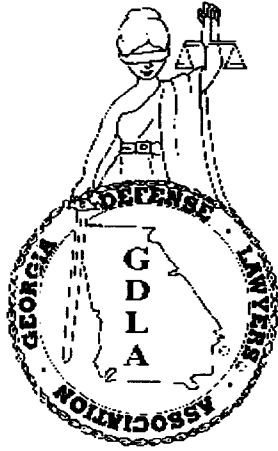


GDLA NEWSLETTER

Volume 12

Editor: John A. Foster

January 2001



THE PRESIDENT'S MESSAGE

BY: Greg Melton

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"Who are those guys", Butch repeatedly remarked to Sundance about the relentless pursuers seeking to alter the duo's economic way of life. GDLA members know all too well who "those guys" are.

The insurance industry, with a handful of notable exceptions, has fundamentally changed its relationship with the insurance defense bar. The mantra of cost containment has spawned staff counsel, fee bill auditing, and litigation guidelines that in the worst cases mandate the unauthorized practice of law and in many other cases seek to limit defense counsel's exercise of independent judgment. The goal of winning cases has been so subjugated by cost constraints that good lawyering has been replaced by commodity lawyering.

The most recent example is the insurance industry's full court press in opposition to Proposed Formal Advisory Opinion (P.F.A.O.) No. 99-R2. The

P.F.A.O. concludes that:

- (1) A lawyer may not disclose to a person who pays the lawyer's billings other than the client, or to third-parties such as an insurer's outside auditing service, confidential information concerning the client without the client's consent, except for disclosures that are impliedly authorized to carry out the representation, and
- (2) A lawyer should not comply with the requirement of a person who pays the lawyer's billings, other than the client, that the lawyer seek or obtain the client's consent to disclosure of client confidences or secrets in billings, statements to be submitted to an outside audit service; and
- (3) A lawyer whose professional services are paid for by a person other than the client can ethically comply with guidelines of the person paying the bill, provided the guidelines do not require disclosure of confidential or secret information of the client, without the client's consent, or interfere



with the attorney's independent professional judgment in rendering legal services to the client or with the attorney-client relationship.

GDLA has filed two "Amicus" briefs before the Georgia Supreme Court in support of the P.F.A.O.. At the heart of the dispute is GDLA's support of the traditional tripartite relationship between insurer, insured and defenses counsel and the insurance industry's opposition, which is likened to Orwellian revisionist history pretending that relationship has always been what they say it is now.

GDLA contends that the relationship then and now requires that defense counsel's only client be the insured to whom is owed the

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ethical obligation of independent judgment.

The opponents contend that the insurer has always enjoyed the status of co-client and ... oh, by the way... the insured has contractually ceded to the insurer the right to make all litigation decisions. The opponents contend defense counsel is an advisor to the insurer only and will conduct the litigation as directed by the insurer.

Perhaps the lesson to be learned from the demise of Butch and Sundance is that obsessive focus on one's pursuers is counterproductive. Instead of asking "who are those guys" perhaps we should be asking "who are we". I submit we are not just insurance defense lawyers anymore - We are defense lawyers who do and should continue to work for insurers who will adhere to the traditional tripartite relationship. GDIA is not just an organization for insurance defense lawyers. It is an organization for defense lawyers. If we are to grow and in so doing become more meaningful, we must broaden our membership base to include all lawyers who defend matters of civil litigation. I challenge each of you to recruit one new member to our organization.

Greg Melton

MID YEAR CLE SIMINAR, MARCH 2, 2001
COLONY SQUARE HOTEL, ATLANTA, GEORGIA

By: **Wiley A. Wasden, III**
 Chair, Winter CLE Seminar

GDLA's Winter CLE is a fantastic opportunity to pick up CLE credit from an exceptional slate of speakers, with topics that we hope are not only timely, but practical in your area of practice. The program qualifies attendees to 6 CLE hours, including 1 Ethics hour and 1 Professionalism hour. These hours may be applied retroactively to the year 2000. The cost of the seminar is \$125.00 per person, which includes CLE accreditation and lunch. As space is limited, your prompt attention in registering before Friday, February 16, 2001, will ensure a spot for you and/or firm member. Though we prefer your check with the registration form, we will also accept registration forms by fax. Mail check and form to Georgia Defense Lawyers Association c/o Wiley Wasden, III, Brennan & Wasden, LLP, 590 Suntrust Bank Building, 33 Bull Street, Savannah, Georgia 31401.

AGENDA

- | | |
|-------------------------|---|
| 9:00 a.m. - 9:30 a.m. | Registration, welcome and coffee |
| 9:30 a.m. - 10:30 a.m. | Mediation and Arbitration in the Split Up of Partnerships and Professional Corporations
Thomas B. Branch, III
Holland & Knight
Atlanta Georgia |
| 10:30 a.m. - 11:30 a.m. | Failure to Warn in Products Liability Cases
C. Bradford Marsh
Swift, Currie, McGhee & Hiers
Atlanta, Georgia |
| 11:45 a.m. - 12:45 p.m. | Lunch
Appellate Practice Pointers
William L. Martin, III
Clerk, Georgia Court of Appeals |
| 1:00 p.m. - 2:00 p.m. | Representing the Uninsured Motorist Carrier at Trial
Joseph H. Barrow
Barrow & Ballew
Savannah, Georgia |
| 2:00 p.m. - 3:00 p.m. | Nursing Home Liability
Michael Reeves
Gorby, Reeves, Peters & Burns, P.C.
Atlanta, Georgia |
| 3:00 p.m. - 3:15 p.m. | Break |
| 3:15 p.m. - 4:15 p.m. | Traumatic Brain Injury - A view from the Defense
Steven P. Gilliam |

2000 Trial Academy

By: Robert R. Gunn, II

The Georgia Defense Lawyers Association held its annual Trial Academy on November 30 through December 2, 2000 at Cal-laway Gardens Resort in Pine Mountain, Georgia. A somewhat smaller than usual group of associates and younger lawyers attended the two and a half day seminar which was conducted in a "Mock Trial" setting. The program consisted of demonstrations by faculty members of various portions of a civil trial from *voir dire* to closing argument, including smaller break-out groups where students conducted their own portions of the trial with constructive criticism provided by faculty members.

Included in this year's program was a box lunch session on Friday involving the nuts and bolts considerations given in "The Care and Feeding of Witnesses." This part of the program was one of the most popular, according to student surveys, and dealt with practical considerations on contacting, interviewing and nurturing witnesses in the real world.

