

Nothing to Fear But Fear Itself

Prior decisions in consolidated cases provide guidance for post-Koken issues

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The trial courts and members of the bar who handle automobile accident matters are being whipped into a fearful frenzy about the uncertainties of handling automobile accident cases in the post-*Koken* era by commentators who refer to the issue with alarmist references such as, ahem, "Hurricane *Koken*."

As Ralph Waldo Emerson once stated, "Fear always springs from ignorance." In other words, the strength of our fears can only be as strong as our lack of knowledge.

In the context of the post-*Koken* cases, it appears that the fear of the unknown in terms of how to handle these new automobile accident claims can be somewhat allayed by the power of knowledge borne out a review of prior case law on similar issues, which law will still apply under the enduring doctrine of *stare decisis*.

Last month I noted in this column the early indications from the courts are that the interest of judicial economy mandates that these separate third-party and first-party claims arising out of motor vehicle accidents will be consolidated by the trial courts in an effort to streamline the issues and claims presented. In addition to eliminating trial delays and speeding up litigation, the consolidation of cases will also serve to prevent inconsistent verdicts on separate claims arising out of a single motor vehicle accident.

Simply put, the post-*Koken* era cases will involve separate claims that are consolidated for purposes of discovery and trial. As the trial courts are bound by the fundamental doctrine of *stare decisis*, a review of those cases addressing the various issues that routinely arise in matters involving joint trials of other types of consolidated claims, will enable counsel to avoid fear, stay grounded, and make educated guesses as to how at least some of these similar issues will be handled in cases arising during this fast-approaching Hurricane *Koken* (there I go again).

Counsel may rest assured that, with the already overburdened trial courts being the ones to initially decide the various issues presented, the interest of judicial economy, which also serves to benefit counsel and the litigants, will continue to be an overriding factor in all of the decisions that will be initially handed down by the trial courts.

Effect of Consolidation

Under Pennsylvania Rule of Civil Procedure 213(a) it is provided that actions involving common questions of fact or arising out of the same occurrence may be consolidated into joint trial on the motion of any party or by the court on its own motion. The same rule also specifically provides that, upon directing a joint trial or a consolidation of actions, the court may thereafter also make any orders on its own, or in response to motions by the parties, that avoid unnecessary cost or delay, i.e. that are in best interests of judicial economy.

According to Goodrich-Amram 2d § 213(a):19, the trial and appellate courts of Pennsylvania have also held that where entirely separate actions are tried together, the separate quality of each of the actions is in no way affected. That is, the procedural rights of the parties and the separate verdicts and judgments will remain as though the actions had been independently tried.

Accordingly, when several cases are joined before a single judge for a joint trial, each separate case is distinct and maintains its own identity. More specifically, as indicated in *Keefe v. Keefe*, 741 A.2d 808

(Pa.Super. 1999), each case may have its own separate docket entries if desired and each produces its own verdict and judgment.

Evidentiary Issues

The commentary in § 213(a):20 of Goodrich-Amram 2d also notes that a joint trial of several independent claims may have important consequences as to the introduction and admissibility of evidence. The continuing right of each of the parties to raise their own issues and defenses, along with supporting evidence, is maintained.

In the post-*Koken* cases, one of the key issue in this regard is whether the tortfeasor defendants will remain protected by Pennsylvania Rule of Evidence 411 and its seemingly impenetrable supporting case law, such as the decisions in *Henery v. Shadle*, 661 A.2d 439 (Pa.Super. 1995), *Price v. Guy*, 735 A.2d 668 (Pa. 1999), all of which prohibit essentially any reference to insurance during the course of a civil trial.

In regards to the post-*Koken* cases which could possibly involve the need to reference both the third party liability carrier as well as the first party UIM or UM and/or PIP carrier, the trial courts will have to contend with the cases of *Bonavitacola v. Cluver*, 619 A.2d 1363, 1370 (Pa.Super. 1993) and *Greenwood v. Hildebrand*, 515 A.2d 963, 968 (Pa.Super. 1986) both of which have held that prohibition against mentioning insurance at trial applies whether the proposed evidence concerns the liability insurance coverage of a defendant or any first party insurance coverage that may apply to a plaintiff.

