MARCH 2004, VOL. 39, NO. 3

ILLINOIS STATE BAR ASSOCIATION

TORT TRENDS

The newsletter of the ISBA's Section on Tort Law

Editor's note

By John L. Nisivaco of Lavin & Nisivaco, Chicago

The first article in this edition is written by Christopher Norem of Parente & Norem. Mr. Norem explores *Voykin v. Estate of DeBoer* and its effect on the admissibility of evidence of prior injuries regarding the "same part of the body" rule. Prior to *Voykin*, it was held that a previous injury was relevant because it was part of the same body part. *Voykin* established that if a defendant wishes to introduce evidence that the plaintiff has suffered a prior injury, whether to the same body part or not, the defendant must introduce expert evidence demonstrating why the prior injury is relevant to causation, damages, or to some other issue. Furthermore, the article discusses the impact of disclosing prior injuries for impeachment purposes. In particular, simply because a plaintiff "forgets" to mention his or her prior injury to the acting surgeon does not mean that it is grounds for impeachment. The prior injury still must be relevant.

The second article is written by Sam Kavathas of Kavathas & Castanes. It is intended as an update on the law regarding a landowner's liability for criminal acts committed by third persons against persons on its property and how such liability is affected by voluntary undertaking to protect, such as the hiring of security guards. The article provides the current law regarding landowners' legal duty to protect others from the criminal acts of third parties on its property. In those situations, the landowners' relationship to the injured party and foreseeability are a main concern.

Thank you to all of the contributors. The articles are excellent and we hope you find the materials helpful.

Get the electronic version of this newsletter

See page 8 for details

Life after *Voykin v. Estate of DeBoer*, a plaintiff's perspective

By Christopher M. Norem of Parente & Norem, P.C., Chicago

Prior to the Illinois Supreme Court's holding in *Voykin v. Estate of DeBoer*, 192 Ill.2d 49, 733 N.E.2d 1275 (2000), there was a significant split among the various state district courts on the so-called "same part of the body rule" (which presumed that a previous injury was automatically relevant simply because it was to the same part of the body) and how that affected the admissibility of evidence of prior injuries to the same part of a plaintiff's body. It was similarly unclear as to how some pre-existing medical conditions as well as any subsequent injuries to the plaintiff could or would be handled by the trial court. The *Voykin* case and its progeny have removed many of these questions. In *Voykin*, the court held:

> "In most cases, the connection between the parts of the body and past and current injuries is a subject that is beyond the ken of the average layperson. Because of this complexity, we do not believe that in normal circumstances a lay juror can effectively or accurately assess the relationship between a prior injury and a current injury without expert assistance. Consequently, we conclude that if a defendant wishes to introduce evidence that the plaintiff has suffered a prior injury, whether to the 'same part of the body' or not, the defendant must introduce expert evidence demonstrating why the prior injury is relevant to causation, damages or some other issue of consequence. This rule applies unless the trial court, in its discretion, determines that the nature of the prior and current injuries is such that a lay person can readily appraise the relationship, if any, between those injuries without expert assistance." *Voykin*, 192 Ill.2d at 59, 733 N.E.2d at 1280.

In applying the above-mentioned reasoning to the facts in the *Voykin* case, the court ultimately concluded that the "neck problems" plaintiff had secondary to playing hockey since the age of six should have been excluded at trial because: (1) the evidence did not demonstrate what the plaintiff's "neck problems" were or when he suffered from them; and (2) nothing about the evidence had any tendency to make it less likely that the defendant caused the plaintiff's neck injury or that the defendant caused the plaintiff to suffer damages. *Maffett v. Bliss*, 329 Ill. App. 2d 562, 575, 771 N.E.2d 445, 457 (4th Dist. 2002), citing *Voykin*, 192 Ill. 2d at 60, 733 N.E.2d at 1281.

What *Voykin* establishes is essentially a relevancy standard that applies to causation, damages, or "other issues of con-

IN THIS ISSUE

sequence." The language "other issues of consequence" could conceivably mean anything, but the three areas of relevancy that a defendant would generally seek to offer evidence of a prior injury as addressed by the Supreme Court are: (1) to negate causation; (2) to negate or reduce damages; or (3) as impeachment. *Voykin* 192 Ill.2d at 57, 733 N.E. 2d at 1279. In order "for a prior injury to be relevant to causation, the injury must make it less likely that the defendant's actions caused any of the plaintiff's injuries or any identifiable portion thereof." Id. at 58, 1279-80. From a damages standpoint, the prior injury may be relevant to establish a preexisting condition of plaintiff, thereby making defendant only liable for a portion of plaintiff's damages, or to establish that plaintiff's prior injury to the same part of the body caused permanency of the same nature and characteristics of that being claimed in the current case. This latter issue has been recently addressed by the First District and can be extremely difficult to deal with at trial. See e.g., *Obszanski v. Foster Wheel Construction, Inc.*, 328 Ill. App. 3d 550, 765 N.E. 2d 1193 (1st Dist. 2002).

