

... of action for nuisance against the highway department, a Superior Court judge has ruled. The highway department argued that

Gants stated that "[t]his Court recognizes that [this is] a triumph of form over substance: the nuisance claim that as a

... erosion to the residential character of the neighborhood than would use by a full time secretary, a janitor, or some other

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Discovery buses In DR Can Be Remedied 'Duck, Dodge' Ploys May Mean Sanctions

BY PAUL D. BOYNTON

Parties who use "duck, dodge and hide" every tactics in arbitration could ultimately face sanctions despite the absence of direct court supervision, practitioners say in *Lawyers Weekly*.

John F. Lakin of Andover — who recently had an arbitration award against a personal injury client vacated in court due to evasive discovery responses — said lawyers have the duty to hunt down evidence with due diligence when requested by the other side. The hide-and-seek game of discovery shouldn't exist, even in arbitration.

Refusing to arbitrate a dispute presumes the good faith of both sides in exchanging information before presenting the cases to an arbitrator, remarked arbitrator James E. Riley Jr. of Boston. "Otherwise, why agree to arbitrate?" he said.

However, litigants are not powerless to resist attempts by opponents to withhold material information, said lawyers. Lakin recently persuaded Superior Court Judge Carol S. Ball to vacate an arbitration award of no liability in favor of the defendant when she found that the defendant's attorney failed to produce a critical document prior to the arbitration hearing. Lakin noted in a marginal reference on

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\$23M Drunk-Driving Award In Bench Trial 'Significant'

VERDICTS &
SETTLEMENTS
PLUS

A driver out on a "drunken rampage" collides into the car of a young college student, causing

her to suffer a traumatic brain injury. Her medical bills total around \$160,000 and her estimated loss of earnings is \$1 million — can she win an eight-figure award in a bench trial?

A recent judgment worth \$22.7 million including interest indicates that the answer is "yes."

Edward C. Bassett Jr. of Worcester, who represented the victim, admitted that there is a "slim" chance of collecting the verdict but nonetheless said that this award will have an impact on other drunk driving cases involving brain injuries.

"When an insurance adjuster tries to say that a case is worth only 'X' dollars, we now have a judgment from a Superior Court judge that will help other plaintiffs with similar injuries put a fair value on their case," he said.

Bassett added that the judge seemed to consider three main elements in determining the award: the plaintiff's disability; her pain and suffering from undergoing three brain operations; and her permanent disfigurement.

Despite the success of the victim's lawsuit, according to lawyers the case raises difficult issues relating to discovering facts, conveying the full extent and value of brain injuries and collecting judgments.

David P. Dwork of Boston said that "it is an unfortunate thing that there is no shortage of people getting injured and killed by drunken drivers, but the difficulty is that these irresponsible operators and bars are also irresponsible when it



EDWARD C. BASSETT JR.
Other brain-injury cases impacted

comes to having adequate insurance, so often there are no available resources to even begin to compensate the victim."

But many of these obstacles can be overcome with a hands-on investigation, a simple presentation of the facts, comparative verdict summaries and a lot of patience, according to practitioners.

"I will continue to pursue the [uninsured driver] for whatever assets he may accumulate and if and when he wins the lottery, I will be standing right there next to him," said Bassett.

The case, *Bloniasz v. Phelan*, is reported in the Verdicts and Settlements section of this week's *Lawyers Weekly*.

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The Home Office

On Aug. 4, 1994, the plaintiff, attorney Brian Cuhna, purchased a residence located in New Bedford.

The property was located within a "Residential A" district, as defined by §9-208 of the New Bedford zoning ordinance.

The plaintiff also had homes in Newport, R.I. and Quincy. He spent approxi-

mate \$23 million on the property, and thus was eligible to use the property as a home office.

However, the judge determined also that §9-208(3) of the zoning ordinance permitted use of a home office by only one professional person, the resident. Therefore, the judge concluded that attorneys employed by the plaintiff could not make use of the home office.

Therefore, the defendants argued, the ordinance permitted only a single professional person residing on the premises to use the home office.

"The defendants' first contention, regarding the singular language as an express limitation, is not convincing," stated Warner. "The ordinance simply does not contain any specific numerical restriction."

Here, Warner noted, the plaintiff uses his home office to interview clients who ei-

ther use the property as a residence or as a professional office is incidental to the plaintiff's use of the property as a residence."

In future cases, said Warner, "it may be that the use of property as a home office will rise to a level where it is no longer subordinate and minor in significance to the use of the property as a residence. In such a case, it may well be within the discretion of the city to prohibit such inappropriate use."

\$23M Drunk-Driving Verdict From Bench Trial

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A 'Drunken Rampage'

Defendant John Phelan was out one night on a "drunken rampage" when he ran a red light and collided with plaintiff Wendy Bloniasz's car, said Bassett.

The plaintiff — a 21-year-old student at Becker College — was thrown from her car, fracturing her skull on the pavement.

She suffered a "catastrophic traumatic" brain injury causing "borderline intelligence," severe bouts of depression — leading to a New Year's Eve suicide attempt — and difficulty with skills such as verbal reasoning and memory.