One wonders how insurance will be kept from the jury in the post-*Koken* cases when carriers will not only be named in the caption but will also be actively defending the first party portions of the case. This is one area where there appears to be no guidance available for the trial courts when they go to grapple with this issue.

While the plaintiffs' bar will assert that jurors are generally aware of the involvement of insurance in civil litigation matters, particularly in automobile accident cases where every driver is required to be insured, surely, additional safeguards other than mere cautionary jury instructions will prove necessary to protect the tortfeasor defendants from the undue prejudice that can result from repeated references to insurance at trial.

Order of Proof at Trial

Another issue that will arise with the myriad of parties, claims and issues involved in these post-*Koken* matters will be the order of proof at trial. Under Pa.R.C.P. 224, the trial courts are given great discretionary power to regulate the order of proof at trial. In particular under this rule, the trial courts have the power to compel the plaintiff to present all of his or her evidence on the liability issues before the damages issues are addressed. Under this rule, the trial courts also have the power to bifurcate the issues of liability from the damages issues at trial as may be appropriate under the circumstances.

This power may prove valuable in the post-*Koken* cases as the courts, in the overriding interest of judicial economy, may be able to quickly weed out cases of questionable liability. In those cases where the plaintiff is compelled by the court to first present only the evidence on the liability issues and the defense then prevails on a nonsuit, or a jury rules in a bifurcated fashion that the defendant was not liable or that the plaintiff was 51 percent or more liable, all of the third party liability and first party UIM/UM damages claims will be eliminated in a streamlined and cost-efficient fashion.

Multiple IMEs?

Civil litigators and Continuing Legal Education presenters are also already debating the issue of how independent medical examinations (IMEs) under Pa.R.C.P. 4010 will be handled in the post-*Koken* context. The central issue will be whether a plaintiff may be subjected to multiple IMEs given that each defendant in these consolidated actions may want to have their own examination completed by the doctor or medical specialty of their choice.

In an analogous fashion, Judge Carmen Minora of the Lackawanna County Court of Common Pleas, in the case of *Driscoll v. Walker*, 52 Pa.D.&C. 4th 316 (2001), addressed the issue of requests for separate IMEs by multiple and diverse defendants with separate theories and defenses in a somewhat similar scenario as that which will be faced in the post-*Koken* cases.

In *Driscoll*, the plaintiff was injured in a 1995 motor vehicle accident and was thereafter subsequently injured one of the same body parts in a 1998 work injury. At the time of this decision, the plaintiff was pursuing both a lawsuit against the tortfeasor in the trial court as well as a separate claim in the workers' compensation system.

In a somewhat unique situation, the defendant-driver in the lawsuit and the defendant employer in the separate worker's compensation case were both represented by the same law firm. That single defense law firm desired to secure one IME of the plaintiff in the auto accident case and another, separate IME for the defense of the worker's compensation matter. The plaintiff refused to cooperate in a second IME.

In reviewing the law of medical examinations under Pa.R.C.P. 4010, and citing to his own other opinion in the case of *Wilczynski v. Lacka. Multi-Purpose Stadium*, 42 Pa.D.&C.4th 337 (Lacka. Co. 1999 Minora, J.) and 18 Goodrich-Amram 2d § 4010(a), Minora noted that while the rule does not specifically permit or prohibit more than one examination of a plaintiff, a defendant does bear a heightened burden of demonstrating good cause for multiple examinations.

Minora acknowledged that the court understood that a defendant has the right to have a plaintiff examined by a physician of his own choosing and that, in this case, the plaintiff was pursuing two separate and distinct claims against two separate defendants. As such, the court agreed that, as will exist in the post-*Koken* cases, such examinations requested by the separate defendants would arguably not be duplicative but would address the separate issues particular to each case.

Nevertheless, Minora reiterated that trial courts were required to review, with heightened scrutiny, any requests by multiple defendants for separate medical examinations to address the separate claims being defended. Although it is generally recognized that plaintiffs give up an element of privacy concerning their medical status when they file suit, Minora emphasized that, in terms of request for multiple IMEs, "the plaintiff's right to privacy is critical and worthy of protection by this court and it should not be unduly invaded." *Driscoll*, 52 Pa.D.&C. 4th at p. 321.

