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Judge Spotlight: King County Superior Court Chief Civil Judge Regina Cahan

By Luisa Taddeo, Betts, Patterson & Mines, P.S.

I recently had the pleasure of interviewing King County Superior Court Chief Civil Judge Regina Cahan. We generally spoke about the general impacts the pandemic has had on civil practice in the King County Superior Courts, as well as other considerations and observations she has had since the pandemic began. Below is a summary of our conversation and the insight Judge Cahan has graciously provided for our members' benefits.

Brief background.

Judge Cahan obtained her bachelor's degree from University of Illinois and later obtained both a master's degree in social work and her law degree from the University of Wisconsin. She began her legal career in a small civil rights firm in Madison, Wisconsin. She began working with the King County Prosecuting Attorney's Office in 1989, where she spent nearly a decade in the criminal division handling homicide, sex crime, and domestic violence cases. In 1999, she transferred to the civil division, where she spent approximately nine years working as a labor and employment law attorney for King County. Judge Cahan was elected to the King County Superior Court bench on October 1, 2008. She assumed the position previously occupied by the Hon. Glenna Hall, who retired from the bench earlier that year.

Biggest impacts to the Courts following the pandemic.

Judge Cahan was appointed as Chief Civil Judge just before the pandemic hit, in early 2020. At the time, she did not realize the impact COVID-19 would have on her appointment. Like all of us, she also did not realize she would still be dealing with COVID-19 concerns! Judge Cahan explained that the most challenging impacts

the pandemic has had on civil practice in the Courts has been that everything has changed, from how to present to the ex parte department, filing and hearing motions, to trial. The pros and perks to impacts on the Courts from the pandemic include: easier and more affordable access for individual's hiring lawyers; and convenience and lower overall legal fees for parties due to the prevalence of remote proceedings. The cons or largest challenges to the Courts following the pandemic include: the limit of physical space for in-person matters. Currently, all civil proceedings are being held remotely. Due to the backlog in criminal cases, there has been an increase in the number of judges hearing criminal matters and therefore, the physical restraints do not allow the Courts to allow civil matters to be heard in-person, without special permission. For motions for in-person trials, these would be made to the judge presiding over your case, however, the lack of space is a large consideration as to why many of these motions are categorically denied.

Is remote voir dire here to stay? It seems likely.

All voir dire is currently being done remotely, even in criminal cases. There is a proposed rule requesting that voir dire continue remotely that is currently pending at the Supreme Court of Washington. From Judge Cahan's perspective and that of her colleagues on the bench, remote voir dire saves a lot of money and jurors love it. Instead of having to come downtown and wait in the Courts all day, remote voir dire is a one-hour commitment where jurors fill out a questionnaire and sit on Zoom while in the comfort of their homes. Judge Cahan also explained that preliminary results from a study being done by the Courts is revealing that remote voir dire and jury selection leads to *more* jury diversity. Judge Cahan has heard the same is true in federal district court. This was surprising to me, but it seems logical since almost everyone these days has a smart phone with Zoom capabilities. Judge Cahan's advice for practitioners is to learn how to conduct voir dire remotely by consulting with other attorneys who have done it.

Will remote trials be here to stay as well?

Judge Cahan believes that there may always be the possibility of having bench trials proceed remotely with the consent of the parties, whereas jury trials seem more likely to resume in-person eventually with remote voir dire staying in place, as long as this is adopted by the Supreme Court of Washington.

Judge Cahan's tips on how to have a successful remote trial.

"Practice practice practice and prep prep prep. Remote trials take more preparation." Judge Cahan could not stress enough how important it is to prepare specifically not only for trial, but for doing the trial remotely. First, prepare your witnesses; they should not be appearing over Zoom for the first-time during trial. Second, invest in the fancy equipment and tools necessary, such as microphones, lights, and sufficient internet bandwidth.

Third, it's time for attorneys to know how to share screens, highlight, zoom into exhibits, etc. Zoom is here to stay, and the Courts are having a hard time tolerating issues with attorneys not knowing how to use the technology. It is not their bailiffs job to help you with your technology, either. Fourth, if it is feasible, hire a litigation consultation who will assist with digital evidence to mitigate any technology issues. This is worth the investment because three seconds feels like ten minutes to jurors in a remote jury trial. Fifth, work with opposing counsel to figure out exhibits and streamline issues where possible. Judge Cahan emphasized that attorneys working together can mitigate and avoid a lot of issues with having to move remote jurors into virtual waiting rooms over evidentiary issues. Do you really want to move jurors into a waiting room over foundation of an exhibit that could have been dealt with pre-trial or during motions *in limine*? While it is faster in some ways to zip jurors in and out of virtual waiting or breakout rooms, this does ruin the flow of trial and, when people are at home, putting them in virtual waiting rooms can cause further delays, such as jurors being distracted by children or spouses, restroom breaks will occur at different times, or jurors will be missing from their screens. Remote trials require counsel to work together *more* with respect to exhibits, and the judges notice and appreciate it.

