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The Development of Qualified Immunity, How It Has Shielded Unprecedented Police Misconduct, and What Lies Ahead

BY VALERIE BRUMMEL

The recent death of George Floyd in the custody of the Minneapolis Police Department has sparked grief and outrage nationwide. While much of the discussion in the wake of Floyd's death has concerned ***criminal*** liability for the responsible police officers[1]—and rightfully so—the tragic incident has also sparked renewed advocacy for changes to laws that hinder the ability of victims of police misconduct to recover damages in civil lawsuits: most notably, the doctrine of qualified immunity.[2]

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The Right of Confrontation: A Concept for the Ages

BY HON. JESSE G. REYES

The Coronavirus pandemic has without question impacted the way we personally interact with one another. Social distancing is the new norm. Greetings by way of handshakes or hugs is a thing of the past. Wearing a mask out in public is now socially acceptable. Our institutions have also been affected as many of our campuses and churches still remain closed. As a result of this crisis, even our nation's halls of justice are devoid of people. Trials in many states have been cancelled or continued until further notice.

As there is no way of knowing how long this pandemic will be with us, some jurisdictions are seeking to implement non-traditional means of providing justice.

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The Development of Qualified Immunity, How It Has Shielded Unprecedented Police Misconduct, and What Lies Ahead

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Qualified immunity has long operated to "protect[] government officials from liability for civil damages insofar as their conduct does not violate ***clearly established*** statutory or constitutional rights of which a reasonable person would have known."[3] In the words of the Supreme Court, the doctrine "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[4] As a near-automatic response to any civil rights suit, defendant police officers invoke the doctrine, because it "protects all but the plainly incompetent or those who knowingly violate the law."[5]

The requirement that a plaintiff in a civil rights case must prove that his or her constitutional rights were "clearly established" allows defendant police officers to argue that regardless of how offensive or dangerous their conduct, they must be shielded from liability because no precedent outlaws their specific conduct. This article reviews the origins of qualified immunity, summarizes the Supreme Court's recent applications of the doctrine, collects examples of cases in the Seventh Circuit and Northern District of Illinois that illustrate how qualified immunity has protected defendant police officers who have engaged in unprecedented police misconduct, and examines developments we might still see in 2020.

Origins of Qualified Immunity (*Pierson v. Ray*)

The Supreme Court created the qualified immunity doctrine in 1967 through its decision in *Pierson v. Ray*.[6] In *Pierson*, police officers had arrested the plaintiffs, fifteen white and black clergymen who attempted to use segregated facilities at an interstate bus terminal in Jackson, Mississippi.[7] The plaintiffs were charged with violating Mississippi state law criminalizing "congregat[ing] with others in a public place under circumstances such that a breach of the peace may be occasioned thereby, and refus[ing] to move on when ordered to do so by a police officer."[8]

After the state dropped the charges, the plaintiffs sued the arresting officers for false arrest and imprisonment. One of the defendant officers argued that "his actions were judicial and he was immune from any civil liability."[9] The Supreme Court clarified that "[t]he common law has never granted police officers an absolute and unqualified immunity."[10] Rather, the Court explained that police officers are protected by a ***qualified*** immunity, because "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[11] The Court provided the example that qualified immunity would "excus[e the police officer] from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied."[12] In this way, the doctrine of qualified immunity was born.

Recent Supreme Court Applications of Qualified Immunity

The Supreme Court's recent opinions about qualified immunity demonstrate that plaintiffs must meet a demanding standard to prove that the defendant police officers violated their clearly established constitutional rights.

In *Kisela v. Hughes*,[13] the plaintiff brought an excessive force claim after she was shot by police officers. The defendant officers had arrived on the scene in response to reports that a woman was "hacking a tree with a kitchen knife."[14] Seeing the plaintiff carrying a large knife at her side, the officers told her twice to drop the knife. When she did not comply, the officers shot her four times.

