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President's Message

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Protecting your client's rights during COVID

By Lee Dawn Daniel

"Fear: the best way out is through."
— Helen Keller

Each generation has had challenging times, and for some, many crises. Those in the profession of law, whether members of the judiciary, persons in judicial administration, attorneys, or support personnel, are fortunate to have the tremendous gift of intellect to think our way through obstacles. The challenges that our profession are facing in working through a pandemic will ultimately improve the technical aspects of practicing law — but it is most important that we preserve the rights of our clients while we are navigating our way through. This article will address the protection and preservation of important rights of your civil clients which are being placed at risk during COVID, and how to prevent their erosion.

Panel voir dire in danger

Attorney conducted voir dire is now required in the Superior Court under Massachusetts General Laws Chapter 234A § 67D and Superior Court Rule 6, as well as in District Court pursuant to D. Ct. Standing Order 1:18. The typical time limitation imposed upon attorney conducted panel voir dire is 20 minutes per party. Despite the fact that jurors are spending multiple days or weeks together in the courtroom during the presentation of evidence, and/or in a jury room during breaks and deliberation, the 40-60 minutes of time during which prospective jurors sit together in the box for panel voir dire is often being sacrificed to individual (and physically close) questioning at side bar. Is it possible to scientifically support the proposition that it is this particular hour or less of assemblage during panel voir dire which places the venire at greater risk for COVID, so that panel voir dire should be eliminated during the pandemic? If efficiency is the goal at trial, how can the extra hours necessary to conduct individual voir dire be justified?

We are to be mindful that Addendum A to Superior Court Rule 6, entitled "Sample Panel Voir Dire Protocol," demonstrates that attorney conducted panel voir dire, as opposed to individual

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EDITOR'S NOTE

Why do judges think we have mind control powers?

By Jonathan A. Karon

Why do perfectly reasonable judges think we have the power to hypnotize jurors? In the 1930's radio listeners thrilled to the adventures of "The Shadow" a superhero with "the power to cloud men's minds."[1] These days we routinely get bombarded with motions in limine seeking to restrict in advance what we can argue and how we can argue it. Some of these are styled as motions to prevent us from using "the Reptile Theory" (usually in terms that make it clear the author has no idea what the Reptile Theory actually is) and some are phrased so broadly that it seems like the Court is being asked to prevent us from making any closing argument at all.[2] These motions usually cite *Fitzpatrick v. Wendys Old Fashioned Hamburgers of New York, Inc.*, 487 Mass. 507 (2021) and *Fyffe v. Massachusetts Bay Transportation Authority*, 86 Mass. App. Ct. 457 (2014) two cases in which substantial plaintiff's verdicts were taken away based on "improper arguments" by plaintiff's counsel. In both cases liability was fairly clear cut (in *Fyffe* it was stipulated) and the Courts' concern was that plaintiff's counsel had somehow inflamed the jury into awarding excessive damages.

What is going on here? Was there a MATA seminar I missed on mind control? Do judges really think it's that easy for us to mesmerize jurors? I have a theory. I think judges are instinctively responding to plaintiff's attorneys as though we were prosecutors. I don't think they're doing this consciously. Rather, I think that when judges hear arguments that would be grossly improper in a criminal trial, their judicial

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Inherent diminished value: 'McGilloway v. Safety Ins. Co.'

By Kevin J. Powers

McGilloway v. Safety Ins. Co., 488 Mass. 610 (2021), marks another Supreme Judicial Court victory for your Amicus Committee.

In *McGilloway*, the SJC held that third-party claimants may recover inherent diminished value (IDV) damages under part 4 of the 2008 edition of the Massachusetts standard automobile policy. IDV is "the concept that a vehicle's fair market value may be less following a collision and repairs, and that it equals the difference between the resale market value of a motor vehicle immediately before a collision and the vehicle's market value after a collision and subsequent repairs."

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Part 4 of the standard policy allows recovery for "the amounts that [a claimant] is legally entitled to collect for property damage through a court judgment or settlement." Justice Georges wrote that "[b]ecause the plain language of part 4 of the standard policy does not limit recovery to merely repair or replacement costs, such recovery must compensate a claimant for any loss of value the claimant incurred as a result of a collision, offset by the increase in value that may occur from

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Inherent diminished value: 'McGilloway v. Safety'

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repairs to the vehicle. In short, if a third-party claimant's vehicle suffers IDV even after it is fully repaired, then under part 4 of the standard policy, the insurer may be liable to the claimant for IDV damages so that he or she may be 'made whole' once again."

