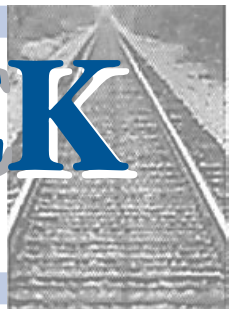
BACK ON TRACK



Shapiro, Cooper & Lewis NEWSLETTER

SPRING 2006

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Turning down a lowball insurance company offer and winning in the end

By John Cooper, HSCL attorney

I recently attained a super result in an automobile wreck case in the Norfolk Circuit Court, Virginia. My client was involved in a low-speed, low-property-damage rear-end collision. She also had preexisting conditions in her back and fibromyalgia. I was thrilled when the jury came back with a verdict of $25,000, plus interest. Twenty-five thousand dollars was the maximum available insurance coverage for the accident.

The insurance company tried to lowball us by offering only $5,000 before trial. They were going to introduce pictures of the back of my client's car showing minimal property damage. I moved the court to try to get the judge to exclude the photographs as irrelevant because the amount of property damage does not indicate how much injury there was to the passengers. However, the court let the pictures in, as was expected.

Luckily for me and the client, her husband is an auto mechanic. After the crash, he looked at the vehicle up on a lift at his shop. He came in and testified that there was some slight frame damage

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Federal Railroad Safety Act or Federal Snuff-Out Act?

By Rick Shapiro, HSCL editor

A Canadian Pacific Railway train derailed in January 2002 near Minot, North Dakota, spewing anhydrous ammonia from tanker cars, causing extensive property damage and hundreds of personal injuries. First, the federal district court certified a class action. The court lowered the boom later. On March 6, 2006, the North Dakota U.S. District Court threw out every count of a plaintiff's class action (D. N.D), finding that "preemption" under the Federal Railroad Safety Act barred all such claims. The court reasoned that since there was a federal rail safety law that promotes "uniform rail safety," it means that no state or federal law negligence arguments (including violations of that Act!) can be brought against railroads. I submit that the judge got lost in his own analysis. The

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In Memoriam—

David Hurt passed away in early 2006 as a result of illness. We sorely miss David, as he worked with our firm for many years as an investigator who drew on his extensive railroad experience to analyze accidents. He retired from Norfolk & Western Railway Co. in 1987 after many years working as a machine helper, machine operator, gang foreman, and section foreman before working for our firm part-time and then full-time as an investigator. David made friends everywhere he travelled and was a special friend to us at HSCL, as well as to our many clients and friends who had the privilege to know him. If you are seeking any further information about David, please contact our home office.

Turning down a lowball insurance company offer and winning in the end

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(unibody damage) to the vehicle. We convinced the judge to allow him to testify as to what his estimate of the minimum impact speed would have been given that frame damage.

This forced the defense attorney to put on a Progressive Insurance Company appraiser, who claimed there was no frame damage. That was a big mistake! I got my chance to cross-examine the young appraiser, showing that he worked for the very same insurance company that was defending this case and would have to pay any judgment.

Normally, the jury is not told anything about insurance. Although the jury instruction of the court tells the jury not to factor in the insurance or lack of any, obviously it makes a difference to the jurors. Most juries know that there probably is automobile insurance or we would not be there to begin with. However, it was the most fun I have had in trial in a long time, being able to expressly say the name of the insurance company and point to the defense attorney and say he works for them.

Another tough issue in this case, which comes up a lot, was that the defendant hired an expert doctor to refute what the plaintiff's treating doctor said. In this case, as in many other automobile wreck cases, they had only a doctor who did a medical records review. This means that the doctor simply looked at the medical records, but never really met the patient. The defendant's doctor had about the same credentials as the plaintiff's doctor, but said there was nothing wrong with the plaintiff that wasn't already there before the car wreck. In fact, in this case, the client had been to the doctor to get treatment for her fibromyalgia and for another injury within a month before the accident in question. However, after carefully discussing the facts with her doctor, her doctor's deposition came across fairly well when he explained that the car crash exacerbated her condition. He talked about having to change her medications, having to treat her more frequently, and about some objective symptoms that she had, such as spasms.

The defense doctor said that she only needed to go to the emergency room. I was able to show that he was a hired gun by comparing what he knew and his role to that of the treating doctor. I showed that he not only had never met the injured plaintiff, but that he also disagreed with other health-care providers, including the physical therapist and the emergency room doctor. After the trial, the judge told me that he thought I had done a pretty good job of proving that the defense doctor was not "independent" like they claimed, but was instead biased.