The case materials used for the Academy were the same as used in previous years, *i.e.*, the now-famous case of Margaret Morton v. Clifford Clark, et al., involving a day break automobile/pedestrian incident at a ridiculously busy intersection in North Atlanta.

While the seminar itself seemed to be a great success with the students and faculty, the Trial Academy Committee (comprised of the current Faculty) agrees that a

new approach to marketing the seminar needs to be implemented so that attendance will be higher in the future years in an effort to offset or totally defray the cost of the seminar. In addition to the obvious benefits to the students of real world in-

struction and 20.8 hours of CLE credit, the seminar also serves as a great recruiting tool for membership to the GDLA. Members are strongly urged to make sure that their associates with one or two years' experience attend this seminar in future years.



Mark your Calendars!

2001

- ◆ Feb. 16-17 GDLA Winter Meeting Holiday Inn Crown Plaza Ashford Dunwoody
- ◆ March 2 GDLA Mid Year CLE Program, Coloney Square (Hotel) Atlanta
- ◆ April 27-29 GDLA Spring Board Meeting, Kiawah Island Inn and Resort
- ◆ May 16-18 GDLA European Products Liability Conference, Brussels, Belgium
- ◆ July 19-22 GDLA Annual Meeting, Sandestin Beach

2002

- ◆ July 18-21 GDLA Annual Meeting, Ponte Vedra



**MINUTES OF THE GEORGIA DEFENSE LAWYERS
ASSOCIATION FALL BOARD MEETING,
OCTOBER 14, 2000**

The Fall meeting of the Board of Directors of the Georgia Defense Lawyer's Association was held at Brasstown Valley, Young Harris, Georgia, on Saturday, October 14, 2000.

The meeting was called to order by Greg Melton, President. Present at the meeting were Steve Kyle, Greg Melton, Walter McClelland, Jerry Buchanan, Sandy Owens, Rick Rominger, Staten Bitting, John Edwards, Jimmy Singer, Wade Monk, Bob Travis, George Duncan, Johnny Foster, Salty Forbes, Warner Fox, Lu Anne Clark, and Grant Smith.

Mr. Melton welcomed new board members Staten Bitting, Wade Monk, Sandy Owens, and Jimmy Singer.

I. The minutes of the summer board meeting at Amelia Island were not readily available, and it was determined that the minutes would be emailed and faxed to the board members for approval.

II. The treasurer's report was given by Jerry A. Buchanan and approved by the board.

III. Mr. Melton next led a discussion of the Committee system of GDLA, both standing and substantive:

Mr. Melton suggested that the organization needs involvement from the bottom up rather than the top down, and that the committee system was an appropriate vehicle to achieve that involvement. The members will receive emails and data-faxes identifying committees and asking for volunteers to be members

and chairs of committees.

After a general discussion, this action was approved.

Mr. Melton stated that the substantive law committee system had been used advantageously in Florida and Alabama, and that the GDLA would like to see substantive law committees contribute newsletter articles, provide speakers for annual meetings, and the like.

Mr. Melton stated that he also would like to see recent development updates from the substantive law committees. He encouraged the board to talk this up among lawyers to get participation for committees.

Mr. Duncan stated that some of our best programs have come from ideas of members. We need to get people with interest and enthusiasm to implement ideas. Our members should know that if they have a good idea for a seminar or other program, the association will support them in developing the idea.

Mr. Forbes proposed that, in addition to the past presidents serving on the membership committee, he would like for the immediate past president to serve on membership committee. It was agreed that the immediate past president would serve on that committee.

Mr. Melton then discussed the other standing committees as follows:

Trial Academy: Technically this is a committee consisting of

faculty and chair, not open for membership as such. It was decided in the past that it functions best when the faculty members made up the committee. Kay Deming, Sandy Owens, Jerry Buchanan, and others have chaired it in the past. Rusty Gunn of Macon will be chair for at least 2 years. This year's faculty is already in place and plans are well underway for another successful program in late November.

Winter CLE: This is a program, but something that should work better now that the annual meeting has been moved to late summer. It is a program providing CLE credits for members. The last one chaired by Warner Fox got rave reviews.

Younger Lawyer's Section: This committee has not been active in the past, but perhaps we can get this going. Organizations larger than ours have asked the chair of the Younger Lawyer's Section of the organization to serve on board. Perhaps GDLA should consider this.

Newsletter: We would like it to be published at least quarterly. Substantive law committees can help in this regard.

Technology Committee: This committee is an outgrowth of the web page. The DRI says that our industry is evolving into e-commerce industry, just like every other industry. Clients are going paperless, and they expect technologically up-to-date lawyers. This committee will explore the possibilities in this regard.

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Amicus curiae committee: Jimmy Singer heads this committee, and has done an excellent job. It has done a lot of good work in the last couple of years. We try to file amicus briefs on behalf of professionalism and jurisprudence issues of interest to defense lawyers.

Legislative Committee: This committee started as a committee to keep the GDLA abreast of what's going on in the legislature.

Long Range Planning: Mr. Melton and Mr. Forbes both suggested that this committee probably should consider developing a long-range business plan.

Ethics and Professionalism: Mr. Duncan stated that GDLA started this three years ago on an ad hoc basis. The culmination was a seminar on civility we sponsored jointly with GTLA. The goal of the committee: (1): encourage dialogue and joint sponsorship with GTLA to the extent we have common ground. (2): There is a Chief Justice's standing committee on professionalism that included defense bar representative in the past. We need to become more involved in that. (3): Sponsor seminars for younger lawyers to build on what we do at the trial academy. We can make the positive side of our profession better known.

Alternative Revenue Committee: This committee and the work of Rick Rominger and George Duncan, has been one of the most impressive things we have done. At the annual meeting, we had sponsors in place that paid us and were excited about sponsoring GDLA. Our vendors were very complimentary of how the meeting was handled.

Membership committee: GDLA has changed this to some extent. Salty Forbes has now taken over for Dick Richardson: The new mandate of the committee is to enlist people who will aggressively pursue increase in members. The membership committee needs to suggest how to better the association through increasing our membership.

Recent developments committee: This is a new committee, whose role will be to keep our membership informed regularly on the recent developments in the law of interest to defense lawyers. With electronic communication being what it is, we should immediately know of developments and inform our members.

IV. Committee Reports

Mr. Melton then called for reports from the various GDLA committees, and reports as following were received and approved by the board.

