.

The Financial Recovery Team's combined knowledge will be key in providing value added advice and representation during uncertain turbulent times. The Act provides tremendous opportunities and funding in the area of renewable energy, technology, health care, transportation and housing. Clients within these industries want to know about these opportunities, and lawyers can add value by providing succinctly tailored industry-focused solutions. The Act will also pose significant restraints and regulations on the funds distributed and on the way business is conducted. Clients will need to be aware of this, and, as business partners with our clients, we should position ourselves not only to inform our clients of these hurdles, but also to advise them on how to navigate these hurdles through putting together proper controls such as directed compliance policies and procedures.

B. Return to the Fundamentals

Clients rely on excellent high quality work – this is what attracted many of our clients in good times, and this is what will help to keep our clients during these turbulent times. Clients need timely business focused legal solutions, which requires us to provide accurate and effective counsel in ever shortening time frames. With budgets tight, there is little room for second guessing or questioning the product they receive. Our service must be thorough, complete, and tailored to the client's needs.

In this climate, financial concerns regarding their legal strategies have become of paramount concern to many clients. At the forefront of most of our clients' agendas is the need to manage and reduce legal costs. Many clients have a growing resistance to the standard billable hour approach to legal fees, and are looking for outside counsel to be creative by proposing alternative fee arrangements. Some alternative fee arrangements welcomed by many clients include success fees, flat fees, volume discounts and blended rates.

However, when evaluating the cost concerns of our clients, we must be careful not just to focus solely on price. Alternative fee arrangements should be built on trust between the parties and not formulas. Price should be one component, but the overall approach should be more comprehensive, taking into account risk management and complexity. A comprehensive approach should focus on providing the client with efficient cost benefit resolutions and, to the extent possible, cost predictability. Such measures may include early case assessment, efficient and active project management, and providing tailored and focused responses.

Early case assessment is a key means of offering efficient cost benefit resolutions and predictability within the litigation context. For example, General Electric's Legal Department reduced litigation and fees over a four year period from \$120.5 million in 2002 to \$69.3 in 2005, largely due to implementing its early case assessment model. See <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1176800657225>. Under GE's model, when a lawsuit comes to the attention of their litigation group, the matter gets logged into the legal department's tracking system. Within 60 days to 90 days, lawyers assigned to the case identify and interview witnesses; collect, review, and report on relevant documents; and assess the risks. During this time period, GE would determine early on the risks and strengths of their case, then reach a reasoned conclusion whether to settle or litigate a case. The effect on legal costs was dramatic. The lesson to learn from GE is that a focus on an innovative approach to an efficient cost benefit resolution — early case assessment — as opposed solely to price, can result in a significant reduction in costs.

Similar to an early case assessment approach, efficiently managing a project may be another means of providing an efficient cost benefit resolution. Clients should be kept

apprised of all key developments in a timely manner, with an assessment of how the developments may affect the client's changing risk, tolerance and strategy going forward. Tremendous cost cutting measures could happen by employing this strategy. Moreover, costs savings may be achieved by employing leaner staffing, by effectively integrating attorneys with key expertise relating to the matter at hand on a case. Fewer attorneys devoting more time to a case promotes efficiency and enhances individual's comprehension of the client's business.

Another cost efficient approach is tailoring your work to the client's objectives. For example, many in-house counsel need executive answers to complex problems, and need succinct answers that are easily digested and may be communicated efficiently and effectively to their business units. In these instances, providing a response that reads like a treatise is neither cost effective nor efficient. In these situations, often an executive summary incorporating clear judgments on strategies is preferred to extensive memorandum and elaborate presentations. Providing the deliverable that best fits clients' objectives will likely save costs and emphasizes your value added.

Now more than ever this is the time to return to the building blocks upon which most of us built our practices — the fundamentals. As stated above, fundamentals include industry focused solutions, and excellent client service. It also includes adherence to core values, such as diversity and community service. These are fundamentals that attract our clients involved in community service in good times, and enable us to align with our clients' values, even in tough times.