After the trial, the client was very happy. I was glad that we were able to get her justice. She will be able to pay all her bills and still have fair compensation. This was a case that many other attorneys might not have been willing to take on. It was one of those days that it felt good to be a plaintiff's injury lawyer.

CIVIL JUSTICE

Our nation's civil justice, or tort, system holds corporations and citizens accountable when their behavior fails to meet society's expectations of treating each other with respect and care. Those who call for so-called "tort reform" want only to eliminate that kind of accountability, most often to benefit large companies and their CEOs.

Our practice supports America's civil justice system as a fundamental check on the power of businesses and governments, and we oppose all efforts to limit the legal rights of citizens.

Although tort-reform proponents claim our justice system is rife with "junk lawsuits" and out-of-control juries that render wildly high monetary verdicts, many authoritative studies have shown that exactly the opposite is the case.

Here is what an August 2005 report issued by the U.S. Department of Justice's Bureau of Justice Statistics showed about the number of civil cases resolved in U.S. district courts in the past 20 years:

- The total number of civil justice cases dropped 79 percent between 1985 and 2003.
- In 1985, judges or juries rendered verdicts in 3,600 civil justice trials. By 2003, the number had dropped to fewer than 800 trials.
- The number of civil justice cases decided by judges or juries—as a percentage of all civil justice cases—fell from ten percent in 1970 to two percent in 2003.
- In the fiscal years of 2002 and 2003, 98 percent of personal injury cases were resolved by mediation, settled out of court, or handled in some other way that avoided trials, judges, or juries. Only two percent of all cases required trials to be resolved.
- Product liability claims made up 13 percent of all cases, and medical malpractice claims accounted for only 10 percent of cases. Fair-minded juries decided 73 percent of all personal injury trials.
- Nonasbestos product liability trials decreased by two-thirds between 1990 and 2003, from 279 to 87. Plaintiffs won in only one in three cases.
- Punitive damages tend to be awarded less and less frequently in civil justice trials.

Federal Railroad Safety Act or Federal Snuff-Out Act?

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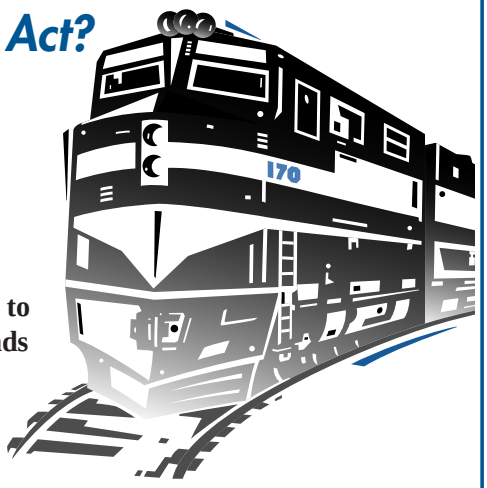

Act was enacted to promote rail safety, not let railroads hide behind the Act, with less accountability.

The Federal case is called *Mehl, et al v. Canadian Pacific Railway, Ltd.* The North Dakota press is in an uproar.

One article entitled **"Federal Act Must Be Changed"** stated:

Somewhere today, there should be lawmakers frantically writing new legislation to fix the Federal Railroad Safety Act of 1970. The Act needs to be changed so railroads can no longer hide behind it in a court of law.

U.S. District Judge Daniel Hovland cited the act, which makes the railroad immune from legal action, when he dismissed a class-action lawsuit brought against Canadian Pacific Railway by Minot residents who suffered injuries following the 2002 derailment and release of deadly anhydrous ammonia on Minot's west edge.

Even the judge didn't think it was fair.

Hovland said the federal legislation "closes every available door and remedy for injured parties."

The *Minot Daily News* added:

"It's doubtful the Act was intended to let railroads simply—and legally—walk away from their responsibility after disasters like the Minot derailment. There must be a way for citizens to seek compensation for injuries they have suffered from railroad accidents. We expect changes, and we expect the names of Kent Conrad, Byron Dorgan, and Earl Pomeroy to be all over the legislation. The fact that this federal act even still exists—giving Canadian Pacific Railway a legal way to shirk its responsibility—is nothing short of shameful."

