MARTIN CLEARWATER & BELL LLP

DEFENSE PRACTICE UPDATE

FALL 2003

SURVEILLANCE: A QUESTIONABLE DEFENSE

BY: JOHN L. LYDDANE AND MICHAEL A. SONKIN

The defense attorney listens intently to Mr. Jones' deposition testimony as he recounts his elective back surgery and his subsequent back problems. On the issue of his damages, Mr. Jones describes, in detail, the pain and stiffness he has felt since the surgery, and recites all of the activities he has been unable to perform since the procedure was performed. He swears he is unable to drive a car, maintain employment, exercise, or mow his lawn.

The defense attorney smiles to himself as the witness sets forth all of the things he can no longer do, because he has a videotape taken by an investigator only two months earlier showing the plaintiff getting into his car, driving to work and pushing his lawn-mower on the weekend.

It would appear that the defendant's case has just become much stronger since the plaintiff's claimed damages will be refuted by this surveillance videotape and, more importantly, his credibility will be severely damaged. A jury that realizes a plaintiff has lied to them on such a significant issue will be less sympathetic to the rest of his claims. The tape will be shown to the jury and the plaintiff will be hard pressed to convince them of the legitimacy of any aspect of his case.

ENACTMENT OF CPLR 3101(I)

Unfortunately, under the law of the State of New York as it currently exists, this scenario will not be played out anytime soon. In 1993, the Legislature enacted Civil Practice Law and Rules (CPLR) 3101(i) in response to a series of Court decisions concerning the disclosure of surveillance materials. It mandates that there "shall be full disclosure of any films, photographs, videotapes or audio tapes" taken of a party. The statute also requires the disclosure of all out-takes, memoranda, notes and transcripts; not just those portions a party intends to use.

As a result of CPLR 3101(i), the usefulness of surveillance videotapes in the defense of a medical malpractice suit or any other personal injury action has been minimized.

With the Legislature's enactment of

SURVEILLANCE *Continued on page 2*

SURVEILLANCE: A QUESTIONABLE DEFENSE

CONTINUED FROM FRONT PAGE

this statute, several questions remained unanswered. The law was silent as to the timing of disclosure of the videotaped surveillance. Plaintiffs' attorneys predictably argued that "full disclosure" required that it be done in a timely fashion in response to a demand served at the outset of the case, and not when a defense lawyer felt it most advantageous to do so. Defense counsel argued that the interests of fairness and truthfulness mandated that the disclosure of surveillance materials occur only after the plaintiff's deposition.

The statute also failed to address the situation where videotape footage is taken after the plaintiff's deposition, and a second deposition is sought prior to the disclosure of the surveillance materials. Given the impact of surveillance materials on the outcome of a case, the interpretation given to the statute would significantly affect the manner in which cases were prosecuted and defended.

RULINGS ISSUED AFTER THE ENACTMENT OF CPLR 3101(I) AND THE CURRENT STATE OF THE LAW

Subsequent to the enactment of CPLR 3101 (i), various intermediate appellate courts have been split over the scope of the statute, and, specifically, the significance of the Legislature's failure to directly address the timing of the disclosure of the surveillance materials.

The uncertainty was put to rest by the Court of Appeals decision this February in the case of *Tran v. New Rochelle Medical Center*. In this case, a hibachi chef lacerated his left hand while on the job which allegedly left him disabled and unable to work. Following his first deposition, defense counsel learned that the plaintiff did return to work and a further deposition was sought. In the interim, video surveillance was performed which gave rise to the question of when the videotape had to be provided to the plaintiff. Plaintiff obviously wanted to see the tape before he was deposed for a second time, while the defendant wanted to ensure truthful answers by withholding the tape until the second deposition was completed.

The Court of Appeals held in *Tran* that the Legislature intended for prompt disclosure of surveillance materials in response to a proper demand, and not after a plaintiff's deposition.

As a result of the *Tran* case, defense counsel is required to provide the surveillance tape to the plaintiff before taking a second deposition. This allows the plaintiff to view the tape and prepare for questions about the activities he is depicted performing therein. In short, the plaintiff has the opportunity to "tailor" his testimony to the videotape and attempt to develop an explanation in advance for his ability to perform the activities shown, while still claiming to have suffered significant damages.