Trial Academy: George Duncan reported that the Trial Academy is set this year for the last weekend in November at Callaway Gardens, with the faculty much the same as years gone by, with Lane Young coming on board as an instructor. The budget is based on 50 students and we had 35-38 last year, but we need to have promotion of the event. The more people that encourage young lawyers to come, the better. Tuition: \$350 per student.

It was agreed that, once the brochures are out, it is important to talk it up among our member firms.

Winter CLE: Mr. Melton again congratulated Mr. Fox on an excellent program last winter. At this point no one has been selected to take over the program for this year. Mr. Fox stressed that it is important to get notices out about the meeting.

Mr. Forbes suggested that the GDLA change the name from Winter CLE to Mid-year so it doesn't sound like it needs to be in January. It was agreed to do that. It will henceforth be known as Mid-year CLE meeting.

Law Journal: Grant Smith reported that the Journal would be published in the next 30 days or so. He still is in need of good papers to be published, and he solicited ideas in that regard.

He also noted that many organizations are moving away from publishing scholarly journals. In Alabama, they do a newsletter monthly, but no annual journal.

Mr. Melton circulated in the room an example of the Alabama newsletter.

Newsletter: Johnny Foster reported that the most recent newsletter was published at the end of July, with a total cost of \$750: \$300 for copying, \$200 secretarial fee, and \$250 postage. He has 3 advertisements, Regency reporting, Bebedict Engineering, and one other. If anyone else paid for sponsorship, he asked for information in that regard. Regarding sponsors, it was agreed that there needs to be

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one central clearing house for information, so that everyone who wants an ad pays for it, and so that everyone who pays for an ad gets what they pay for.

Amicus curiae committee: Mr. Singer reported that the Amicus Committee has been busy in the past few months. The committee went to firms 3 times in last 3 months, had a positive response and the firms have done excellent work. The committee was asked by Kay Deming for an amicus brief in the Time-Warner case. David Hanks' firm wrote an excellent brief, which dealt with whether an objecting party had to show prejudice from improper comments by the Judge.

The GDLA was also asked to write an amicus brief by the Supreme Court in the King v. State case dealing with constitutional right of privacy with respect to medical records. The opinion just came down, and the Supreme Court recognized the GDLA position.

Membership committee report: Mr. Forbes offered the report of the membership committee as follows:

There is currently pending the application of Christine H. Hall, with Beckman, Kelly and Smith, of Norcross Ga. Alan Herman and Warner Fox have sponsored her. Committee asked board to approve application. The admission of Ms. Hall was moved and seconded, and unanimously approved.

Mr. Forbes commented that there is a need to follow up on applications, once the membership application is sent out by the committee,

and once an applicant is approved and admitted to membership. It was decided that we would make certain all this happens in the future. We will now have in place safeguards to be sure new members get notice and pay dues.

Mr. Forbes also read a list of 13 people who had asked for applications, but had never returned the completed applications. It was agreed that there was a need to follow up on these outstanding applications and to complete the process so as to bring these lawyers into the GDLA.

Walter McClelland suggested that we have the applicant submit initiation fees with the application. It was moved and seconded and approved that each applicant should submit a check for the initiation fee with the application.

Initiation fee and dues were discussed. The Board approved increasing the dues from \$125 to \$150 per annum. It was decided that the new dues would be effective immediately.

Mr. Forbes reported that the Alabama Defense Lawyers Association has a law school student section. He raised the issue of whether the GDLA should consider such a law student section. He suggested that GDLA form such a law school student committee, allow them to join for no cost, and give them a break on annual meeting fees. This, he suggested, would increase exposure in the state, and allow the students to put on their resume that they belong to our organization.

Following discussion, it was the consensus of the board to give the

matter more thought before such a law school committee was formed. It was decided to study the Alabama model to see if such a system would be appropriate for GDLA. It was decided that Grant Smith, Jimmy Singer and Salty Forbes would study the Alabama model and present a proposal at next board meeting.

Next, Mr. Forbes discussed the new DRI incentive for new members, whereby DRI provides any member bringing a new dues-paying member a certificate of \$50 good toward any DRI meeting or program. Mr. Forbes suggested that GDLA consider such a program, providing a \$50 transferable certificate for any member recruiting a new dues paying member. The program would be open to any member of GDLA, but would exclude members of the GDLA officers and Board of Directors. The program is available to member firms to which the Board members or past presidents belong. The motion was seconded and unanimously passed.

Mr. Duncan then raised the issue of the Proposed Formal Advisory Opinion proposed by the office of the General Counsel for the State Bar of Georgia, and now under consideration by the Supreme Court of Georgia. Mr. Duncan informed the Board of the filing of two briefs by members of the insurance industry, one by AIG and the other by Zurich Insurance Company. He raised the issue of whether the GDLA should file a brief on behalf of its members.

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Much discussion followed. Subsequently, the GDLA filed its comments with and argued its position orally before the Supreme Court.

Mr. Forbes then suggested, and all agreed, that Mr. Kyle is owed a debt of thanks by the GDLA for his excellent work as our meetings coordinator. Mr. Kyle expressed thanks for the acclamation of the group, and discussed some of the problems encountered in attempting to schedule large meetings of the association, including the need to guarantee minimum rooms, the problem of member last minute cancellation and its negative effect on the guarantee by the association, and the like. It was proposed that members need to be made aware of the negative impact of last minute cancellations, and that a policy should be developed charging canceling members if the association is required to pay.

Mr. Kyle reported that the 2001 annual meeting would be held at Sandestin July 19-22, 2001. The 2002 meeting will be held at Ponte Vedra, Florida, and the organization needs to find a third venue of the proposed three-year rotation.

Mr. Melton next raised the issue of attendance at the Annual DRI meeting.

Mr. Melton next suggested that the GDLA bylaws should be amended so as to include on the nominating committee for GDLA officers not only the past presidents in attendance at the annual meeting, but also the outgoing president, because of his or her active involvement in the organization and his or her knowledge of the involvement of other members. The motion was

made, seconded, and unanimously passed. The bylaw amendment will be submitted to the membership pursuant to the Bylaws of the organization.

Regarding the Winter Board meeting, following discussion, it was decided that the Winter meeting would be held in Atlanta, and the Spring meeting would be held in the Charleston/Kiawah Island area, depending on the availability of accommodations as researched by Mr. Kyle.

On the matter of Old Business, inquiry was made regarding the proposed Willis J. Richardson Scholarship program at the University of Georgia Law School. It was reported by Mr. Duncan that the matter was being investigated, and was progressing.