There may be an inclination to move away from some of the values that go to the core of the firm. However, staying the course in these areas now will have more impact and more benefit for the firm when economic conditions rebound. For example, diversity is a core value for Holland & Knight. While it would be very easy for the value to take a back seat to other initiatives that may appear to directly affect economic times, our focus must extend beyond current times to the future. Many corporations still place a high priority on diversity as a competitive business advantage. For example, companies such as The Coca-Cola Company and Microsoft offer clear incentives and give priority in some instances to outside counsel who share their commitment to diversity. Holland & Knight's commitment to diversity will help strengthen our position in the future within the eyes of clients who see the differentiated value that exists when they are serviced by a diverse team. It can become a competitive advantage.

To weather these challenging times it has been proven by Ann Mulcahy and others that focusing on clients and fundamentals is critical. The organizations and firms that do this inevitably come out stronger and better positioned as the economy recovers and we move forward. We are firm believers that there is an opportunity for law firms to emerge as more innovative and effective organizations. ■

By Michael A. Collora and Michael K. Loucks

A Peremptory Challenge Debate



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Mike Collora had just asked the judge to let his jury consultant sit at counsel table during voir dire. *Jury Consultant*, someone to mold a jury with the most potential biases in favor of his pot smoking, college dropout, tax evading client. Defense counsel was looking not for a fair or impartial jury, nor even a jury of the defendant's peers, but rather the *most favorable to the defendant jury* possible. As a twenty plus year federal prosecutor, I had seen defense counsel use peremptories to strike from the jury pool every male, business person, persons of particular city, ethnic or racial background, and the elderly. Federal case law is filled with opinions reversing convictions because prosecutors had used challenges in similarly impermissible ways. So, when the judge asked if we were ready to start picking the jury, I leapt to my feet and moved that the Court not permit any peremptory challenges.

"Mr. Loucks, Rule 24 of the Federal Rules of Criminal Procedure specifically states that the defendant gets ten peremptory challenges, and you get six. You want me to ignore the Rule?" I *hate* it when a judge zeros in on my weakest link.

"Your honor, before I answer your question, let me address the bigger picture. A defendant and the government are entitled to a fair and impartial jury; peremptory challenges are discriminatory by nature. First, for each potential juror, counsel will evaluate challenges for cause and have a fair and equal opportunity to make any argument to challenge any juror whom we think may not be fair or impartial. You will then either find the juror to be fair and impartial or excuse the juror. That should be it." *I was on a roll, a great equity argument, zero legal authority.*

"Rule 24 allows the parties more challenges than there are seats in the jury. Your clerk will call out 12 names at random, you might find every single one to be fair and impartial, and counsel can then knock out every single citizen, not because we believe that he or she can't be fair and impartial, but just because we think someone else with other inherent biases might be better predisposed to judge the facts in our client's favor."

The judge cleared his throat: "All that sounds well and good, Mr. Loucks, but how do I ignore the rule?"

Not that again. "After we are done discriminating among potential jurors, one of us may accuse the other of having done so for an impermissible purpose. A long line of Supreme Court decisions has steadily sought to restrain improper prejudice in jury selection. The Supreme Court, in *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 223-224 (1946), ruled that citizens cannot be excluded from jury service because of their economic status: 'Were we to sanction an exclusion of this nature ... [w]e would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economic all and socially privileged.'"

"In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court made clear that prosecutors cannot use peremptories to exclude jurors based on race or sex. The Court has also stated that a defendant does not have a constitutional right to peremptory challenges. As long as counsel are not obvious about our discriminatory purpose — e.g., striking every juror of a particular race — and if we claim a permissible basis for our use, and you believe us, our use will go unchallenged. A peremptory challenge is a tool that permits a party to discriminate for the sake of discrimination."

"Judge, before coming in today, I went trolling on the web sites of jury consultants. Some claim their goal is to help pick a fair and impartial jury; others help whoever hires them pick

the jury best for the client. How do they claim they do this? By using psychologists, criminologists, sociologists, and other ‘people experts.’ In reality, your honor, this all boils down to using peremptories as a tool for discrimination. A jury consultant advises a party that, based upon the potential juror’s background, that person will be predisposed for, or against, that party. Is it because the potential juror is poor or rich? Blue collar or white collar? Because she lives in Wellesley or Roxbury? Because his spouse is an executive or a factory worker? Because she is young or old? We don’t need that in our legal system, your honor. Conduct a more thorough voir dire, give the lawyers more tools to probe for actual biases — written questionnaires, or the right to question potential jurors — but once you find the juror to be fair and impartial, don’t give us the extra corrupting tool we can use to strike jurors at whim. Abolish peremptories.”