Judge Cahan and I also discussed whether and to what extent the "drama" of trial is impacted by being conducted virtually. Judge Cahan commented that in-person trial is more like theater, remote trials are more like TV. While the atmosphere of trial is lost when it's done virtually, jurors are forced to focus on the evidence, the person in front of them, the merits of the case and not as much on the theatrics. This is a reason why remote trials require more preparation that in-person trials: the evidence must shine and any lack of preparation on the part of the attorney is even further highlighted than would be the case in person.

Case assignments, use of interpreters, and open communication with the Courts.

Judge Cahan spends a lot of effort trying her best to alleviate the Courts' backlog by making sure that cases that are on standby are pushed forward if and when there is an opening. She underscored how disappointing and frustrating it can be where she sees an open courtroom, pulls a case off standby to start the following week, but then counsel explains that they are not available. The takeaway: if you have a case on standby, be ready for your trial to begin the entire time or notify the Court immediately about any conflicts a few weeks out. If you are not ready for trial and are on standby: file a motion to continue. Judge Cahan also expressed that there has been a lot of difficulty obtaining translators since she is seeing a current shortage. If your case needs a translator, let the Courts known as soon as possible as well as how long the translator will be needed and what languages since the Courts expend a lot of effort to get interpreters. This is an issue that counsel should be ready to discuss in

detail at the pre-trial conference.

Final remarks.

Lastly, Judge Cahan wanted to stress the utmost appreciation she has for all those who work in the King County Superior Court and the Clerk's office. She wanted to acknowledge all the tireless efforts from the Court staff to allow it to be one of the most productive courts in the country during the pandemic. She is so appreciative and proud of all their hard work in such an unprecedented time. On behalf of WDTL, we want to thank Judge Cahan for her willingness to be interviewed, her candor, and tips. It was an absolute pleasure to be able to have such an open discussion with her about something that has become our new reality.

Luisa Taddeo is Of Counsel in the Seattle office of Betts, Patterson & Mines, P.S. where she focuses her practice on insurance coverage and insurance defense litigation. Ms. Taddeo has extensive experience in insurance coverage litigation and has represented insurers in coverage disputes related to first-party property claims and third-party liability claims. She has also advised insurers on issues related to the duty to defend and the duty to indemnify, including defending insurers in litigation involving allegations of bad faith, including allegations of IFCA and CPA violations. Ms. Taddeo has spoken at continuing education seminars and written articles related to her insurance coverage practice.

Uncomfortable Position: Conflicts Among Jointly Represented Clients

By Mark J. Fucile, Fucile & Reising LLP

Representing two or more clients jointly in the same case is relatively common for defense counsel in a wide variety of practice areas. A manufacturer and a distributor in a product liability case or a manager and a corporate employer in an employment case are but two recurring examples. In most instances, joint representations benefit all of the clients concerned and move forward without problems. When conflicts occur between jointly represented clients in the same case, however, the result can be stark: the defense lawyer—and the lawyer's firm—are typically required to withdraw altogether. Occasionally, firms proactively plan for potential conflicts by receiving advance consent from one of the clients to continue representing the other if a conflict develops. As a practical matter, the remaining client in this scenario is often the "lead" defendant—the manufacturer or corporate employer in our opening examples. A recent Washington Court of Appeals disqualification decision, however, highlights that advance waivers are not necessarily a perfect solution. In this article, we'll first briefly survey how conflict issues can arise in joint representations. We'll then turn to the use—and the limitations—of advance waivers in this context.

Joint Representation Conflicts

RPC 1.7 governs conflicts among multiple current clients and associated waivers. Comment 29 to RPC 1.7 summarizes the difficult result if conflicts develop between jointly represented clients in the same case: "Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."

Although outright claims between clients create conflicts, "adversity" for conflict purposes is much broader and under Comment 6 to RPC 1.7 also includes conflicting legal positions and "finger pointing" defenses among the jointly represented clients. Often, these conflicting positions only emerge well into a case. In In re Carpenter, 160 Wn.2d 16, 155 P.3d 937 (2007), for example, two jointly represented defendants appeared aligned at the outset of a case through an indemnity agreement but conflicts arose later when one of the defendants proved unable to perform on the indemnity. The lawyer in Carpenter did not withdraw when the conflicts developed and was later disciplined for continuing despite the conflicts.