CONCLUSION

The impact of this decision on defense practice is significant, but does not eliminate the usefulness of surveillance. Truly effective surveillance which captures a plaintiff performing activities that are demonstrably contrary to their claimed disability will be effective regardless of whether the plaintiff is surprised with it prior to a deposition or not. It has also served to highlight other tools available to the defense attorney to minimize the claimed damages, including a focus on subsequent treatment records and taking non-party depositions of the subsequent physicians. Procedures are in place to permit even out-of-state depositions of treating physicians, who are not ordinarily subject to a subpoena issued within the State, to further establish the plaintiff's true condition.

Given the *Tran* case's ruling requiring disclosure of surveillance material, a different approach to conducting surveillance is required. Investigators attempting to take surveillance footage of a plaintiff should use discretion and judgment in doing so. A plaintiff's activities should only be recorded when he or she is observed engaging in activities that are clearly favorable to the defense. Surveillance obtained after all depositions have been completed, but before trial, can still have a significant impact in reducing settlement demands and forcing a plaintiff to stay truthful or risk losing any sympathy from the jury.

Surveillance obtained after all depositions have been completed, but before trial, can still have a significant impact in reducing settlement demands and forcing a plaintiff to stay truthful or risk losing any sympathy from the jury.

While the current interpretation of the statute is undeniably more favorable to plaintiffs, there are still approaches available to the defense attorney to protect his or her client's interests by ensuring that an accurate, truthful picture of the plaintiff's condition is presented to the jury.

BACKGROUND OF CPLR 3101(I)

BEGINNING IN 1990, several courts issued rulings on whether surveillance tapes had to be disclosed prior to their use at trial. The courts generally held that the surveillance materials were discoverable, but never directly addressed when that disclosure had to be completed.

The timing of any disclosure of surveillance material was a particularly sensitive issue, since production of that material before a plaintiff's deposition or trial testimony would permit plaintiffs to tailor their testimony to what is depicted on the video. Explanations such as "that was a particularly good day for me" or that "I was only able to do that activity for a short amount of time" would undoubtedly be put forth to neutralize or minimize the effects of the surveillance. If permitted to take a plaintiff's deposition or trial testimony before disclosure of the surveillance material, a defense attorney could elicit testimony as to the plaintiff's abilities on a wide range of activities with the knowledge that he or she had foolproof evidence to contradict and undercut any exaggerations in the witness' stated deficits.

In 1992, this issue was temporarily put to rest by the Court of Appeals decision in *DeMichel v. South Buffalo Railway Company*. In this particular case, which involved the discoverability of a surveillance tape in connection with pre-trial depositions, the State's highest court agreed that surveillance materials were discoverable upon a showing of "substantial need" for the materials and "undue hardship" about disclosure. With regard to the issue of the timing of the disclosure, the Court of Appeals recognized the temptation a plaintiff would face to tailor his or her testimony to the contents of the videotape if permitted to view the materials prior to their deposition. Therefore, the Court held that surveillance films should only be provided after the plaintiff has been deposed.

COURTROOM EXPERIENCE: AN INSIDER'S VIEW

GEORGE VAN SETTER

Once again, a recent jury decision demonstrated that "established wisdom" is often incorrect. While it is often said that a jury has decided the case before summations even occur, a recent jury deliberation showed that juries do not always do so, but may very well need the arguments in a summation to crystallize their thoughts.

The verdict was noteworthy in that, not only did the judge and jury engage in a lengthy post-trial debriefing but also, because a juror, on his own, prepared a detailed multi-paged letter describing the jury deliberations in exquisite detail. The insight into this jury's thinking was far greater than we usually obtain in "exit interviews" following a verdict.

The jury advised us that during their deliberations, the various jury factions actual ly adopted both the arguments and the very language of counsel in support of their positions in deciding the claim against a physician charged with persisting in a dangerous procedure when good judgment mandated caution.

As the jury grappled with this decision, the prevailing side argued that "he had a job to do" and that was why he persisted. This phrase had been suggested by counsel in summation to validate the physician's persistence. While this was hardly the height of eloquence, it was enough of an argument to carry the day.

Once again, this shows that summations are not only a time to discuss the evidence, but also a time to digest it into a form that will carry arguments in the jury room.

Don't ever assume that the case is over before summation. As a great man once said, "It ain't over till it's over."

JOSEPH L. DEMARZO

In December of 2002, MC&B partner Joseph L. DeMarzo obtained a defense verdict in a breast cancer case brought against plaintiff's treating gynecologist.

Plaintiff, a 33 year-old married mother of three, presented to the defendant gynecologist in May 1997, at which time a thickening of the left breast was found on physical examination. The physician then referred plaintiff to the defendant radiologist for a baseline mammogram. The mammogram revealed an increased density in the area of the palpable finding, but no masses. An ultrasound revealed two small cysts, but no other findings. The defendant gynecologist followed plaintiff with clinical breast exams on a six month basis, and the plaintiff was also performing self breast exams. The breast exams were normal on these visits, as were plaintiff's self breast exams.