Finally, it was noted that David and Barbara Whitworth were experiencing family health problems with parents, and the board members extended to them their thoughts and best wishes.



At its fall meeting, the GDLA Board of Directors approved a recruitment incentive. Here's how it works: Hereforth, any member who recruits a new lawyer for membership in our organization will receive a certificate redeemable for a fifty dollar discount on the registration cost of any GDLA event - annual meeting, Winter CLE, and trial academy. Please take advantage of this incentive and help GDLA increase its membership.

Health

COMPREHENSIVE MAJOR MEDICAL - *Guaranteed Acceptance* coverage to Georgia Lawyers, employees, and eligible family members.

Life

TERM LIFE - Excellent rates and solid benefit plan for Georgia Lawyers, spouses, children and employees.

Security

DISABILITY INCOME - Your own occupation, choice of benefit periods, renewal to age 70, waiver of premium, survivor's benefit and other options.

LONG TERM CARE - Benefits in the case of catastrophic illness or for needs in aging.

Peace Of Mind

PROFESSIONAL LIABILITY - Quality assurance in customized benefits to fit your firm's needs.

**BUSINESS OWNER'S POLICY - WORKERS' COMPENSATION -
COMMERCIAL AUTO - COMMERCIAL UMBRELLA** -
Simplification of your practice protection through one carrier.

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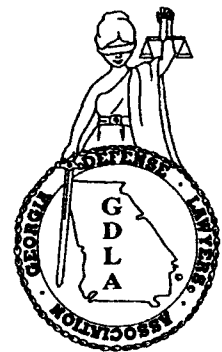
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SOUTHEAST REGIONAL DIRECTOR
DRI REPORT TO GDLA
By: Salty Forbes

1. Membership Promotion/Discounts

The DRI Board voted at the Annual meeting to continue the Free Membership Promotion for all GDLA members who have not previously been a member of DRI. The Board also adopted a Reward Certificate Promotion which will be for any member of DRI who recruits a full dues paying member of DRI the proposer would receive a certificate worth \$50.00 toward any DRI seminar or annual meeting registration. There is no limit to the number of certificates, the certificates are transferable, however, they must be used within two (2) years of the date of issuance.

2. Lomas

The Law Office Management Assistance System (LOMAS) is a by-product of the Small Law Firm Economic Symposium presented in April, 2000. Dr. Bill McCallister was a principal speaker at this DRI event. Following Dr. McCallister's presentation, a series of discussions was undertaken between his organization, Richard B. Collins, DRI Director and chair of the SLFES Steering Committee. McCallister Consultants proposes to offer a unique service to DRI members that will not only serve as a member benefit, but it will also provide professional advice, a portion of which is provided without cost to the membership. The key elements of the proposal call for McCallister Consultants to provide to DRI member firms, four fifteen-minute consultations per year without cost to the members or DRI. At the time of the initial consultation, the member firm will se-

lect the medium they prefer to use, e.g., email, telephone, and all instances of consulting for that firm will be carried out in the same medium.

If a firm exhausts its allocation of free consulting, it may, at its own initiative, secure additional support from McCallister Consultants at the rate of \$120.00 per hour. The customary hourly rate for other McCallister Consultants is \$150.00 per hour. DRI and McCallister Consultants will split hourly fees billed beyond this allocation on a seventy-five (McCallister) twenty-five (DRI) basis. DRI and McCallister Consultants will prepare invitational cards explaining the LOMAS proposal, and DRI will produce and mail this invitation, at DRI expense, to the membership. In order to activate an account under this program, an officer of the firm must sign an acceptance card agreeing to the terms as set forth above, and which will include a waiver of the right to take legal action against DRI and McCallister Consultants. Each invitation/information card will contain a unique identification number for use in recognizing each DRI firm taking advantage of the program.

In addition to the financial benefits, the LOMAS program also provides significant benefit to both DRI and its members. Each month McCallister Consultants will provide DRI a summary and analysis of the requests for consultation that it receives. By tracking and categorizing this data, DRI will better understand the needs of its membership. In addition, McCallister Consultants will write a monthly column in *For the Defense* in which it reports common questions and answers to membership problems.

3. Juritas.Com

One of the principal reasons for the lack of growth of DRI's expert witness database is the deficiency in the access of on-line material for members using this service. In order for material to be stored electronically, it must be converted to digital format. The thousands of pages of transcripts, resumes, and summaries in DRI's possession are all in hard copy, and the cost of digitizing these documents is estimated conservatively to cost from \$150,000 to \$200,000. Currently, members seeking information on an expert must utilize staff to manually search the files, photocopy the relevant information, and mail or fax the results to the requesting member. This process is both expensive and time consuming, and it is an archaic manner of providing service to the membership.

Juritas.com is an operated company that provides instant access of on-line court documents to its subscribers. They will convert all expert witness transcript, resumes, and summaries to electronic text, OCR (Optical Character recognition) searchable, and to further index the materials in a logical format. *Juritas* will bear the entire cost of this conversion, (\$150,000 - \$200,000) host the data on both its site and the DRI site, and provide security so that only DRI members can access the information. The DRI material will not be available to their subscribers unless the subscribers are also DRI members. In addition, DRI members are eligible for participation in the *Juritas* affinity program under a 25%

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discounted rate from their usual subscription fee.

**4. SMALL LAW
FIRM ECONOMIC
SYMPOSIUM**

DRI will sponsor small law firm oriented, regional, one-day seminars, much like the program that was conducted in Chicago. There will be certain changes made to the format in order to accommodate it in a day. DRI would probably not bring in a representative from the insurance industry, but rather would have an attorney talk about what is expected of insurance defense counsel in order to successfully deal with insurance defense and related cases, and how it can be done on a financially successful basis. DRI would focus the technology portion of the program to be less of a historical overview of the Internet to a more direct "how to" utilize technology to gain financial advantage and to minimize the size disadvantage of smaller firms. DRI would continue to put forth information on the financial factors and benchmarks on profitable law firm operations so that law firms could measure whether or not they are being operated financially successfully, or furthermore, to show areas where improvement could be made. Lastly, the program would focus on alternatives to a one-hundred percent defense practice, and thus how firms can diversify and add new practice areas to deminimize the total impact of the firms' revenues on insurance defense practice. DRI is willing to pay for all of the cost of the SLFES program and will share any profits with the SLDO's involved, however for the programs to be profitable 200 attendees are needed.

