Connecticut Law Tribune
SEPTEMBER 14, 2009
VOL. 35, NO. 37 • $10.00
An incisivemedia publication
CTLAWTRIBUNE.COM

COURT USES PRACTICAL REASONING TO FASHION RULINGS

Key decisions involve medical malpractice and insurance cases

By BRENDEN P. LEYDON

The Supreme Court decided many interesting cases regarding tort and insurance issues this year. There are two cases I want to discuss in detail.

Dias v. Grady, 292 Conn. 350 (2009). In ***Dias***, the court was faced with the issue of whether the phrase "medical negligence" in Connecticut General Statutes §52-190a(a), which requires a plaintiff to obtain a written opinion of a similar health care provider as the defendant that there is evidence of medical negligence, refers to a breach of the standard of care only or also encompasses causation.

As we all remember from first year torts class, the four elements of a negligence cause of action are: duty, breach, causation and damages. However, the word negligence is also sometimes understood, according to the *Dias* court, "as specifying an attribute of the defendant's conduct, namely a want of care in the performance of an act, by one having no positive intention to injure the person complaining of it." Thus, the plain language of the statute allowed for each side's argument.

Torts & Insurance

The court therefore reviewed the legislative history, which while not perfectly clear, seemed to support the plaintiff's position that the phrase medical negligence meant breach of the standard of care, not causation. More importantly, the court analyzed the absurd result that would flow from such an interpretation as in many cases an opinion on causation from a qualified similar health-care provider is simply not possible. For instance, the negligent act could have been committed by an anesthesiologist or even a general practitioner (Propofol anyone?), but causation might need to be established by a neurologist or other specialist. In such a case, despite clear negligence, the plaintiff would be barred from pursuing a valid claim as no similar health care provider would be competent to opine on causation. Therefore, the court held that the pre-suit opinion letter only had to address breach of the standard of care, not causation.

Vermont Mutual Insurance Co. v. Walukiewicz, 290 Conn. 582 (2009). In *Vermont Mutual*, the court was faced with the question of whether liability coverage for an "accident" included injuries suffered by alleged assailant at the hands of an insured acting in self-defense. The case related to an underlying claim brought by Kevin Brown against the named defendant, Joseph Walukiewicz, regarding a dispute between the two men over Brown's estranged wife. The altercation resulted in Brown falling down some porch steps, resulting in serious injuries.

Brown brought a personal injury claim against Walukiewicz, who defended the claim in part on a theory of self-defense. Walukiewicz's insurer claimed that his defense was not covered under his homeowner's policy since, despite the self-defense claim, it was not an accident and it fell under a policy exclusion for acts expected or intended by the insured (the "intentional acts" exclusion). Vermont Mutual ended up prevailing at trial in a declaratory judgment action determining there was no coverage.

The Supreme Court reversed. The court did note that there was a strong argument that because self-defense by definition required a conscious decision to act, it was not in a strict literal sense an accident and was in fact expected or intended by the insured. But the justices held that a broader of view of these terms was warranted in accordance with public policy and the reasonable expectations of the insured. Since acts in defense of self or others are not wrongful and in fact enjoy societal approval and are legally sanctioned, a policyholder reasonably would expect to be afforded liability insurance coverage in connection with those acts.

The notable aspect of each of these cases is that the court was faced with a choice between a strictly literal interpretation of a statute or policy language and a practical and reasoned analysis of the purpose and context of the language to fairly and justly address the issue. In these cases, the court appropriately went with the latter approach, with reason and justice prevailing over a mechanistic method to resolving the questions. ■

Brenden P. Leydon, a partner at Tooher, Wocl & Leydon LLC in Stamford, handles trial and appellate matters involving torts and insurance law cases.