When conflicts occur in joint representations, they are usually non-waivable under RPC 1.7(b), which governs waivers, because they are in the same case. Further, under the judicially created "hot potato rule" illustrated locally in

Atlantic Specialty Insurance Company v. Premera Blue Cross, No. C15-1927-TSZ, 2016 WL 1615430 (W.D. Wash. Apr. 22, 2016) (unpublished), a law firm is not permitted to unilaterally drop a client "like a hot potato" to "cure" a conflict with another firm client.

Advance Waivers

To address the risks of unanticipated conflicts that may only surface deep into a case, firms sometimes use a construct under which one (or potentially more) of the jointly represented clients agrees to voluntarily become a former client if a conflict develops and waives the resulting former client conflict in advance. RPC 1.9 permits waiver of all former client conflicts and Comment 22 to RPC 1.7 allows advance waivers. The key to any advance waiver, however, is whether, in the phraseology of Comment 22, "the client reasonably understands the material risks that the waiver entails." Given the inherent complexity of this construct, the potential flaw in this solution is that the client who is forced out may claim later that they did not understand the waiver or that circumstances had changed and, therefore, the waiver should be revoked or is otherwise unenforceable. The recent Court of Appeals decision noted above reinforces this point.

R.O. by and through S.H. v. Medalist Holdings, Inc., No. 81040-5-I, 2021 WL 672069 (Wn. App. Feb. 22, 2021) (unpublished), involved parallel criminal and civil litigation against two corporate groups, Medalist and Backpage, and their executives. A law firm represented both corporate groups and the executives in the civil case under a set of joint representation agreements. In the criminal case, Backpage and its CEO (represented by different counsel) pled guilty and as a part of the plea deal, agreed to cooperate with the

prosecution against Medalist. The law firm in the civil case then moved to withdraw from representing the Backpage defendants while continuing to represent the Medalist defendants. Although the joint representation agreements were filed under seal with the court, the general description suggests they were similar to the advance waiver construct discussed above. Backpage's CEO objected to the law firm continuing to represent the Medalist defendants. The trial court allowed the law firm to withdraw from representing the Backpage defendants but disqualified it from continuing to represent the Medalist defendants. The Court of Appeals affirmed. In doing so, the Court of Appeals relied on Comment 21 to RPC 1.7, which allows clients to revoke a waiver when "a material change in circumstances" occurs. The Court of Appeals found that the guilty plea met that standard, allowed the CEO to revoke the waiver and affirmed the law firm's disqualification for an unwaived conflict.

As an "unpublished" opinion, Medalist is not precedential. It is, nonetheless, a telling illustration of the unique potential vulnerability of advance waivers in the joint representation context. That is not necessarily a reason to avoid this construct. At the same time, Medalist underscores that they can be an imperfect solution to a difficult problem.

A more conventional approach is to assign separate counsel to the defendants involved and then to have their lawyers coordinate the defense as appropriate. Although potentially more expensive, this approach also eliminates the risk of joint representation conflicts and the associated cost to the clients (or their carriers) of retaining replacement counsel well into a case.

Mark Fucile counsels lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. He has chaired the WSBA Committee on Professional Ethics, is the editor-in-chief of the WSBA Legal Ethics Deskbook and teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. He can be reached at 503.224.4895 and Mark@frllp.com.

Defense Win - Betts Patterson & Mines, P.S.

Shawna Lydon and Nicole Brodie Jackson of Betts Patterson & Mines, P.S., and Heidi Hankins and Tiffany Owens, Allstate Staff Counsel, recently prevailed at trial in King County Superior Court in an alleged traumatic brain injury case against attorneys Edward K. Le and Michael Kittleson.

The case involved a motor vehicle accident in which the defendant admitted to rear-ending plaintiff's vehicle while both parties were attempting to make a right turn at a red light. Plaintiff alleged that he suffered a traumatic brain injury in the collision. However, the defense disputed the nature and extent of plaintiff's injuries and damages related to the collision.

Prior to trial, plaintiff was offered $300,000 in policy limits to resolve the case. An Offer of Judgment for $300,000 was also filed and rejected. Mr. Le than proposed that defendant enter an Agreed Judgment of $1,300,000 and Assignment of Claims in exchange for a Covenant Not to Execute. The defendant declined that proposal.

At trial, defense counsel successfully obtained a Direct Verdict on plaintiff's past and future medical special damages.

Ultimately, Mr. Le asked the jury to award $3,600,000 in general damages to plaintiff for his alleged pain and suffering and loss of enjoyment of life. The jury came back with a verdict of $30,000.