**5. EUROPEAN
PRODUCTS LIABILITY
CONFERENCE**

DRI is sponsoring a Products Liability Conference in Brussels, Belgium on May 16-18, 2001. The cost of registration for a member is \$895.00. The conference will be open to all DRI members and the European community. DRI expects a number of European attorneys, insurers, and companies to attend the conference.



YOU ARE INVITED

If you or someone you know is not already a member of Georgia Defense Lawyers Association we invite you to apply for membership. If interested, please contact Morton G. Forbes at the following:

MORTON G. FORBES
Forbes & Bowman
P.O. Box 13929
Savannah, Georgia 31416-0929
(912) 352-1190
FAX: (912) 352-1471
E-MAIL: salty@forbesandbowman.com

TECHNOLOGY UPDATE

Our organization has certainly made a lot of important advances in the area of technology over the past several years. Jerry Buckman has done a tremendous job with the website, GDLA list and other technological advances and with informing the membership of these new developments as well. We have a technology committee and Bill Claxton is now serving as its chairperson. Any member interested in technology is encouraged to contact Bill to sign up for membership.

The web site has a Discovery tool bank and a Brief bank. Both can always use new items. All members are encouraged to visit the web site, take advantage of our discovery tools and brief bank section and volunteer to provide the items we have listed and any other items which would be useful to the organization.

NEWS WORTHY ITEMS WANTED

Are you aware of a recent important legislative enactment or a major defense victory in the Courtroom? Have you attended any events our readers would be interested in? We would like to report it in the GDLA Newsletter. Send your items to: John Foster, Post Office Box 13929, Savannah, Georgia 31416, or call him at (912) 352-1190, or e-mail him at jfoster@forbesandbowman.com

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MEDICAL MALPRACTICE UPDATE

By: David N. Nelson
Chambless, Higdon & Carson
577 Walnut Street
Macon, Georgia 31202

I. Introduction

This is a survey of selected cases that focuses on issues unique to medical malpractice. (1) Over the past year, the courts of this state have wrestled with issues such as whether to subject doctors to an ever widening definition of malpractice, the semantics of proximate cause, and the scope of informed consent. Other issues, such as juror misconduct, are not addressed by this survey.

II. Malpractice Defined

During the past year, the supreme court has refused to expand the definition of medical malpractice to add new causes of action. In turning back efforts to expand the definition of medical malpractice, the supreme court has repeatedly declined to create new causes of action or expand the legal duties imposed on doctors.

The supreme court in Etkind v. Suarez (2) was asked to create a new cause of action for wrongful birth, but declined to do so. In Etkind, the plaintiff filed suit against her obstetrician after giving birth to a child with Down's Syndrome. Her claim was premised on a theory that but for the treatment or advice of her obstetrician, she would have aborted her pregnancy. In ruling on this matter, the supreme court chose to follow its earlier holding in Atlanta Obstetrics & Gynecology Group v. Ableson, 260 Ga. 711(1990), in which it refused to recognize such a claim. The supreme court further held that since the legislature had failed to amend the medical malpractice statute since Ableson to include recovery for wrongful birth, it was not going to judicially expand the definition of

malpractice on this occasion and affirmed the dismissal of the plaintiff's lawsuit.

The supreme court also refused to expand the definition of malpractice in Albany Urology Clinic, PC v. Cleveland. (3) In Cleveland, it held that the failure of the physician to disclose a negative personal life factor (drug use) was not actionable absent proof that injury was proximately caused by his failure to disclose to the patient his "negative life factor".

The plaintiff in Cleveland sought treatment from an urologist, Dr. Trulock, for a lump the might represent penile cancer, Dr. Trulock operated on the plaintiff to remove the lump. Subsequent to the surgery, the plaintiff began to experience painful erections and could no longer have intercourse. The plaintiff then filed a malpractice suit against Dr. Trulock that included a claim for fraudulent concealment or misrepresentation because Dr. Trulock had failed to disclose his use of cocaine at the time of treatment. A jury returned a verdict in favor of Dr. Trulock on the malpractice claim, but returned a plaintiff's verdict on the claim for fraudulent concealment.

The supreme court held that Dr. Trulock was not under an affirmative duty to disclose his drug use to patients prior to treatment. (4) Therefore, his failure to disclose his drug use, absent proof that it affected the services he rendered to the plaintiff, could not support an independent cause of action separate and distinct from the malpractice action. In refusing to expand the duty to disclose, the supreme court expressed great concern that this duty would be hard to define and might be depend-

ent upon a patient's independent and subjective sensibilities. (5) Accordingly, the supreme court reversed the court of appeals and affirmed the trial court's entry of a judgment notwithstanding the verdict in favor of Dr. Trulock.

III. Causation

This year the court of appeals addressed the sufficiency of the language that experts use to establish proximate cause, holding that testimony that merely establishes there is a possible or potential connection between the alleged negligence and the injury is insufficient to establish proximate cause. (6)

In Renfro v. Arrington, (7) the plaintiff alleged that improper dental procedures had caused her to suffer from subacute infectious endocarditis. She further alleged that her injuries were caused by the failure of her dentist to take a proper medical history, administer prophylactic antibiotics, and take contemporaneous x-rays to determine whether an infection existed. However, the record indicated that the plaintiff had failed to complete all of the questions on the patient intake sheet and was unaware that she suffered from any of the diseases that would have placed her at risk for contracting subacute infectious endocarditis. The defendant dentist moved for summary judgment, but the court only granted him summary judgment on some of the counts contained in the plaintiff's complaint.

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Nina Bass, George Duncan and Jerry Buchman and Family



Bruce Welch, Salty Forbes and Bill Bass



Salty Forbes, George Duncan, Greg Melton, Steve Kyle,
Jack Janecky and Walter McClelland

Continued from page 12

The court of appeals disposed of the plaintiff's claims based on the dentist's alleged failure to take a proper medical history by pointing out that a more complete medical history could not have been obtained since the plaintiff was unaware that she suffered from the very disease that placed her at risk. (8) The court of appeals also held that expert testimony that the dentist's actions "could" have caused her injury was insufficient to establish proximate cause. This language established only a mere possibility that the plaintiff's injuries were related to the defendant's negligence. Accordingly, the court of appeals held that the trial court should have granted summary judgment to the defendant dentist. (9)

The failure of a plaintiff to establish a causal connection between the alleged malpractice and all of the claimed injuries, though, does not require the reversal of a general verdict. The defendants in Pilzer v. Jones (10) appealed a \$4.4 million judgment contending that the expert medical testimony at trial failed to establish a causal connection between their alleged negligence and some of the claimed injuries. Specifically, the defendants contended that the damages returned on a general verdict form improperly included damages related to a colostomy that was not proximately caused by the defendants' negligence.