In February 1999, plaintiff was diagnosed with a 1.7 cm, Stage 1 cancer of the left breast, and underwent a bilateral mastectomy and chemotherapy. Plaintiff claimed that the defendant radiologist was negligent in misinterpreting the mammogram, and that the defendant gynecologist should have referred her to a breast surgeon and ordered close interval mammograms to assess stability following the 1997 mammogram and sonogram. The plaintiff alleged that her chance of cure was substantially diminished due to the alleged delay in diagnosis, and that she would have avoided chemotherapy and a bilateral mastectomy.

The defendant gynecologist contended that she evaluated plaintiff properly, and that the June 1997 mammogram results did not warrant either referral to a surgeon or closer surveillance.

As in most breast cancer cases, the element of sympathy and the tendency of a jury to look at the case with the benefit of hindsight were significant issues for the defense to address. Extensive, frank discussion of these issues during jury selection, and in opening statements, was very helpful in defusing these issues. Further, the defense stressed the careful approach which the defendant gynecologist took in plaintiff's overall care, including the breast condition. The defendant physician also attended the trial on a daily basis, which helped to personalize her to the jury.

As in most breast cancer cases, the element of sympathy and the tendency of a jury to look at the case with the benefit of hindsight were significant issues for the defense to address.

DCM: MOVING CASES ALONG MORE RAPIDLY THAN EVER

BY: ANTHONY SOLA AND DANIELLE I. SCHWAGER

A new system intended to expedite civil cases has recently been adopted in the trial level courts throughout New York State, accounting for the recent rapidity with which cases are proceeding. It is known as the Differentiated Case Management System or DCM.

Under the DCM system, cases are committed to one of three different tracks: expedited, standard or complex. Cases that are placed on the expedited track must be closed within 0-9 months, cases on the standard track must be closed within 9-12 months, and cases on the complex track must be closed within 13-15 months. The term "closed" means that the case must be settled or a verdict at trial must be reached by the deadline.

Although there are variations from jurisdiction to jurisdiction, in many Courts cases appear in the trial part for one Pre-Trial Conference and at the next appearance the case is sent for jury selection.

DCM impacts both the rate of discovery and the timing of trials. Medical malpractice actions are generally classified as complex, and thus afforded the longest time line. In some instances, however, medical malpractice cases have been placed on the standard track with a proviso that the parties attempt to complete discovery and bring the matter to a conclusion within 12 months and, if not, the Court will, upon request, consider moving the matter to the complex track. There is no certainty that the request will be granted.

Of course, even 13-15 months is a very short time frame for the completion of any case, much less a medical malpractice action.

Some jurisdictions are more stringent than others in the application of this new system. There are Courts that adhere to an unrelenting timetable with little, if any, room for movement. In some jurisdictions, for example, the deposition dates that are scheduled in the Preliminary Conference Order must take place on or before those dates, with the date for the plaintiff's deposition scheduled to be conducted within two months of the Preliminary Conference. Processing medical authorizations and receiving records within a two-month time frame is challenging, to say the least.

Some Courts have ordered that discovery be completed by a date certain within the framework of the case's particular track, and some Judges have instituted their own timeline. Judges have reduced the time to make summary judgment motions from the usual 120 days to 30 days after a case is certified as ready for trial. Judges have reduced the time to have a physical examination of the plaintiff from 60 days to 30 days after completion of the plaintiff's deposition. Clearly, under the DCM system, discovery is moving at an exceptionally rapid pace.

The other area directly affected by the DCM system is the trial calendar. Although there are variations from jurisdiction to jurisdiction, in many Courts, cases appear in the trial part for one Pre-Trial Conference and at the next appearance the case is sent out for jury selection. As such, it has become necessary to prepare for trial earlier in the litigation. Cases are now generally sent out for jury selection within months, rather than years, of appearing on the trial calendar.

As you have undoubtedly noticed from your own cases, counsel has been forced to request that hospitals, physicians, carriers and clients produce discovery items at an accelerated pace.

PARTNER SPOTLIGHT: BRUCE G. HABIAN

SENIOR PARTNER BRUCE G. HABIAN has earned the respect of clients, opposing counsel, and the judiciary for sophisticated defenses he has presented in obstetrical and cancer cases.