Defense Win - Mix Sanders Thompson, PLLC

Mix Sanders Thompson: 3-0. Three defense verdicts (jury trials) since August 31.

Defense Win - Tyson & Mendes LLP

Elizabeth Leedom, Erin Seeberger, and Jonathan Litner of Bennett, Bigelow & Leedom and Bertha B. Fitzer and Jennifer Veal of Tyson & Mendes obtained a defense verdict in an orthopedic surgery case, Green v. Franciscan Medical Group. Read their article "Junk Science Defeated" to learn more.

On July 1, 2021, Bertha and Jen joined Tyson & Mendes LLP as partners in their Seattle Office and moved their physical offices to 950 Pacific Avenue, Suite 720, Tacoma, Washington.

The Need for Police De-escalation

By David T. Sweeney

A distraught mother calls 911 to report that her mentally ill son is threatening suicide. Two police officers are immediately dispatched to the scene. They meet the mother outside. "Thank God you're here!" she says. "My son has been threatening to kill himself today. He grabbed a butcher knife and is holding it to his throat." An officer asks, "Where's he at, ma'am?" "The last time I saw him he was in the kitchen" she says. "He's been diagnosed as bi-polar, and he needs help."

The officers enter the darkened house and move down a hall toward the kitchen. As they get closer, the son steps into the hall with a 10" butcher knife held to his throat. The officers immediately begin yelling, "Drop the knife! Drop the knife! Do it now!" The officers move closer so that both of them are side by side in the hall. More orders are shouted. The son takes a step toward the officers and both open fire, killing him instantly. In their statements and on the stand, both officers say that the armed subject was a threat to their safety, and they discharged their weapons in order to protect themselves. Graham v. Connor, 490 U.S. 386 (1989) holds that use of force can be reasonable based on the subject being an "immediate threat to the officers." Tennessee v. Garner, 471 U.S. 1 (1985) holds that an officer may use deadly force only if the officer has a good-faith belief that "the suspect poses a significant threat of death or serious physical injury to the officer or others." Unlawful force violates the Fourth Amendment's prohibition against unreasonable seizure. But could this tragedy have been avoided in the first place? A strategy of de-escalation might have prevented this unnecessary death.

What is de-escalation?

The Seattle Police Department defines de-escalation as follows: "De-escalation tactics and techniques are actions used by officers, when safe and feasible without compromising law enforcement priorities, that seek to minimize the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance." (Seattle Police Department Manual 8.100, 2021).

The United States Department of Justice writes, "De-escalation is about changing the conversation on use of force from what is legally permissible under Graham v Connor to what is the best outcome for the safety of the public and law enforcement personnel." (U.S. DOJ, 2019). "When circumstances reasonably permit, officers should use non-violent strategies and techniques to decrease the intensity of a situation, improve decision-making, improve communication, reduce the need for force, and increase voluntary compliance" (Ranalli, 2020 – Lexipol.com).

Simply put, how can a police officer still do what they need to do, while keeping themselves and the public as safe as possible? De-escalation does not mean that police officers need to remove themselves from force situations. To do so can be dangerous to the community. Police officers still have a duty to serve and protect and the law allows officers the right to use reasonable force to protect themselves while protecting the public.

De-escalation Training

When training officers, I stress the benefits of using elements of time, distance, and shielding to safely accomplish the law enforcement purpose. Let's look back at the scene I described at the beginning of the article, which is based on a real-life situation.

Time: If the officers used time as an ally, they could slow the situation down so that cooler heads could prevail. Time allows for calm thought, negotiation, and persuasion. Time allows the officers to formulate a plan. Time allows for negotiators or officers trained in crisis intervention to respond to the scene. True, the subject still might have a knife to his throat, but there was no need to rush in and force a confrontation.

Distance: The ability to keep a safe distance away from armed subjects increases officer safety. Distance is an officer's friend. By staying out of harm's way, the officer can still negotiate with the subject to persuade him to drop the knife. Being too close can get an officer hurt or killed, and certainly led to the increased threat level when the mentally ill subject stepped toward the officers.

Shielding: Police officers can increase their own safety and the safety of the mentally ill subject by utilizing shielding present in the house, such as doors, walls, and stairs. Tables, chairs, and other barriers can be put in place that makes it harder for the subject to advance on officers. The actual house itself may offer shielding, as the officers negotiate from outside the home.