In *Obszanski*, the plaintiff injured his back in a 1996 work incident. Plaintiff had surgery, returned to work, injured the same region (L5-S1) of his back in 1999, and had surgery again to repair the disc injury. Although the trial court granted plaintiff's motion in limine barring any reference to the subsequent injury, it decided to allow the defense to inquire as to how the subsequent back injury affected any claims of current disability, if made by plaintiff at trial. The plaintiff testified on direct that since the 1996 back injury, he had pain and discomfort in his back, could no longer play basketball or coach. The defense was then allowed to cross examine him on the 1999 herniation and surgery. The appellate court agreed with plaintiff that this cross violated the ruling found in *Voykin* and granted a motion for a new trial on the grounds that "the introduction of evidence concerning Obszanski's subsequent injury without any supporting testimony was error." Id. at 593, 1201.

Had the defense presented expert testimony on this issue, the outcome may have been different. The *Obszanski* court stated:

> "With an appropriate foundation laid by a medical expert, if that could be done, defense counsel should be allowed to show that the subsequent injury is a "cause" of plaintiff's current complaint. This is difficult because the injury in question is claimed to be permanent in nature. If medical evidence can show enhanced or separate pain from the subsequent injury, then the jury should hear that. If not, then it should not come in at all." Id. at 593, 1201, (emphasis added).

Obviously, plaintiff's counsel must be cognizant of the exact nature of the current complaints being presented and those, if any, made in the past. See also, *Caliban v. Patel*, 322 Ill. App. 3d 251, 750 N.E.2d 734 (3d Dist. 2001) (Where plaintiff was claiming back injuries from a 1992 automobile accident and also had auto accidents in 1989, 1990, falls in 1992, and 1993, evidence by one of plaintiff's treaters that a 1993 fall exacerbated plaintiff's physical problems from the 1992 auto accident was admissible under *Voykin*. But since the symptoms reported by plaintiff following the 1992 subject accident were "distinctly different" from his prior back symptoms following the earlier accident, the testimony contradicted defendant's claims of causal connection between the 1989 and 1992 subject accident. Furthermore, defendant's failure to offer any supporting expert testimony for admission of the 1990 accident or the 1992 fall bars their admission under *Voykin*); *Hawkes v. Casino Queen, Inc.*, 336 Ill. App. 3d 994, 785 N.E.2d 507 (5th Dist. 2003).

In *Hawkes*, the Fifth District specifically rejected defendant's argument that a treating chiropractor's testimony stating that the plaintiff's prior neck injuries and treatment "could have" caused the bulging disc in his neck he was claiming related to the subject occurrence, noting that under *Voykin*, the testimony did not make it less likely that defendant's actions caused any of plaintiff's injury. Id. at 1006, 585. Defendant's attempt to present two treating physicians' testimony to show plaintiff was symptomatic at C5, the level he had surgery, prior to the subject occurrence was rejected because the testimony was "supposition and conjecture" and not to a reasonable degree of medical certainty as required. Id. 1007, 518. Establishing that the prior injury "could have" caused the subject problem or his treating surgeon would have "liked to have known" of prior problems at the level he did surgery on, clearly does not satisfy the *Voykin* standard. The defendant improperly tried to create a situation where "[t]he essential next step of assessing the relationship between the prior injury and the present injury from the testimony of both doctors was left to the jury. This practice is exactly what the *Voykin* decision guarded against." *Hawkes* 336 Ill. App. 3d at 1007, 785 N.E.2d at 518.

Another potential basis for inquiry into this area by the defense is impeachment. It is important to recognize, however, that simply because the injured plaintiff "forgot" to mention the prior injury and treatment to the treating physician involved in the subject occurrence, the defense does not have carte blanche to elicit this information from the plaintiff, the treating physician, or even a retained expert.