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The district court granted summary judgment to the defendants, applying qualified immunity. The Ninth Circuit reversed, finding "the constitutional violation was obvious" based on "analogous" precedent.[15] In its review, the Supreme Court sided with the district court, finding that "not one of the decisions relied on by the Court of Appeals supports denying [the officers] qualified immunity."[16] Distinguishing *Deorle v. Rutherford*,[17] the Court observed that "*Deorle* involved a police officer who shot an unarmed man in the face."[18] Likewise distinguishing *Harris v. Roderick*,[19] the Court stated that *Harris* dealt with the actions of an FBI sniper who shot a retreating man during the Ruby Ridge standoff, and found that "a reasonable police officer could miss the connection between the situation confronting the sniper at Ruby Ridge and the situation confronting [the officers]."[20]

In a scathing dissent, Justice Sotomayor, joined by Justice Ginsburg, condemned the majority for sending "an alarming signal to law enforcement officers and the public … that [officers] can shoot first and think later [and] palpably unreasonable conduct will go unpunished."[21] Justice Sotomayor first criticized the majority opinion for sidestepping entirely any inquiry into the reasonableness of the officers' conduct.[22] She then outlined a long history of cases—including *Deorle* and *Harris*—that "make clear that a police officer may only deploy deadly force against an individual if the officer has probable cause to believe that the person poses a threat of serious physical harm, either to the officer or to others."[23] Applying that clearly established standard to the facts at hand, Justice Sotomayor concluded that the officers acted unreasonably in shooting the plaintiff, "who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter."[24] Finally, Justice Sotomayor asserted that the majority's holding "rests on a faulty premise: that [the cases cited by the Ninth Circuit] are not identical to this one." *Id.* According to Justice Sotomayor, "that is not the law, for ***our cases have never required a factually identical case*** to satisfy the 'clearly established' standard."[25]

The following year, the Supreme Court again reversed the Ninth Circuit's refusal to apply qualified immunity. In *City of Escondido, California v. Emmons*,[26] the plaintiff alleged that the defendant police officers used excessive force against him. The officers had responded to a 911 call reporting a domestic disturbance at a married couple's apartment. After the officers knocked on the door, no one responded. A few moments later, the plaintiff opened the door and came outside. One of the officers, Robert Craig, told the plaintiff not to close the door, but he did so anyway then tried to walk past the officers. Craig stopped the plaintiff, quickly took him to the ground,[27] and handcuffed him. The officers then placed him under arrest for "resisting and delaying a police officer."[28] Eventually, the officers learned that the plaintiff was the resident's father, not her husband.

The district court granted summary judgment based on qualified immunity, finding the law "did not clearly establish that Officer Craig could not take down an arrestee in these circumstances."[29] The Ninth Circuit reversed and remanded for trial stating, "The right to be free of excessive force was clearly established at the time of the events in question."[30] The Ninth Circuit pointed to *Gravelet-Blondin v. Shelton*, which held based on abundant case law that the "failure to fully or immediately comply with an officer's orders" does not "justif[y] the application of a non-trivial amount of force."[31]

In a *per curiam* opinion, the Supreme Court reversed, holding, "Under our cases, the clearly established right must be ***defined with specificity.***"[32] The Court continued:

Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent ***squarely governs the specific facts at issue***.[33]

Criticizing the Ninth Circuit, the Court found that it was not enough to cite a single case (*Shelton*) that "described the right to be free from the application of non-trivial force for engaging in mere passive resistance."[34] Instead, "the Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in ***these circumstances***."[35] While the Court left open the possibility of "the rare obvious case, where the unlawfulness of the officers' conduct is sufficiently clear even though existing precedent does not address similar circumstances," it ultimately concluded that "***a body of relevant case law*** is usually necessary to clearly establish the answer."[36]

Kisela and *Emmons* require plaintiffs to present a multitude of cases nearly identical to their own to avoid the application of qualified immunity. However, this requirement creates a paradox given the Supreme Court has also held that courts need not examine whether the defendant violated the plaintiff's constitutional rights before finding that the right was not clearly established. In *Pearson v. Callahan*,[37] the Supreme Court receded from its prior decision in *Saucier v. Katz*:[38] whereas *Saucier* required courts to ***first*** decide whether a constitutional violation occurred ***then*** decide whether the law was clearly established, *Pearson* gave lower courts discretion to skip the first prong altogether. While the Court acknowledged that *Saucier*'s procedure "promotes the development of constitutional precedent," it concluded that the benefit was outweighed by "a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case," and the "risk of bad decisionmaking [when] the briefing of constitutional questions is woefully inadequate."[39]