At trial, the plaintiffs, April Jones and her mother, contended that during a sigmoidoscopy, which was to aid in the diagnosis of Jones' irritable bowel syndrome, the doctor had perforated Jones' rectum with a small flexible tube. The plaintiffs' acknowledged that this was a normal surgical complication, and in-

stead successfully attacked the post-operative care given by the defendants by presenting evidence that the defendants had failed to adequately monitor Jones' post-operative recovery and that the nurse defendant had failed to adequately chart the necessary vital signs. Jones suffered a near fatal infection from the perforated colon and claimed it led to her colostomy. However, her experts conceded that there was only a possibility that the colostomy was related to the defendants negligence.

The court of appeals held that this testimony was insufficient to establish that the negligence of the defendants had caused Jones to undergo a colostomy. However, the court of appeals refused to reverse the general verdict, holding that the verdict was only for damages for injuries proximately caused by the defendants. The court of appeals presumed that the jury had deliberated as instructed and had not awarded damages for any injuries that were not proximately caused by the negligence of the defendants. (11)

IV. The Physician-Patient Relationship

During the past year, the supreme court has declined to expand the scope of informed consent, and the court of appeals has declined to expand the physician-patient relationship to include non-treating on-call physicians.

Informed consent was one of the main issues addressed by the supreme court in Cardio TVP Surgical Associates, P.C. v. Gillis. (12) In Gillis, the plaintiff sued the defendant doctor, his physician's assistant, and the hospital alleging battery based on lack of consent, negligence

per se, and medical malpractice during a bypass operation. The plaintiff contended that he had not consented to having a physician's assistant harvest the saphenous vein used for his heart bypass surgery.

The plaintiff had signed an informed consent form that provided, in pertinent part, that the plaintiff consented to the performance of a bypass operation "by Dr. Shaker and any other physicians or other medical personnel who may be involved in the course of treatment." The court of appeals held that this language did not establish informed consent as a matter of law because questions of fact remained regarding whether the major role of the physician's assistant had been disclosed to the plaintiff since he was not identified in the form. The supreme court reversed this holding. (13) In reversing the court of appeals, the supreme court noted that nothing in the express language of Georgia's informed consent statute (O.C.G.A. § 31-9-6.1) renders a consent invalid when the names of non-physicians are not included in the consent form. (14)

The court of appeal in Anderson v. Houser (15) held that a doctor's contractual duty to be on-call could not be used to establish a vicarious physician-patient relationship if the physician had never treated the patient. In Houser, the plaintiff was admitted to the emergency room for a suspected drug overdose while the defendant doctor was out of town. Dr. Houser, who had never met and did not treat the plaintiff, had been the scheduled on-call physician during the plaintiff's hospital stay. Later, the plaintiff sued Dr. Houser and several other

Continue on next page

Continued from page 17

physician contending that they had negligently failed to diagnose her esophageal perforation. Dr. Houser moved for summary judgment contending that he owed no duty to the patient since he had never treated her. The on-call arrangement which he had participated in was intended to ensure that the hospital was adequately staffed, but was not designed to ensure that a particular patient could reasonably expect to be treated by a particular doctor. The court of appeals therefore affirmed the grant of summary judgment, holding that the circumstances did not establish a consensual doctor-patient relationship. (16) Further, the court of appeals expressed great concern that imposing liability in this instance might have potentially far-reaching and unintended results. (17)

V. Malpractice Affidavits

The courts this past year were once again busy construing the affidavit statute. (18) A pro se plaintiff in Peterson v. Columbus Medical Center Foundation (19) filed suit after her infant son died, but failed to attach the required affidavit. Subsequent to filing the suit, she retained counsel who amended the complaint to allege that she had filed the suit within ten days of the expiration of the statute of limitations period, and that because of time constraints an expert affidavit could not be prepared. This automatically triggered a forty-five day extension for the filing of the affidavit. All this was moot, however, since the forty-five day extension ran from the date of filing rather than the date of the amendment, and the amendment had been filed seventy-five days after the date of filing. Accordingly, the court of appeals held that since the automatic

extension had expired, the court had not abused its discretion in dismissing the plaintiff's malpractice complaint. (20)

Nonetheless, in Peterson the plaintiff managed to remain in court because she had also asserted a simple negligence claim alleging that the doctors were negligent in their administrative functions. (21) In refusing to dismiss these claims, the court of appeals noted that an expert affidavit was not required to support a claim sounding in ordinary negligence rather than professional negligence. (22)

While the court of appeals was finding ways to keep plaintiff's in court the Supreme Court the Supreme Court in Sambor v. Kelley (23) was upholding the last vestiges of the minimal requirements for a valid affidavit. The plaintiff in Sambor attempted to have a Georgia notary administer an oath to an expert in Michigan. The supreme court held that this type of long distance swearing rendered the expert's affidavit invalid. However, if past decisions are any indication, the courts will ultimately conclude that this type of defect can be cured by an amendment pursuant to O.C.G.A. §9-11-9.1.

VI. Claims Barred by the Statutes of Limitation and Repose

This year the court of appeals held that actions renewed outside the statute of repose pursuant to Georgia's renewal statute are time barred. In Blackwell v. Goodwin, (24) the plaintiffs voluntarily dismissed their complaint without prejudice outside the five-year period set forth in the statute of repose.

After renewing their action, the defendants moved to dismiss the complaint on the grounds it was barred by the statute of repose. The court of appeals affirmed the dismissal of the plaintiffs' complaint, holding that the legislature had never intended for the dismissal and renewal statutes to overcome the medical malpractice statute of repose. (25)

In an attempt to avoid the statute of repose, the plaintiffs in Blackwell attempted to fashion a battery claim based on the alleged failure of the nurse to obtain the patient's consent. However, any failure on the part of the defendants to comply with the informed consent requirements did not give rise to a separate and distinct cause of action that was not barred by the statute of repose. (26) Therefore, the court of appeals held that the five-year statute of repose barred this claim as well. (27)

While the statute of repose can bar claims renewed pursuant to Georgia's renewal statute, it is not a bar to an untimely action in the face of fraud. In Esener v. Kinsey, (28) the plaintiff discovered that during childbirth her daughter had suffered anoxic brain damage, but that this had been concealed from her by her gynecologist. She discovered this fraudulent concealment just 78 days before the statute of repose abrogated the action. After suit was filed, her gynecologist moved for judgment on the pleadings, contending that the statute of repose barred the plaintiff's claim notwithstanding the allegations of fraud, since the fraudulent conduct had been discovered prior to the expiration of the statute of repose. While