Other elements that could lead to a successful outcome may include additional officers, less-lethal weapons, team tactics, calling a supervisor to the scene, utilizing mental health providers, and efforts to determine why the subject is not complying. Is mental illness clouding his judgement? Does the subject speak a foreign language? Are they under the influence of drugs or alcohol? Do they have a developmental disability? If the public is not at risk, time, distance, and shielding can help police officers work through this problem and still get the subject the help they need.

De-escalation may not be appropriate when the safety of the public is at stake. If a domestic abuser is actively assaulting

his partner, waiting to negotiate at the door while someone is being hurt or killed is inappropriate. Immediate action is necessary to protect lives. If a felony suspect is running from the police to get away, the officer should be giving orders to stop and chase after the suspect in order to protect the public.

De-escalation and the law

Currently, the U.S. Supreme Court still utilizes Tennessee v. Garner and Graham v. Connor when evaluating police use of force. "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." However, there continues to be challenges from Appellate Courts on the constitutionality of officer's actions, along with decreased protections for officers relying on qualified immunity in order to shield themselves from lawsuits.

In Washington State, RCW 43.101.450 requires all current law enforcement officers to receive de-escalation training and periodic updates. RCW 43.101.455 requires periodic mental health training as well.

Attorneys representing municipal clients should be advised to be aware of the public's demand for legal and ethical policing. As demonstrated by the shooting scenario, though officers may be using force that is legally allowed, the public desire for police legitimacy relies on officers also doing what is right. Municipal clients should be advised to adopt a police policy of requiring de-escalation when it is feasible to do so. Policy by itself will not yield results. Training in de-escalation techniques is the only way to change the police mindset to take all reasonable actions to preserve life, while still accomplishing their legal law enforcement purpose. "De-escalation plays a crucial role in enhancing a law enforcement agency's legitimacy in the eyes of a community. This practice of using verbal and non-verbal skills to slow down the sequence of events supports the safety of both the public and of front-line law enforcement personnel. Although the techniques of de-escalation create time for first responders to enhance their situational awareness, conduct proper threat assessments, and allow for better decision-making, this practice often goes unnoticed by those within the agency and members of the community." (U.S. DOJ, Community Oriented Police Services, 2019).

Conclusion

De-escalation policies and training are more than the latest police buzzwords. De-escalation helps to save lives, keeps officers safe, and reduces civil liability for the municipality and for the officer. Implementing de-escalation policies and training as best practices increases the legitimacy of the officer's actions in the court of public opinion and in a court of law. Using time, distance, and shielding benefits the public and benefits the police.

To protect human life is a police officer's greatest calling. De-escalation helps make this possible.

David T. Sweeney is a 34-year veteran police leader. He has spent countless hours training police officers in best practices and has investigated hundreds of cases involving use of force. He is the President of DT Sweeney Consulting, LLC, advising both defendants and plaintiffs on incidents of police use of force, pursuits, and wrongful death cases. He can be reached at (206) 833-6238 or at the company website: https://expertpolice.com.

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Toxicology of Alcohol: The Role of Toxicologists in Social Host & Liquor Liability

By Clara Chan, MSc, DABT, Bruce Kelman, PhD, DABT, ATS, ERT, Nadia Moore, PhD, DABT, CIH, ERT, and Allison Stock, PhD, MPH, MS

Introduction

Commercial establishments where alcoholic beverages are served (e.g., bars, restaurants) and social hosts who serve alcohol in non-commercial settings may find themselves potentially liable for damage, injury, and/or death caused by alcohol-related accidents involving individuals they have served. Critical issues addressed by toxicologists often involve interpretation and/or estimation of blood alcohol concentration (BAC) levels, associated clinical effects, and degrees of intoxication. This article outlines how toxicologists help resolve questions regarding liability in the alleged over-service of patrons or guests that has led to damage, injury, and/or death.

Clinical Effects of Alcohol

Alcohol consumption affects mental, cognitive, and other physical functions in a dose-related manner (e.g., more consumption is associated with greater effects). Toxicologists combine BACs with observed behavior to determine associated levels of impairment/intoxication. It is generally accepted by toxicologists that the degree of physical and mental impairment from alcohol correlates with BAC. In general, higher BACs produce increased impairment and greater degrees of intoxication. For example, the typical effects of a 0.02% (or 0.02 g/dL) BAC include some loss of judgment, decline in visual function, and divided attention.[1] At a 0.08% BAC, which is the current national limit for legally driving while intoxicated in the United States,[2] typical effects include poor reaction time, balance, speech, vision, hearing, perception, and judgment.[3]