Lower courts thus have the Supreme Court's express permission to simply dispose of civil rights claims on qualified immunity grounds without creating precedent that dissuades police officers from engaging in the same conduct or allows recovery in the future. Together, *Kisela*, *Emmons*, and *Pearson* ensure that police officers can continue to use the excuse that they had no reason to believe their conduct violated clearly established constitutional law.

Application of Qualified Immunity in the Seventh Circuit and Illinois Federal Courts

Consistent with *Kisela* and *Emmons*, the Seventh Circuit and district courts in the Northern District of Illinois routinely have applied qualified immunity to shield defendant police officers from liability because the plaintiff failed to present any prior cases with substantially identical facts. Consider the following examples:

Mason-Funk v. City of Neenah:[40] the plaintiff, a hostage victim, managed to escape, run to his car, and retrieve a handgun, which he held at his side in a lowered position. The defendant police officers responding to the scene saw the plaintiff, mistook him for the hostage-taker, and shot him without warning. Applying qualified immunity to shield the police officers, the Seventh Circuit stated, "No existing precedent squarely governs the facts and circumstances that confronted [the officers]. Consequently, the officers were not on notice that their use of deadly force on an armed individual, without warning in a dangerous and chaotic hostage situation, violated any clearly established right. Funk fails to cite to any precedent … which involved a hostage situation."[41]

Brown v. Morsi:[42] the plaintiff was driving her car down the alley behind her home in Chicago with her two children (ages eight and one) in the backseat when she encountered the defendant police officers' squad car. After the officers told her, "B-tch, move that f-cking car back," pointed their guns at her, and opened her car door, the plaintiff fled, reversing her car down the alley back into the street. As she slowed to a stop, the officers intentionally hit the plaintiff's car with their squad car. The officers admitted that at the time, they knew the plaintiff's children were in the backseat. While the court acknowledged that the officers "may have violated Plaintiff's Fourth Amendment rights," it held that they were protected by qualified immunity.[43] The court characterized plaintiff's alleged constitutional violation as "a brief, moderately-paced pursuit of Plaintiff … [followed by a] colli[sion]—at moderate speed, and without setting off either car's airbags—with Plaintiff's car," and found that "[n]o precedent squarely governs these facts."[44] The court disregarded the plaintiff's citations to Supreme Court precedent addressing an "extremely dangerous high-speed chase" and out-of-circuit precedent addressing "intentional collisions by police vehicles … where the suspect fled on a motorcycle or bicycle—facts clearly distinct from a two-car collision."[45]

Carlson v. Mordt:[46] the defendant police officers went to the plaintiff's house with an arrest warrant based on an unpaid fine for driving under the influence of alcohol. After learning that the plaintiff previously had been arrested for domestic battery and assault, the police officers brought a dog that "had been trained to 'bite and hold' to apprehend a person, and releases [*sic*] the person only on command."[47] When the officers arrived at the plaintiff's home, he hid in the attic. The officers announced that the dog would be sent into the attic and released the dog, who found the plaintiff and bit his arm. The officers then forced the plaintiff to lie face down on the floor and handcuffed his hands behind his back. Suddenly, the dog attacked the restrained plaintiff again, biting his buttocks and legs. The officers next to the plaintiff backed away, and the attack continued until a dog belonging to the plaintiff's co-resident attacked the police dog. The court held that qualified immunity shielded the officers from the plaintiff's excessive force claim because he did "not come forward with any cases establishing the unlawfulness of using a police dog to effect an arrest when the intended arrestee has a history of arrests for assaultive crimes, has hidden from the police in a location that would provide a strategic advantage to him against the police, and where the police have informed him that they were using a dog to search for him."[48]

As these cases illustrate, the Seventh Circuit and district courts in the Northern District of Illinois have expansively applied the doctrine of qualified immunity to shield police officers from civil liability if the plaintiff cannot identify case law clearly establishing that the defendants' conduct, under substantially identical circumstances, violated his or her constitutional rights.