Minora also rejected the defense contention that if the parties had separate counsel, each defending party would have clearly had the right to pursue separate examinations. Minora noted that the "considerations of costs, time, expenses, plaintiff privacy, fairness, and judicial economy exist even when there are separate defense counsel." *Id.* at 322.

Obviously influenced by the fact that the two defending parties in the separate actions were represented by the same law firm and noting that the defense counsel had an ethical duty to explore the option of saving their client's time and money in terms of a single IME and thereby a single trial deposition of one expert for the defense, Minora ultimately held that, after balancing the defendants' rights to an examination against the plaintiff's right to privacy, "[c]ommon sense, judicial economy, the minimization of costs and expenses to the defense clients and perhaps most importantly, the protection of the plaintiff's right to privacy envisioned by Pa.R.C.P. 4010(a) dictates only one logical result and that is conducting only one omnibus independent medical examination." *Id.* at p. 322-323. Accordingly, the judge ordered defense counsel to proceed with "one comprehensive omnibus defense physical examination" to address the issues raised in both cases. *Id.* at p. 321.

While it remains to be seen how this issue will be handled in the different post-*Koken* context where the claims may actually be consolidated under one caption and where there may be separate defense counsel representing the distinct interests of the various defendants, the *Driscoll* decision issued by Minora will, at the very least, provide guidance on the issue of the permissibility of multiple IMEs.

Tailored Jury Instructions

Perhaps one of the most difficult tasks facing the trial courts in the post-*Koken* cases will be the crafting of jury instructions that delineate all of the claims and burdens of proof to the jury in plain English in a clear and concise fashion.

The prior case of *Acquaviva v. Hartman*, 201 A.2d 239 (Pa.Super. 1964), involving multiple third party automobile accident cases consolidated into a single trial, reminds us that trial courts will be permitted to use their great discretion in creating jury instructions that guide the jury even if the instructions are somewhat incomplete.

In *Acquaviva*, the Superior Court did not fault the trial court for leaving out part of the instruction pertaining to the plaintiff's contributory negligence as those instructions could have created uncertainty and confusion for the jury. Similarly, in the cases arising in the post-*Koken* context, it is anticipated that the trial courts will be given more leeway by the appellate courts in the struggle to craft straightforward and coherent instructions to the jury.

Inconsistent Verdicts

In terms of how to handle inconsistent verdicts that may arise in a post-*Koken* trial of conjoined claims, we also already know that Pennsylvania law generally holds that a new trial should be granted in the event of inconsistent verdicts at a consolidated trial. See *Goodrich-Amram* 2d § 213(a):21. Additionally, where a new trial is granted in one of the several claims presented, a new trial should be held on all of the original consolidated claims in order to avoid the possibility of a group of inconsistent verdicts.

This will hold true even in the event that a nonsuit was erroneously entered in favor of one party during the course of the trial, on the theory that a new trial should be held on all of the claims presented in order to avoid the possibility that the jury's decision on the remaining claims had been influenced by the court's entry of a nonsuit.

Presumably, these rules will continue in the context of the newly formed automobile accident third party/first party consolidated cases in the post-*Koken* era.

Conclusion

Obviously, the above analysis only touches on some of the issues that will arise with the imminent approach of these novel post-*Koken* automobile accident cases. The point is that, if the bar and the bench take the time to stop, draw in a calming breath, and actually formulate the issues presented in their simplest fashion, it may become readily apparent that there is an existing body of case law and legal commentary on analogous situations that can, at the very least, serve as guidance on how to handle the novel issues that will arise in these new types of automobile litigation matters.

There can be no running away in fear from the impending issues and claims. Rather, the civil litigators should continue to do what they do best -- address the issues in a head-on fashion by researching and arguing until the dust settles and the issues are clarified by the bench with new precedent.

In the words of the self-help guru, Dale Carnegie, when faced with the fear of the unknown, "Do the thing you fear to do and keep on doing it... that is the quickest and surest way ever yet discovered to conquer fear." In this regard, both the plaintiff's bar and the defense bar should face the fear of the unknown brought on by these cases by working together to not only litigate the issues but to also educate each other with the initial trial court opinions as they are handed down. •

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