I sat down. Collora’s turn. *See, I never answered the hard question.*

Well, finally it’s my turn. A typical tough trial today — I represent a businessman who has not paid taxes in ten years. He claims taxation is unconstitutional and instead donated to charity. What I need is a jury of pot-smoking, MIT dropouts, not accountants or cops. To get such a jury, I need lots of peremptory challenges.

“Your honor, I object to the Government’s Motion. Peremptories are granted by Fed. R. Crim. Proc. 24(b), ten for the defense, six to the prosecution. In *Swain v. Alabama*, 380 U.S. 202 (1965), the Supreme Court observed that the preemptory challenge may have existed since 1305 in England. In fact, after 1530 and until recently, a defendant in England had 20 challenges, 35 in a high treason case. Peremptories in criminal cases have been the law in this country since at least 1790.”

“In addition, Justice Story approvingly referred to the preemptory right in *U.S. v. Marchant*, 25 US 480 (1827), a case arising out of a Massachusetts prosecution. Citing *Marchant*, the First Circuit in *New England Enterprises v. U.S.*, (1st Cir. 1968) did not question the right to peremptories, but rather limited the government to six peremptories over objection.”

I paused for dramatic effect. “Ten peremptories, not zero as Loucks would afford my client, have been the law since 1872. Rule 24, adopted in 1944, merely continued that right.”

The Judge cleared his throat. “Doesn’t some of what Loucks asserts about the misuse of peremptories make sense?”

“Only some. I agree, my rights are somewhat restricted

under Rule 24. For example, I cannot strike a juror solely because of race. *Batson v. Kentucky*, 476 U.S. 79 (1986) (applying the Equal Protection Clause and overruling *Swain*, lowering the burden of proof for a defendant claiming the prosecution was using preemptories for a racial purpose). The Supreme Court extended that reasoning to racial exclusions even if a defendant is not part of that excluded class. *See Powers v. Ohio*, 499 U.S. 400 (1991). The *Batson* ruling now applies also to a defendant. *Georgia v. McCullom*, 505 U.S. 42 (1992). I also concede I cannot use a strike solely based upon gender. *See J.E.B. v. Alabama*, 511 U.S. 127 (1994).”

“But, your honor, the Court in *Batson* upheld the preemptory challenge, and has noted that while peremptories are not a constitutional right, *see Stitson v. U.S.*, 250 U.S. 583, 586 (1919), such challenges are one means of assuring the selection of a qualified and unbiased jury. *Batson*, at 92.”

The Judge interrupted. “Wouldn’t it save time to eliminate peremptories?”

A bit miffed since I was on a roll, I went on: “Given the array of forces against a defendant — the prosecutor, the federal agents, probation, magistrates, my client’s novel theory on taxes — this right to peremptories gives my client some comfort that he can help choose the one group that can free him and recognize the wisdom of his actions — the petit jury. Otherwise, I would want extended voir dire.”

The Judge interposed another question. “Hasn’t the Supreme Court recently expressed concern about peremptories?”

“Yes, your honor. In *Rice v. Collins*, 546 U.S. 333 (2006), the Supreme Court upheld a prosecutor’s reason — “youth and she rolled her eyes” — for using a preemptory to challenge a black juror in a drug case. But Justice Breyer indicated he was leaning toward abolishing the preemptory challenge, *id.* at 343, and several members of the SJC feel the same way even though it is guaranteed by M.G.L. c. 234, §.29. *See Commonwealth v. Benoit*, 452 Mass. 212, 226, fn 10 (2008) But until then, surely, I can use age, education, demeanor, income and maybe even religion (*but see Commonwealth v. Carleton*, 418 Mass. 773 (1994) (ethnic challenges not permissible)) as a private basis for my use of a preemptory challenge. As the first Justice Harlan said, ‘The right to challenge a given number of jurors without showing cause is one of the most important rights secured to the accused. *Pointer v. U.S.* 151 U.S. 396, 408 (1894).’ ”

I sat down, triumphant. ■



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