People who are chronic alcohol drinkers, however, can develop a tolerance to the effects of alcohol and learn to compensate for impairment. Tolerance to alcohol means that alcohol produces less of an effect, including on behavior, than it would for non-tolerant individuals. These individuals may not exhibit gross signs or symptoms of impairment even when their BAC is above the legal limit, even though they are actually impaired.[3] A person who consumes alcohol does not appear "intoxicated" merely because he or she has consumed alcohol. Rather, intoxicated behavior occurs when the quantity of alcohol the person consumed has exceeded the individual's tolerance for alcohol and produced mental, cognitive, or physical abnormalities. Whether an individual appears

intoxicated depends on multiple factors other than alcohol consumption, including body weight, gender, race/ethnicity, the amount of food consumed before drinking, use of drugs or prescription medicines,[4] and social behavioral changes learned during multiple drinking episodes.[5]

Interpretation of Alcohol Test Results

When interpreting alcohol test results to determine how much alcohol was consumed by an individual at an earlier time, the toxicologist considers the quality of the sample collected and the analysis method used.

The "gold standard" tissue sample collection for measuring BAC is a peripheral venous sample of blood or serum. Alternatively, a breathalyzer test is a non-invasive method to obtain an immediate result of the individual's breath alcohol concentration.[5] Interpretation of postmortem samples can be complex as discussed later in this article. Forensic analyses for BAC analyze whole blood samples using gas chromatographic (GC) methods, which provide accurate and selective alcohol (i.e., ethanol) quantitation. In clinical settings (e.g., hospitals, emergency rooms), BAC is generally evaluated in serum or plasma samples using enzymatic methodologies with lesser accuracy but faster turnaround times (and lesser cost).[6] Due to the differences in the methodologies and the types of biological samples analyzed, BACs quantitated in clinical settings using enzymatic methodologies are generally higher than the same samples quantitated using forensic GC analyses.[7] Toxicologists guide the interpretation of results considering the various factors from the different assays.

The appropriateness of using BAC from postmortem samples to reflect BAC levels prior to death (i.e., antemortem) can be complex due to after-death redistribution and the potential for decomposition-related alcohol production. Each assessment to determine postmortem sample suitability (i.e., correlation to the concentration at time of death) is unique. One approach is to compare the postmortem BAC to alcohol concentrations measured in other biological fluid/tissue samples that are inherently less influenced by redistribution and decomposition-related issues (e.g., vitreous humor fluid of the eye, urine); correlation between the different assessments increases confidence that the postmortem BAC accurately reflects the antemortem level.[4]

An assessment for proper sample storage conditions may occur as improper storage may alter samples such that alcohol levels may no longer reflect an individual's BAC at the time of collection. For example, it is well known that loss of alcohol from biological specimens may result from evaporation and/or oxidation. Alcohol is volatile and will evaporate from blood samples if the specimen containers are not properly sealed, resulting in loss of alcohol by evaporation. Loss of alcohol can also result from oxidation

of alcohol (ethanol) to acetaldehyde in stored biological specimens. Alcohol concentrations in biological specimens may increase when sterility is lost, as alcohol (ethanol) production can occur as a byproduct of biological growth. Under sterile conditions, the concentration of alcohol in blood specimens would not be expected to increase.[4]

Blood Alcohol Concentration Calculation

Toxicologists estimate BAC for individuals based on the known pharmacokinetics of alcohol (i.e., the time and dose-profile for how it is absorbed, distributed, metabolized, and excreted) together with specific attributes of the individual and the drinking event under consideration. BAC assessments are generated to assess different parameters important for the evaluated issue, such as:

- Was the reported consumption profile and timing (e.g., what and when drinks were served and consumed) consistent with the measured BAC?
- How much alcohol would the individual have needed to consume to generate the measured BAC?
- Given the BAC was measured at a later timepoint, what was the individual's BAC when leaving the serving establishment and/or when the accident occurred?
- When assessing the BAC at the time of the accident (and if appropriate), what was the contribution of alcohol intake from the service event under consideration compared to additional alcohol consumed by the individual (either before arriving and/or after leaving the serving establishment)?

The tool toxicologists generally use for BAC extrapolations is the Widmark equation.[8] The equation uses a set of variables to mathematically describe alcohol pharmacokinetics in the human body. Specifically, the equation incorporates a uniform distribution of alcohol (a one-compartment model) and a constant elimination/metabolism rate per unit time (zero-order elimination kinetics), together with human-specific factors (e.g., body weight and distribution volume) and time-specific variables (e.g., time elapsed since drinking began, time of accident, and/or time of BAC measurement). The resulting equation describes BAC as a function of an individual's human factors together with the timing and amount of alcohol consumed.[9] The accuracy of estimates associated with the Widmark equation depends on the reliability of input parameters. Uncertainties arise with the number of assumptions made regarding an individual's body weight, the type and alcohol content of consumed beverages, and the individual's alcohol elimination/ metabolism rate.