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the allegations of fraud did not toll the statute of repose, the court of appeals held that equity might prevent the defendant from raising the defense of the statute of repose. (29) Therefore, treating the allegations of fraud as true for purposes of the motion for judgment on the pleadings, the court of appeals held that whether equity prevented the defendant from raising this defense was a jury issue. (30)

The statute of repose is also not a bar to an action premised on a foreign object left in a patient's body. The plaintiff in Abend v. Klaudt (31) had a catheter surgically inserted in 1987 to allow for the administration of chemotherapy. When Dr. Abend performed surgery to remove the catheter two years later he left a five inch portion of it lodged in the left ventricle of the plaintiff's heart. The catheter remained lodged in the plaintiff's heart for the next six years until she began experiencing slurred speech, facial droop, lack of coordination, and numbness. Approximately six days after these problems first became noticeable, the plaintiff was informed that Dr. Abend had failed to remove the entire catheter device. She filed suit less than one year after she was first notified that she had the remains of her catheter device lodged in her chest, but more than a year after her first symptoms.

Dr. Abend moved for summary judgment based on the statute of repose, but this was denied. On appeal, the court of appeals affirmed that the statute of repose did not apply to foreign object claims because those fall outside the scope of the statute of repose. (32) However, since it was unclear whether the plaintiff knew or should have known about the foreign object

more than a year prior to suit being filed, the court of appeals held that this was a mixed question of law and fact for determination by a jury.

VII. Conclusion

The selected cases contained in this survey indicate that the courts are taking a hard look at some of the more questionable or inventive claims. However, the courts do appear to be less than enthusiastic about limiting claims based on non-compliance with technical pleading requirements, and are instead looking for ways around these requirements.

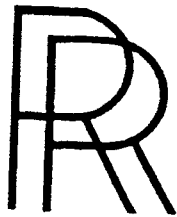
1. The survey period covers 1999 through May 2000.
2. 271 Ga. 352 (1999)
3. 272 Ga. 496 (2000)
4. Id.
5. Id.
6. *Pilzer v. Jones*, 242 Ga. App. 198 (2000)
7. 238 Ga. App. 470 (1999)
8. Id.
9. Id.
10. 242 Ga. App. 198 (2000)
11. Id.
12. 272 Ga. 404 (2000)
13. Id.
14. Id.
15. 240 Ga. App. 613 (1999)
16. Id.
17. Id.
18. O.C.G.A. §9-11-9.1
19. 243 Ga. App. 749 (2000)
20. Id.
21. Id.
22. Id.
23. 271 Ga. 133 (1999)
24. 236 Ga. App. 861 (1999)
25. Id.
26. Id.
27. Id.
28. 240 Ga. App. 21 (1999)
29. Id.
30. Id.
31. 243 Ga. App. 271 (2000)
32. Id.

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Trial Evidence in Psychological Injury Cases

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Introduction

A significant number of civil injury trials and workers' compensation cases include the claim of psychological injury. The arguments are as numerous as the players. The plaintiff argues that the injury clearly produced or aggravated a mental illness. Defense counsel and the defendant insurer believe that the evidence is weak and equivocal and is being used to build the damages. The search for truth takes the court into areas that are not in the mainstream of either medicine or psychology. Psychological injury is

no longer a parasitic area of damages but it is now the central focus of many trials.

Background: Psychological Injury Claims

Psychological injury refers to a variety of mental harm claims. The claim may result from actual organic damage to the brain or emotional upset with no medical evidence of brain damage. Psychological injury claims are common in both liability cases and workers' compensation matters. The cases are generally divided into two categories: In the Or-

ganic Brain Syndrome (OBS) case, the claimant alleges that the insured event or cause of action produced a change in the structure, metabolism or neurochemistry of his or her brain. These cases can result from any type of head injury or toxic exposure. In some cases, a claim of organic brain syndrome is made even though the CT and MRI scans do not show a visible lesion in the brain. This is a high risk type of claim for the insurer and can result from overinterpreted or misinterpreted medical or psychological data.

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In the emotional harm only case, the claimant alleges that the insured event or cause of action produced an anxiety, depressive or other type of mental illness. These cases can result from any insured event. Physical injury is frequently involved but is not necessary. For example, in some jurisdictions, persons may claim Post-traumatic Stress Disorder (PTSD) from witnessing a traumatic event or from the intentional infliction of emotional harm such as in work-place harassment claims. In these cases, there is no physical injury but emotional harm is still claimed.

There are combinations of causes and events that lead to the claim of psychological injury. Although the organic brain syndrome case is usually considered to be the most serious, plaintiffs have been successful in obtaining large jury awards and settlements in emotional harm cases with no evidence of physical injury.

The Causes of Psychological Injury

The most common claims of psychological injury are related to automobile accidents. In addition to these, mass transportation accidents, slip and fall cases, toxic exposure, back and neck injuries and other types of chronic pain cases, premises liability, traumatic occurrences such as being trapped in a burning building and even work-place harassment are commonly used as the basis for psychological injury claims. In many cases, the physical injury is minor but the claimant states that he or she is totally disabled because of a resulting mental illness. There are very few limits, if any, as to the types of insured events (cause of action) that can be the basis for claims of psychological injury.

There are over 225 clinical mental disorders. Of these, there are Five Common Psychological Injury Claims.

1. Organic Brain Syndrome associated with a claimed concussion
2. Post-traumatic Stress Disorder (PTSD)
3. Depressive illness claims
4. Anxiety disorders other than PTSD
5. Chronic pain cases with related depression

Types of Evidence Presented at Trial

Organic Brain Syndrome (OBS) cases generally involve neuropsychological testing. The OBS case can include a psychiatric evaluation and several neurological protocols such as a gross neurological screening, CT Scan, MRI, EEG and the relatively new quantitative electroencephalography (QEEG).

Simply stated, neuropsychological testing is the comparison of the individual's test scores and patterns, to the test results or norms generated by, perhaps thousands of persons that have been measured in the same task. These include cognitive, motor skill and intellectual tasks that require central nervous system functioning.

The psychiatric mental status examination (MSE) is designed to separate organically based behaviors from psychogenic or purely psychological symptoms. Frequently, the clinician is faced with a complex differential diagnosis that may include psychopathology, physical injury or disease, life-long personality or character disorders and drug or substance effects.