Some of the significant parts of the judge's opinion are set out below:

"While the court is convinced the dismissal of plaintiffs' claims is inevitable under the current state of federal law in the Eighth Circuit, this Court recognizes that such a result is unduly harsh and leaves the plaintiffs with essentially no remedy for this tragic accident.... By pervasively legislating the field of railroad safety, Congress demonstrated its intent to create uniform national standards and to preempt state regulation of railroads....

The Federal Railroad Safety Act passed by Congress in 1970 has ensured national uniformity of railroad safety regulations, but it has also absolved railroads from any common law liability for failure to comply with the safety regulations. It is clear that Congress determined that there was a need for national uniformity and a need to adopt standard federal regulations to protect the public rather than allow for varied and inconsistent state law remedies. State law claims have been preempted by federal law. While the Federal Railroad Safety Act does provide for civil penalties to be imposed on noncompliant railroads, the legislation fails to provide any method to make injured parties whole and, in fact, closes every available door and remedy for injured parties. As a result, the judicial system is left with a law that is inherently unfair to innocent bystanders and property owners who may be injured by the negligent actions of railroad companies."

In conclusion, this case turns the Federal Railroad Safety Act upside down—instead of the court utilizing the Act to **enforce** rail safety, it uses the mere existence of the Act to wipe out any injured victim's injury or death claim for violations of the Act.

Many courts have ruled that violations of the Act may constitute negligence. Here, the court barred the plaintiffs from even proving any violation based on the mere existence of the Federal Railroad Safety Act. That is an absurd result not intended by passage of the Act. Some Congressmen (especially those in North Dakota!) are now discussing legislative amendments to make clear the Act does not preempt all potential injury suits if a victim can prove negligence or a violation of the Act itself.

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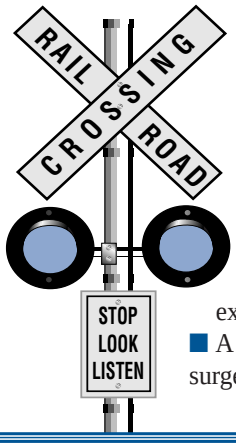
RECENT RAIL SETTLEMENTS

■ A railroad engineer injured his wrist escaping from sudden locomotive engine fire. After surgery, he could not return to work, which amounted to significant lost wages. The case settled for $700,000.

■ Two long-term rail workers injured when rail equipment strikes their on-track vehicle. Both workers suffered physical injuries, causing them to be medically disabled from their jobs. Each case settled for substantial six-figure settlements that are confidential.



CASES IN PROGRESS

■ Crew members were injured in a head-on collision of trains operated by the same railroad. Dispatch errors are the key liability factor.

■ A conductor was injured in a locomotive when a vehicle blocked the crossing, causing his injuries.

■ An engineer and conductor were injured in a locomotive when a trucker blocked a crossing, resulting in a collision and damages.

■ A railroad conductor was hurt in a motor vehicle wreck while operating his personal vehicle.

■ A track maintenance worker with a long career was required to undergo carpal tunnel syndrome surgery on his wrists, alleging that the railroad failed to warn and protect him against repetitive stress at work, causing loss of his career and permanent injuries.

■ Several long-term railroad workers suffering various lung disorders, ranging from asbestos/rock to dust/diesel exhaust fumes, are alleging occupational exposure at work that caused loss of ability to work and permanent damages.

■ A railroad worker was injured operating a "derail" track appliance, causing back surgeries and loss of career, and is alleging improper maintenance.

iPOD NANO CONTEST

Last edition, we introduced a new, **free** service to our newsletter recipients—the HSCL "Safer World" client newsfeed service. I went online, followed the link, and set it up in seconds. I read the newsfeed reader almost every day—it is fabulous for current health, railroad, and daily news.

Instead of our usual trivia question and free magazine subscription, we are now offering **TWO NEW iPOD NANOS FREE TO READERS WHO SIGN UP FOR OUR CLIENT NEWSFEED.**

We will pick the winners randomly from a drawing of all newsfeed sign-ups in the first 30 days after this newsletter is delivered (random drawing of the e-mail addresses of the persons downloading the free service). We will announce the lucky winners in our next edition. All you need to do to qualify is follow the link below and sign up for the great service!

Safer World HSCL NEWSFEED
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