Conclusion

Social host liability issues generally hinge on the alleged over-service of guests subsequently involved in incidents resulting in damage, injury, and/or death. Key issues in these matters hinge on the amount of alcohol served by the

establishment, the resulting BAC of the consuming individual, and the associated clinical effects and degree of intoxication.

Toxicologists can address these issues and more, including assessments of sample validity and methodology; extrapolations of BAC to earlier timepoints; assessments to determine whether the service profile (i.e., what and when) correspond with the measured BAC; and, if appropriate, assessments to determine the contribution of alcohol from the service event under consideration to the BAC at the time of the accident.

Clara Chan, MSc, DABT

Clara Chan is a Project Manager and Senior Toxicologist at J.S. Held LLC. She has a Master of Science in toxicology from Queen's University, Canada, and a Bachelor of Science in pharmacology from the University of Toronto. She is certified in toxicology by the American Board of Toxicology. Clara has been working in the field of toxicology since 2003, evaluating chemical toxicities and health effects. She provides technical support and serves as a consultant for projects in areas of toxicology, risk assessment, personal injury litigation, consumer product safety, and indoor air quality/mold assessment. She has provided support to clients composing safety data sheets and deriving of occupational exposure limits and permissible daily exposure limits. She has supervised client-sponsored laboratory testing of consumer products in North America and in Hong Kong. She has experience with analysis and interpretation of consumer product safety testing results. Clara's native language is English and she is fluent in Chinese (Cantonese).

Bruce Kelman, PhD, DABT, ATS, ERT

Dr. Bruce Kelman is Senior Vice President and Principal Toxicologist at J.S. Held LLC. He has more than 40 years of experience in toxicology and has served as a consultant and expert in numerous investigations across North America, South Korea, and the United Kingdom. He has evaluated numerous claims of personal injury and health impacts from many chemicals and drugs, and has presented a variety of health risk concepts to policy makers, government regulators, citizen groups, and individuals. Dr. Kelman also regularly interprets standard and non-standard tests for drugs of abuse including ethanol, opioids, methamphetamine, cocaine, and cannabis.

Nadia Moore, PhD, DABT, CIH, ERT

Dr. Nadia Moore is Vice President and Principal Toxicologist at J.S. Held LLC. She has more than 25 years of multidisciplinary experience in toxicology, exposure science, regulatory compliance, molecular biology, and analytical chemistry. She has performed risk-based exposure and toxicology assessments for potential contaminants in workplaces, residential scenarios, and consumer products and has conducted short-term through 2-year carcinogenicity animal studies of inhaled vapors, aerosols, particulates, and complex mixtures. Her

experience encompasses chemical and physical agents (including asbestos, pesticides, solvents, vapors, particulate matter, metals, and microbial agents), diverse exposure scenarios (including environmental, occupational, and residential), and all routes of exposure (including inhalation, oral/drinking water, and percutaneous). Nadia's practice also includes the determination of whether exposure to a chemical or physical agent has caused an injury, exposure assessment in diverse scenarios, determination of acceptable impurity levels in consumer products, and weight-of-evidence analysis of historical scientific data to gauge present-day conclusions.

Allison Stock, PhD, MPH, MS

Dr. Allison Stock is Vice President, Environmental Health and Safety at J.S. Held LLC. She is an internationally known toxicologist with 25 years of toxicological, epidemiological, regulatory, and environmental experience. Her background is supported by experience in the federal and state government as well as private industry (small and Fortune 500 companies). Dr. Stock specializes in human health risk assessments combing both toxicological and epidemiological data. She has expertise in petrochemicals; pharmaceutical agents; environmental permitting; property transfer; environmental, social, and health impact assessments; inhalation toxicology; renal toxicology; drug and alcohol exposures; toxicological and epidemiological risk assessment; communicable and foodborne illnesses such as Legionella, Salmonellosis, and Pseudomonas infections; rapid needs assessments; emergency response; ambient and indoor air monitoring; occupational health and safety plans; and stakeholder communications. Dr. Stock has served on both federal and industry working groups on air pollution issues such as particulate matter (PM2.5), benzene, carbon monoxide, and low sulfur diesel exhaust. She has also served as a corporate representative and an expert witness for litigation support.

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Junk Science Defeated!