Possible Reform in 2020

On June 4, 2020, in response to the "brutal killing of George Floyd by Minneapolis police" and "a long line of incidents of egregious police misconduct," United States Representatives Justin Amash of Michigan and Ayanna Pressley of Massachusetts introduced the Ending Qualified Immunity Act.[49] The bill proposes an addition to 42 U.S.C. § 1983 stating:

> It shall not be a defense or immunity to any action brought under this section that the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when it was committed. Nor shall it be a defense or immunity that the rights, privileges, or immunities secured by the Constitution or laws were not clearly established at the time of their deprivation by the defendant, or that the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.[50]

Senators Kamala Harris of California, Edward J. Markey of Massachusetts, and Cory Booker of New Jersey are pursuing similar measures.[51]

The push for legislative reform may have been motivated by—in addition to George Floyd's death—the Supreme Court's silence. On May 18, 2020, the Supreme Court denied three petitions for writ of certiorari relating to the doctrine of qualified immunity. Among them was the Ninth Circuit case of *Jessop v. Fresno*.[52] Perhaps chastened by the Supreme Court's reversals in *Kisela* and *Emmons*, the Ninth Circuit held that police officers who stole $225,000 worth of property were protected by qualified immunity because there was no clearly established law holding that the Fourth or Fourteenth Amendments prohibit officers from stealing property seized pursuant to a warrant.[53] While the court noted that case law "suggests that the City Officers' alleged theft of Appellant's property could [] implicate the Fourth Amendment," it concluded that the facts of those preceding cases "vary in legally significant ways from those in this case."[54] Ultimately, the Ninth Circuit held that "[a]lthough the City Officers ought to have recognized that the alleged theft of Appellants' money and rare coins was morally wrong, they did not have clear notice that it violated the Fourth Amendment—

which, as noted, is a different question."[55]

Jessop is a chilling consequence of *Kisela* and *Emmons*. If a police officer's theft of property seized pursuant to a warrant is not a clearly established constitutional violation because no previous case has so held, the doctrine of qualified immunity seems virtually limitless. But, as Justice Sotomayor observed in her dissent in *Kisela*, the Supreme Court's application of qualified immunity was not always so obsessed with factually identical precedent. In *Hope v. Pelzer*,[56] for example, the Court clarified that "officials can be on notice that their conduct violates established law even in novel factual situations." At issue in *Hope* was the horrifying and inhumane treatment of a state prisoner, who was handcuffed to a hitching post in the hot sun and taunted by the defendant prison guards. Rejecting the defendants' invocation of qualified immunity based on a "lack of federal law by which the guards' conduct should be evaluated," the Court instructed that the "salient question … is whether the state of law … gave [the defendants] ***fair warning*** that [their conduct] was unconstitutional."[57] The Court concluded that the "obvious cruelty inherent in the practice should have provided [the defendants] with ***some notice*** that their conduct was unconstitutional."[58] The Court also relied on binding Circuit precedent outlawing "several forms of corporal punishment" and "physical abuse."[59]

The standard in *Hope* seems to strike the proper balance: the focus is on whether the officers in question should have understood that their conduct violated the plaintiff's constitutional rights, rather than the existence of case law addressing substantially identical conduct. At times, officers must make split-second decisions under high-pressure circumstances. It would be unjust to hold them liable for decisions that are mistaken in hindsight, but not so clearly wrong that the officer should have known his conduct was unconstitutional. The proposed Ending Qualified Immunity Act, for example, goes too far by eliminating any protection for police officers who could not reasonably have been expected to know their conduct was unlawful. But it is also unjust to require plaintiffs to identify prior cases with substantially identical facts as a prerequisite to recovering civil damages.