Mr. Habian states that detailed placental tissue study is crucial to establish defense causation elements in order to defeat obstetrical liability claims. As the following examples demonstrate, it is obvious why he counsels Risk Management Departments and Perinatal Division Chiefs to preserve placental tissue in all cases. In one trial, a New York County jury was presented with a microscopic placental study that yielded evidence of infarction (death) of placental tissue indicative of chronic malnourishment and diminished oxygenation of the fetus in utero. A successful defense of intrauterine growth retardation (IUGR) was established, thereby negating the claim of labor and delivery mismanagement being responsible for the infant's cerebral palsy and related neurological deficits. Expert testimony elicited from a placental pathologist was coordinated with sonographic evidence of poor growth patterns of the fetus.

Mr. Habian believes in a multi-disciplinary approach to the defense of cancer cases, with surgical, oncology, and pathology opinions proving a consistent defense position.

In another case, a Kings County jury rendered a unanimous verdict in favor of the defense based upon evidence of a clinical history of maternal viral infection prior to the labor and delivery. The defense utilized National Institute of Health DNA infection probes to isolate from the placental tissue a specific enterovirus (Coxsackie). This study successfully supported the defense position that neonatal seizures and cognitive deficits were due entirely to the specific Coxsacki virus. This contradicted the plaintiff's theory that the duration of the labor process, together with claimed abnormalities on the fetal monitor strips, was responsible for these injuries.

Mr. Habian further states that CT and MRI scans tell their own distinct stories. Such sophisticated imaging studies have been used to "date" an intrauterine insult (usually focal with isolated pathology, as compared to generalized diffused insults, which would be secondary to lack of oxygen). He states: "These films have distinct patterns of tissue presentation that can be presented with competent neuroradiological testimony to support the defense position concerning the timing of an insult." The use of such evidence has been successful in defeating neonatal stroke cases and allegations of trauma resulting in brain pathology, to demonstrate the damages were unrelated to claims of obstetric mismanagement.

Mr. Habian believes in a multi-disciplinary approach to the defense of cancer cases, with surgical, oncology, and pathology opinions proving a consistent defense position. The use of biopsy and intraoperative pathology data can successfully support the defense in these cases.

In that regard, Mr. Habian has successfully used pathology findings of necrosis (cells grow so fast that they outstrip their blood supply), an analysis of mitotic activity (number and speed of replication), and concepts of differentiation (how poorly the cancer resembles microscopically the natural parent organ), to develop defenses that the cancerous lesion had such a rapid growth that clinically it was impossible for the clinicians to have diagnosed it during the time frame alleged by plaintiff.

Often, plaintiffs' attorneys claim that the delay in diagnosis of the primary breast lesion is responsible for metastatic spread to the other breast and other organs. Pathology analysis, however, may reveal that the other breast was affected by a new primary cancer, unrelated to the original lesion. As far as distant organs, what had been thought to be a metastatic spread secondary to the delay in diagnosing the breast cancer has been revealed to be separate and distinct new primary liver cancer. This evidence is demonstrated to the jury by means of independent pathologic patterns and actual photographs of microscopic tissue analysis.

Mr. Habian is a frequent lecturer at trial seminars for the profession speaking about the above listed topics; he is a faculty member of the National Institute of Trial Advocacy, and has authored many medical-legal book chapters concerning the subject matters described herein. He is a member of the International Association of Defense Counsel, was honored in a 1995 ***New York Magazine*** article listing the leading attorneys in New York City by specialty, and has been submitted by his peers for listing in the ***Best Lawyers in America.***

He is a member of the International Association of Defense Counsel, was honored in a 1995 New York Magazine article listing the leading attorneys in New York City by specialty, and has been submitted by his peers for listing in the Best Lawyers in America.

MC&B ANNOUNCES TWO NEW PARTNERS

IDETTE A. GRABOIS joined MC&B in 1998. Her practice is comprised of all aspects of medical malpractice litigation and personal injury defense. Ms. Grabois received her J.D. from Brooklyn Law School and her B.A., cum laude, from the State University of New York at Albany in 1990. She is admitted to practice before the New York State Courts and the United States District Court for the Southern and Eastern Districts of New York.

MICHAEL SONKIN joined MC&B in 2000. His practice is comprised of all aspects of state medical malpractice defense, legal malpractice defense and personal injury defense. Mr. Sonkin received his J.D, cum laude, from Syracuse University's College of Law in 1993 and his B.A., cum laude, from Stony Brook in 1990. He is admitted to practice before the New York State Courts and the New Jersey State Courts.