By Elizabeth Leedom, Erin Seeberger, & Jonathan Litner, Bennett, Bigelow & Leedom and Bertha B. Fitzer & Jennifer Veal, Tyson & Mendes

Elizabeth Leedom, Erin Seeberger, Jonathan Litner of Bennett, Bigelow & Leedom and Bertha B. Fitzer and Jennifer Veal of Tyson & Mendes, successfully defeated the latest and most dangerous attack on evidence-based medicine. In a highly contested medical malpractice case, involving a gravely impaired child, a Pierce County Superior Court jury returned a unanimous defense verdict in Link v. Multicare Health System, et. al on October 26, 2021

All medical personnel provided excellent care. A pediatric cardiologist diagnosed a vascular abnormality in utero via fetal echo. Two weeks after the infant's birth, a second cardiologist made the further diagnosis of a right aortic arch. At age six weeks, the baby was diagnosed with failure to thrive and was brought to Mary Bridge Hospital. MRI imaging revealed a vascular ring, of a type that rarely causes problems before a child starts taking in solid foods. An upper GI study demonstrated that liquids flowed freely around the indentation caused by the vascular ring into the stomach. The baby was treated for malnutrition and observed for five days at Mary Bridge Hospital. The mother was taught proper feeding techniques and the baby rapidly gained weight.

Two months after the care in question, the infant arrived nonresponsive, with a GSC of 3 at a rural emergency room. Up until 11:00 pm that evening, the baby had been completely normal. Left alone with the mother's boyfriend when she left to go buy him drugs, the baby collapsed into a coma. Imaging in the ED revealed subdural hematomas and torn cortical bridging veins. The baby was again transported to Mary Bridge Hospital. Physicians then discovered retinal hemorrhages and other brain injuries, leading to the diagnosis of abusive head trauma.(AHT)

The mother's boyfriend admitted to shaking the baby, allegedly because she had choked on formula. He was charged with Assault of a Child in the First Degree and ultimately pled guilty to Child Assault in the Third Degree, with Aggravating Factors. He was sentenced to 36 months in prison.

Building off the theories and expert opinions that the criminal defense had developed to obtain a reduction in the charges, plaintiff filed a civil medical malpractice suit against the pediatric cardiologists and Mary Bridge Children's Hospital. To support that the claim that the vascular ring should have been surgically repaired before the events, plaintiff launched a frontal attack on

the scientific basis for a diagnosis of AHT. Plaintiff's experts asserted that the vascular ring caused the baby to choke, which then caused hypoxic ischemic injury and/or cerebral venous sinus thrombosis (CVST) which then caused the retinal hemorrhages. Not even Dr. Stephen Glass would support this theory. Although he was called to comment on the life care plan and damages, he firmly declined to offer any opinions regarding the cause of the infant's injuries.

Plaintiff's case is part of a national phenomenon, a concerted attack on the causation of injuries commonly associated with AHT. A small group of biomechanical engineers, forensic pathologists and radiologists have advanced similar explanations for the injuries commonly associated with abusive head trauma. This small group of modestly credentialed experts are appearing in criminal cases around the country, occasionally convincing judges that there are many wrongly convicted individuals imprisoned based on this allegedly faulty diagnosis of shaken baby syndrome.

The American Academy of Pediatricians, (AAP), along with sixteen other professional associations combined efforts to rebut this attack on evidence-based medicine. In 2018, the group published a "Consensus statement on abusive head trauma in infants and young children in the journal Pediatric Radiology." The Consensus Statement unequivocally concludes that there is no controversy regarding the medical validity of the existence of AHT. It further states that: "That there is no reliable medical evidence that the following processes are causative in the constellation of injuries of AHT: cerebral sinovenous thrombosis, hypoxic ischemic injury, lumbar puncture or dysphagic choking/vomiting."

Citing to the Consensus Statement, defendants attempted to avoid the expense of a needless trial by moving for summary judgment on the issue of causation. With the support of declarations from national experts in pediatric neuroradiology, cardiology, and child abuse, defendants argued that plaintiff's evidence could not meet the Frye standard, or the standards required of ER 702. The trial judge denied the motion. Efforts to obtain interlocutory review were unsuccessful.

Two years of extremely expensive litigation followed culminating in a five-week trial. Despite the efforts of national counsel for the plaintiffs and experts asserting that the diagnosis of SBS or AHT involved a "conspiracy," the jury made short work of the case. After little more than an hour deliberation, the jurors summarily rejected the plaintiff's $111 million damages claim.

Plaintiff filed Notice of Appeal and defendants have cross-appealed. It is hoped that this case becomes a vehicle for resolving the confusion in the civil and criminal courts. It is time to definitively reject these fringe theories regarding the medical validity of an abusive head trauma diagnosis.

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