As of June 1, 2020, the Supreme Court is still considering ten cert petitions relating to qualified immunity. Hopefully, the Court will take the opportunity to review one or more of these cases and modify the doctrine before Congress eliminates it altogether. A retreat from *Kisela* and *Emmons* back towards the fair warning standard set forth in *Hope* will increase the likelihood that civil rights victims obtain fair compensation for their suffering. More to the point, such a paring back of qualified immunity might give police officers pause before violating the Constitution and prevent even unprecedented police misconduct, while limiting the liability of those who reasonably believed their conduct was lawful.■

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1. At the time of this article's publication, Derek Chauvin, the officer who killed Floyd by kneeling on his neck until he died, has been charged with second-degree unintentional murder, third-degree murder, and second-degree manslaughter. The other officers present at the scene, Tou Thao, Thomas Lane, and J. Alexander Keung, all face charges of aiding and abetting second-degree unintentional murder, as well as aiding and abetting second-degree manslaughter. *George Floyd Death: All Four Former Officers Involved Now Charged, In Custody*, CBS Minnesota, June 3, 2020, https://minnesota.cbslocal.com/2020/06/03/george-floyd-death-derek-chauvins-murder-charge-upgraded-to-2nd-degree-unintentional-murder-3-other-officers-charged.
2. *See, e.g.*, Ian Millhiser, *Why police can violate your constitutional rights and suffer no consequences in court*, Vox, June 3, 2020, https://www.vox.com/2020/6/3/21277104/qualified-immunity-cops-constitution-shaniz-west-supreme-court; Ben Sperry, *How qualified immunity promotes the unreasonable use of force by police officers*, The Hill, June 2, 2020, https://thehill.com/blogs/congress-blog/politics/500673-how-qualified-immunity-promotes-the-unreasonable-use-of-force-by; Debra Cassens Weiss, *Death of George Floyd brings debate on qualified immunity for police misconduct*, ABA Journal, June 2, 2020, https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html; Patrick Jaicomo and Anya Bidwell, *Police act like laws don't apply to them because of 'qualified immunity.' They're right*, USA Today, May 30, 2020, usatoday.com/story/opinion/2020/05/30/police-george-floyd-qualified-immunity-supreme-court-column/5283349002; Editorial Board of the New York Times, *How the Supreme Court Lets Cops Get Away With Murder*, NY Times, May 20, 2020, https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html.
3. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The "clearly established" requirement was created by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
4. *Id.*
5. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).
6. 386 U.S. 547 (1967).
7. *Id.* at 549.
8. *Id.*
9. *Pierson v. Ray*, 352 F.2d 213, 217 (5th Cir. 1965).
10. *Pierson*, 386 U.S. at 555.
11. *Id.*
12. *Id.*
13. 138 S. Ct. 1148 (2018).
14. *Id.* at 1151.
15. *Id.*
16. *Id.* at 1154 (internal citations omitted).
17. 272 F.3d 1272 (9th Cir. 2001).
18. *Id.*
19. 126 F.3d 1189 (9th Cir. 1997).
20. *Id.*
21. *Id.* at 1162.
22. *Id.* at 1158.
23. *Id.*
24. *Id.*
25. *Id.* at 1161 (emphasis added).
26. 139 S. Ct. 500, 501–02 (2019).
27. In other words, Craig executed a takedown. In this context, a takedown is a tactic used by police officers to maneuver an arrestee from a standing position to the lying face down on the ground. The following source provides a description of different takedown techniques and illustrates the level of force required: Michael Schlosser and Dallas Schlosser, *Control Tactics and Counter-Tactics*, Police Mag, Sept. 5, 2017, https://www.policemag.com/342320/control-tactics-and-counter-tactics.
28. *Id.* at 502.
29. *Id.*
30. *Id.*
31. 728 F.3d 1086, 1093 (9th Cir. 2013) (citing *Nelson v. City of Davis*, 685 F.3d 867, 881 (9th Cir. 2012); *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1131 (9th Cir. 2002); *Deorle v. Rutherford*, 272 F.3d 1272, 1282 (9th Cir. 2001)).
32. 139 S. Ct. at 503 (emphasis added) (internal quotations omitted).
33. *Id.* (internal quotations omitted).
34. *Id.*
35. *Id.*
36. *Id.* at 504 (emphasis added) (internal quotations omitted).
37. 555 U.S. at 236.
38. 533 U.S. 193 (2001).
39. *Pearson*, 55 U.S. at 236–37, 239.
40. 895 F.3d 504 (7th Cir. 2018).
41. *Id.* at 510.
42. No. 15-cv-4127, 2018 WL 3141761 (N.D. Ill. June 26, 2018).
43. *Id.* at *8.
44. *Id.* at *7.
45. *Id.* at *8.
46. No. 00-cv-50252, 2002 WL 1160115 (N.D. Ill. May 29, 2002).
47. *Id.* at *1.
48. *Id.* at *4.
49. Adam M. Taylor and Jordan S. Rubin, *Police Officers' 'Qualified Immunity' Targeted by House Bill*, Bloomberg Law, June 4, 2020, https://news.bloomberglaw.com/white-collar-and-crimina-law/police-officers-qualified-immunity-targeted-by-house-bill.
50. *A Bill to amend the Revised Statutes to remove the defense of qualified immunity in the case of any action under section 1979, and for other purposes*, https://pressley.house.gov/sites/pressley.house.gov/files/Ending%20Qualified%20Immunity%20Act_0.pdf.
51. *Harris, Markey, Booker Introduce Senate Resolution to Abolish Qualified Immunity for Law Enforcement, Hold Officers Accountable for Police Brtality*, Kamala D. Harris, June 3, 2020 https://www.harris.senate.gov/news/press-releases/harris-markey-booker-introduce-senate-resolution-to-abolish-qualified-immunity-for-law-enforcement-hold-officers-accountable-for-police-brutality#:~:text=%E2%80%9CIt%20is%20clear%20that%20the,sworn%20to%20protect%2C%20period.%E2%80%9D&text=We%20must%20act%20now%20and%20end%20qualified%20immunity%20once%20and%20for%20all.
52. 936 F.3d 937 (9th Cir. 2019).
53. *Id.* at 942.
54. *Id.* at 941.
55. *Id.* at 942.
56. 536 U.S. 730, 731 (2002).
57. *Id.* (emphasis added).
58. *Id.* at 732 (emphasis added).
59. *Id.*