The CT, MRI and EEG are neurological tools that have been used for decades and these are quite

familiar to most defense attorneys. In the CT and MRI, we attempt to visualize changes in the density or other characteristics of bone and tissue. The EEG (Electroencephalography) is a method of graphically recording the electrical activity of the brain, particularly the cerebral cortex.

Trial attorneys can now expect evidence to be presented from new generations of these devices with added capabilities. For example, the QEEG (quantitative electroencephalography) is driven by data taken from nerve evoked potentials (EP) or the classical EEG studies. This new technique yields, (a) EEG frequency analysis, (b) topographic display, (c) statistical comparisons to a normative database and (d) other similar computer-based calculations. QEEG brain mapping can help highlight or identify regional features of the EEG. Occasionally this will identify subtle changes or abnormalities that have escaped identification by traditional visual inspection of the polygraph EEG alone. QEEG brain mapping can also help in the communication of EEG features and their localization, especially for communication to persons who are not expert in EEG such as jurors.

Finally, we are now seeing SPECT scan data appearing in personal injury and workers' compensation trials. Single photon emission computed tomography (SPECT), enables three-dimensional images of regional cerebral blood flow (rCBF) to be derived from two-dimensional data. Whereas the Positron Emission Tomography (PET) Scan can be used to measure regional cerebral metabolism and neurotransmitter receptor characteristics in addition to rCBF. PET requires sophisticated and expensive technology, including a cyclo-

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tron on site, and has less availability to plaintiff and defense counsel. In contrast, SPECT is relatively inexpensive and is widely available for clinical use.

Summary Table of Psychological Injury Evidence

NOTE: Psychological injury is here meant to include organic brain syndrome and chronic pain claims as well as purely emotional harm cases.

1. Psychological Testing: The detection of psychopathology including personality and clinical mental disorders. These tests are based on many psychological theories including studies of known mental illness populations.
2. Neuropsychological Testing: The detection of cognitive and intellectual deficits. These tests produce normative comparisons of central nervous system based functions with statistical measurements taken of hundreds or thousands of persons.
3. CT or CAT Scan: Intracranial Computed Tomography detects lesions and abnormalities in the structure of the brain. The CT scan is a computer assisted collage of radiographic (x-ray) data.
4. MRI: Magnetic Resonance Imaging studies present clear and detailed images of soft tissue. Known as the MRI, NMR or MR technique, these studies rely on the magnetic properties of the Hydrogen atom. Hydrogen is the most abundant and magnetically sensitive of the body's atoms.
5. EEG: The polygraph presentation of electrical activity found in multiple cortical regions of the brain.
6. QEEG: Computer analysis and mapped images to examine the background spectral content of an EEG for further data.

7. SPECT: Single photon emission computed tomography (SPECT), provides three-dimensional images of regional cerebral blood flow (rCBF)
8. Psychiatric Examination: The medical evaluation of mental health symptoms and behaviors. Several techniques are used including a structured mental status examination (MSE)
9. Neurological Examination: The medical evaluation of speech, gait, station, cranial nerves, motor system, coordination, reflexes, sensation and other neuro-anatomical systems and processes.

Criticisms of Psychological Injury Evidence

Because of the complexities of human behavior and human injury, psychological evidence is subject to intense cross-examination by defense counsel. The most common, global error made by experts is the overinterpretation of findings. Few psychological tests or protocols actually provide the "proximate cause" link. However, many experts feel secure in establishing the efficient relationship between the injury and test findings.

When asked if the accident caused a ten point drop in the plaintiff's IQ, many experts will not hesitate to voice a conclusion without conducting a thorough differential diagnosis. In actuality, the plaintiff's reported IQ change may be the result of medication, an unrelated disease process, unrelated depression or mental illness, manipulation of test responses or other intervening factors such as poorly administered or scored tests. Dementia, the loss of cognitive ability, may be the result of sixty diseases and disorders, many of them difficult to recognize because of subclinical status (not readily detectable).

The courts should expect and demand that psychological injury, expert witnesses explain their differential diagnosis. For example, in claiming a depression secondary to an automobile accident, it is important to know how the witness ruled out the effects of possibly five or more of the plaintiff's medications that are also known to produce depressive illness.

The field of neuropsychology has been criticized because the tests are sometimes given by untrained and inexperienced psychologists with little background in neuroscience. These specialists will frequently rely on the self-reported history of the plaintiff and then testify to the person's profound memory loss. In addition, some of the tests have known weaknesses including cultural influences that change test outcome, low scores caused by depression (pseudodementia), a high failure rate in normals, low scores due to intentional slowness or peripheral neurological conditions and there has even been a questioning of the validity and reliability studies or statistics that are the foundations of the tests themselves.

The Need for Standards in the Forensic Examination

Examination protocols or procedures vary within each discipline. This is especially true in psychology and psychiatry and less true in neurology. Psychologists and psychiatrists would argue that this is a positive contribution because they are less bound to instrumentation and more focused on the measurement and description of complete behaviors rather than micro-observations such as the mapping of cortical brain waves. Neurologists would counter with the assumption

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that injury related behaviors can be manipulated but electrodiagnostic techniques and imaging provide essential forensic data. There is truth in both arguments but there is also a lack of standardization of the examination protocol in psychological injury.

The first attempt to provide some uniformity to emotional harm evaluations was developed for the condition known as Post-traumatic Stress Disorder. In the 1995 text, *Post-traumatic Stress Disorder in Litigation, Guidelines for Forensic Assessment*², Robert I. Simon, M.D. and seven co-contributors have outlined the steps and precautions that

should be followed in this type of psychological injury claim. The text is recommended for use by both those who would offer or defend evidence of this anxiety condition.

Conclusions and Recommendations

Psychological Injury as an element of damages, has a reasonable place in torts. However, much of the evidence offered as proof of damages is unreasonable. Because psychological injury in the form of organic brain syndrome and emotional harm is the basis for significant costs in both settlement and jury verdicts, there is a clear need for standards for the

medical and psychological examination of these plaintiffs.

Endnotes

1. Peter B. Silvain is a Clinical Associate Professor of Psychiatry in the Program in Psychiatry and Law of the Georgetown University School of Medicine in Washington, D.C. His consulting practice is in Palm Coast, Florida.
2. Robert I. Simon, Editor, *Post-traumatic Stress Disorder in Litigation, Guidelines for Forensic Assessment*, American Psychiatric Press, Washington, D.C., 1995.

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