Her medical bills totalled \$163,820.69 and her estimated loss of future earnings was \$1,096,272, according to Bassett.

The defendant was arrested and pled guilty to operating a motor vehicle under the influence of alcohol, negligently causing serious bodily injury, illegally leaving the scene of an accident and operating a vehicle after the revocation of his license.

The defendant was sentenced to eight to 10 years in prison.

The plaintiff brought a civil suit against the defendant as well as several bars where the defendant apparently had been drinking that night.

Bassett noted that while the plaintiff reached confidential settlements with some of the bar owners, her claim against the defendant proceeded to court for an assessment of damages hearing before Judge Peter A. Velis in Worcester Superior Court.

"It was very important to her to get a judgment against [the driver] and I promised her we would do that," he said.

The judge awarded the plaintiff \$15 million in damages and \$7.65 million in interest.

'Critical' Investigations

Although the defendant was convicted in criminal court — essentially closing the issue of whether he was at fault — a major hurdle facing the plaintiff in her case against the bars was a lack of cooperation from the defendant, said Bassett.

"The first thing we did was to hire a private investigator because the defendant kept changing his story and made it very

difficult for the plaintiff to even prove which bars he had been drinking in," he said.

According to Ronald S. Beitman of Falmouth, editor and coauthor of the American Bar Association's book, "Liquor Liability: A Primer For Winning Your Case," this lack of cooperation from the defendant is a very common problem for plaintiffs' lawyers.

"A lot of people have the misconception that drunk drivers have great remorse and make themselves available, but I've been doing this for almost 20 years and we've had only one driver in that time who cooperated," he said.

Beitman stressed that a "hands-on" investigation is the most effective way to overcome this hurdle.

Dwork agreed, noting that "lawyers can't rely on the authorities to do an investigation because they are looking at aspects related to administrative and criminal violations rather than trying to build a civil case."

Beitman recommended that lawyers get out of their offices and actually participate in certain elements of investigations.

Otherwise, he said that an attorney is likely to get a report that overlooks evidence against the bar or restaurant and only confirms the liability of the driver.

Valuing Damages

Conveying the extent of brain injuries to a judge or jury is another challenge in suits against drunk drivers and bars, according to practitioners.

In contested cases, Dwork said that it usually involves a multidisciplinary effort to establish the seriousness of the injury with testimony from experts such as neurologists, psychiatrists as well as friends and relatives

who have witnessed the changes in the victim.

But in *Bloniasz*, Bassett said that no experts testified at the damages assessment hearing.

Instead, he submitted doctors' reports to set forth the extent of the plaintiff's damages and government statistics to show her lost wages.

"I wanted to present evidence to the judge in a simple fashion and, in Massachusetts, much is left to the fact-finder in terms of deciding the value of economic damages," he stated.

"The difficulty is that operators and bars are irresponsible when it comes to having adequate insurance, so often there are no available resources to even begin to compensate the victim."

— David P. Dwork, Boston

Matthew P. McCue of Worcester, who assisted Bassett in the case, added

that the goal was to avoid being "overly dramatic" in the memo to the judge.

"Our strategy was to try to communicate the severity of the injuries in a factual manner [so] we included specific details about how her disability impacts her at work," he said.

McCue added that they also provided the judge with deposition testimony from the plaintiff, her mother and boyfriend as well as summaries of other Massachusetts verdicts in similar cases.

"I used comparative verdicts that I found on Lawyers Weekly's [Web site,] [and other sources] which were helpful in showing the judge that this case is equal to or worse than those other cases," he said.

Bassett noted that the range of comparative verdicts was \$3 million to \$15 million.

"The judge didn't ask for those verdicts, but it is another fact that they might look at and is a check on their fairness," he said, noting that U.S. District Court Chief Judge William G. Young requested such information of him in the civil suit against

Louise Woodward.

While Dwork has never seen verdict summaries used during a trial, he has seen them during mediations.

"It is a good way to negotiate a settlement to give insurance companies an idea of what the case is worth and to support a potential claim that they have violated Chapter 93A," he said.

However, Dwork noted that the high award in the *Bloniasz* case might be more related to the fact that it was an uncontested hearing.

"The judge probably got carried away in sending a message rather than assessing the pecuniary damages — although the woman was seriously injured," he said.

Collection

Bassett stated that yet another difficulty in the *Bloniasz* case involves collecting the judgment — a problem that many plaintiffs' lawyers share.

Bassett explained that because the pro se defendant was uninsured, the possibility of collecting the \$22.65 million judgment is slim.

"The problem with these cases in general is that there is usually very limited insurance on the operator and with the bar. If the operator has limited insurance and limited assets, there is not a lot you can do," said Dwork.

However, he noted that lawyers can try to identify the individuals who were involved with the service of alcohol to the defendant and bring claims against those persons.

"It reaches more pockets and puts more pressure on the insurer to provide coverage and resolve a claim to protect the insured," said Dwork.

He added that because "judgments against drunks" are not dischargeable in bankruptcy, lawyers have 20 years to try to enforce the judgment.

"If they ever get an inheritance, hit the lotto or get a job — we'll be there," said Dwork.

— MEGHAN S. LASKA