The *Voykin* court recognized the potential problems presented with allowing unfettered inquiry under the banner of "impeachment." The court specifically held, "This does not mean, however, that every undisclosed prior injury to the same part of the body is grounds for impeachment. Just as with the substantive admission of evidence, trial courts should not permit inquiry into this area unless the prior injury is relevant to a fact of consequence, i.e., whether the prior injury negates causation or negates/reduces the defendant's damages." *Voykin*, 192 Ill.2d at 58, 733 N.E.2d at 1280. The plaintiff cannot be crossed nor can evidence be presented on a prior injury unless it is tied back into the aforementioned parameters, usually with the use of expert testimony as required by *Voykin*. Moreover, even if the evidence is arguably relevant or may have some probative value, the prejudicial effect of its admission, or its likely effect of confusing the jury, may still require its exclusion. See *Maffet v. Bliss*, 329 Ill. App. 3d 562, 771 N.E. 2d 445 (4th Dist. 2002) (In a case where plaintiff's ability to see a combine she struck on the highway was at issue, evidence of her "prior vision problems" in her left eye should not have been admitted. This is supported by the fact that the evidence was not specific enough to establish what the problem actually was, when it occurred, how long it occurred, the exact nature of the problem, how it actually affected her vision, or whether it ever reoccurred prior to the subject occurrence. The appellate court concluded that although there was arguably some probative value to the evidence, its import was substantially outweighed by its prejudicial effect on the jury and was not adequately tied in with expert testimony as required by *Voykin*). It is important to remember that simply because

the evidence might be "relevant" doesn't mean it will necessarily be admitted.

The aforementioned issues must be very carefully considered and addressed in limine by plaintiff's counsel in the presentation of his or her case to a jury when confronted with a similar or identical prior or subsequent injury to the same part of the body and/or a claim of permanency is being maintained. If these issues are not well thought out and addressed in advance, it could spell disaster in front of a jury.

Editor's note: *For more information on* Voykin, *check out the March 2004 issue of the Illinois Bar Journal.*

Premises owner's liability for third-party criminal acts in situations involving a voluntary undertaking to protect

By Sam Kavathas of Kavathas & Castanes, Chicago

Generally, a landowner does not have a legal duty to protect others from the criminal acts of third parties on its property, unless a "special relationship" exists. *Rowe v. State Bank*, 125 Ill.2d at 215-16, 126 Ill.Dec. 519, 531 N.E.2d 1358 (1988); *Hills v. Bridgewie Little League Assoc.*, 195 Ill.2d 210,228-29,745 N.E.2d 1166, 253 Ill.2d 632 (2000). There are four "special relationships" recognized under Illinois: (1) carrier-passenger; (2) innkeeper-guest; (3) business inviter-invitee; and (4) custodian-ward. *Osborne v. Stages Music Hall, Inc.*, 312 Ill.App.3d 141, 147, 244 Ill.Dec. 753, 726 N.E.2d 728 (1st Dist. 2000), *Rowe* at 215-216. However, even where a special relationship exists, a plaintiff must also show that the criminal attack was reasonably foreseeable. *Rowe* at 215-216. In addition, whether a duty exists will depend upon a consideration of the likelihood of injury, the magnitude of the burden to guard against it, and the consequences of placing that burden upon the defendant. *Rowe* at 227-228. It is essential that the incident is not just foreseeable, but reasonably foreseeable. It must be objectively reasonable to expect not merely what might conceive or occur. *Hill v. Charlie Club*, Inc., 279 Ill.App.3d 754 665 N.E.2d 321 (1st Dist. 1996). The Supreme Court in *Hill* discusses how the business inviter-invitee relationship is specifically addressed by section 344 of the Restatement. In summary, the business invitee may be found liable if the injury is caused by accidental, negligent or intentional acts of third persons, if the owner could have discovered that such acts were being carried out or were likely to occur. The landowner must either protect the invitee against the harm or warn of the potential harm. Section 344 may be helpful when you wish to file a negligence action along with a dram shop, where your client is an innocent bystander. You won't be limited by the dram shop limits in a negligence action. See *Shortall v. Hawkeye's Bar & Grill* 283 Ill.App.3d. 439, 670 N.E.2d 768, 219 Ill. Dec. 90 (1996).

As an alternative pleading you may wish to also allege a voluntary undertaking in your complaint. A defendant that voluntarily undertakes a legal duty to protect its invitees may be found liable if it negligently performs the undertaking. Whether a defendant voluntarily undertook a legal duty to a plaintiff is a question of law that must be determined by the court. *Chelkova v. Southland Corp.*, 331 Ill.App.3d 716, 719 771 N.E.2d 1100, 265 Ill. Dec. 141 (2002). In reviewing liability under a theory of voluntary undertaking, our Supreme Court adopted section 324A of the Restatement (Second) of Torts, which provides:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." *Vesey v. Chicago Housing Authority*, 145, Ill.2d at 415-16 583 N.E.2d 538, 164

Tort Trends

Published at least four times per year.

Annual subscription rate for ISBA members: $20.

To subscribe, visit www.isba.org or call (217) 525-1760

OFFICE
Illinois Bar Center
424 S. 2nd Street
Springfield, IL 62701
Phones: (217) 525-1760
OR 800-252-8908

Web site: www.isba.org

Editors
John L. Nisivaco
10 S. LaSalle, Suite 2102
Chicago, 60603

Managing Editor/Production
Katie Underwood

POSTMASTER: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.