In allowing recovery for IDV, the SJC distinguished *Given v. Commerce Ins. Co.*, 440 Mass. 207 (2003). In *Given*, the SJC held that first-party claimants could not recover IDV under part 7 of the sixth edition of the standard policy. Part 7 allows recovery for either diminution in value or the cost of repair, but not both; "part 4, however, contains no such limitation on recovery, let alone any limitation tied to a claimant's decision to have his or her vehicle repaired." Paragraph eleven of the sixth edition barred an insurer from "pay[ing] more than what it would cost to repair or replace the damaged property," but did not apply to part 4.

The SJC rejected Safety's arguments that IDV recovery would "cause a seismic shift in the insurance marketplace" and "economically destabilize the insurance marketplace," and that automobile IDV damages are "very difficult, if not impossible" to calculate. The Court noted that "numerous other States recognize and permit recovery of IDV damages." To illustrate that its decision was "in line with those of numerous other jurisdictions that have recognized IDV damages in the context of property damage claims, including damage claims relating to automobiles," the Court cited several extra-jurisdictional authorities, including *American Serv. Ctr. Assocs. v. Helton*, 867 A.2d 235 (D.C. 2005), which we cited in our amicus letter.

Kevin J. Powers, a sole practitioner in Mansfield, has been active in the Massachusetts appellate bar since 2006, a member of MATA's Amicus Committee since 2017, Interim Chair of the Amicus Committee from 2018 to 2019, and current Vice Chair of the Amicus Committee. His reported decisions include Meyer v. Veolia Energy N. Am., 482 Mass. 208 (2019), and he has co-written or edited several of MATA's recent amicus filings. He can be reached at kpowers@kevinpowerslaw.com.

In our amicus letter, we urged the Court to adopt the rule in the Restatement (Second) of Torts § 928 (1979) to permit compensation for "the reasonable cost of repair or restation, with due allowance for any difference between the original value and the value after repairs." The same language also appeared in the Restatement of Torts § 928 (1939). The SJC cited the Restatement (Second) of Torts § 928 (1979) in *McGilloway*, and we are satisfied that the decision effectively adopted the rule, at least to the extent of part 4 of the standard policy.

That IDV damages are recoverable, however, does not "suggest that every automobile that is involved in a collision and is subsequently repaired has suffered an IDV." As in so many other fact questions, "individual proof is required" to prove IDV. "Specifically, a plaintiff must establish (1) that his or her vehicle has suffered IDV damages, and (2) the amount of IDV damages at issue."

McGilloway stands as the latest example of the SJC bringing Massachusetts law current with recent technology. We no longer live in an age in which a well-executed repair vanquished all trace of an accident. Consumer access to Carfax information began in 1996, but Carfax received police accident reports from only half the states as late as 2003. See Jensen, It's the Truth, but Not the Whole Truth, N.Y. Times, May 6, 2007, available at https://www.nytimes.com/2007/05/06/automobiles/06MOTORING.html; Wikipedia: Carfax (company), at https://en.wikipedia.org/wiki/Carfax_(company). Today, however, "[w]ith the advent of databases such as CarFax, the consuming public now has the ability to learn whether a vehicle wears the 'scarlet letter' of an accident history." *Fin. Servs. Vehicle Trust v. Panter*, 458 N.J. Super. 244, 250 (N.J. Super. Ct. App. Div. 2019). The SJC's interpretation of the standard policy aligns with this new technological reality.

> *McGilloway* stands as the latest example of the SJC bringing Massachusetts law current with recent technology.

On the issue of G.L. c. 93A and G.L. c. 176D, § 3(9) claims, one point as to which our amicus letter was silent, the SJC gave Safety a consolation prize. The Court noted that "the [C]ommissioner [of Insurance] ha[d] not yet recognized that part 4 of the standard policy covers IDV damages, and [the SJC] previously ha[d] not considered the issue." Therefore, the SJC denied recovery for bad faith and unfair claim settlement practices "because the insurers relied on a plausible, although ultimately incorrect, interpretation of [the] policy."

Congratulations to victorious Attorneys Kevin McCullough, John Yasi, and Michael Forrest of Salem, who represented the plaintiffs. Undersigned counsel and MATA Amicus Committee Chair Tom Murphy drafted MATA's amicus letter. Another good day for Massachusetts plaintiffs and their attorneys.

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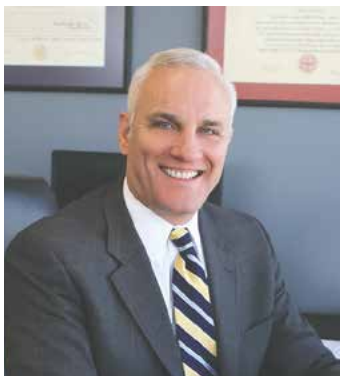
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