The Right of Confrontation: A Concept for the Ages

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Instead of appearing in courtrooms, litigants will be now be appearing on video conference screens. The question then becomes in this new normal, can trials be constitutionally conducted over remote video conferencing platforms where the participants will not be face-to-face? Will an accused's sixth amendment constitutional rights be violated if the accuser's testimony is presented via video conference instead of in person?

Sixth Amendment (U.S. Constitution)

In order to properly examine these questions, we first look to the language of the Sixth Amendment and its history. The Sixth Amendment Confrontation Clause states, "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him..."[1] The Sixth Amendment guarantees a number of rights which are designed to make criminal prosecutions more accurate, fair, and legitimate. The Confrontation Clause was intended to prevent a conviction upon evidence without providing the defendant an opportunity to face his or her accusers and delve into their honesty and truthfulness.

History of the Confrontation Clause

There is no legislative history on the Sixth Amendment's Confrontation Clause[2] as it was, in fact, included and passed by Congress without a floor debate. However, in order to discern the true meaning of the clause, the United States Supreme Court has looked to history, specifically English jurisprudence.[3] In the 1600's, a defendant's demand that the witnesses be brought to face them in court was rarely, if ever, granted. Indeed, it was commonplace for the English courts at that time to allow out-of-court statements to be used as evidence at trial.

A classic example of this scenario was the treason trial of Sir Walter Raleigh.[4]

"It was to Winchester, in 1603, just after that city had been desolated by the Plague, that Walter Raleigh was brought down from the Tower of London… to be arraigned for high treason. Throughout the trial he defended himself with a brave spirit, rather showing love of life than fear of death, and with noble eloquence, in replying to the insults of Coke, the king's Attorney, and a splendid dignity which no insult could for a moment ruttle."[5]

At the trial, one of the most damaging pieces of evidence against Raleigh consisted of a sworn "confession" by Lord Cobham, Raleigh's alleged co-conspirator in the plot to kill the king. Raleigh protested the introduction of this evidence: "But it is strange to see how you press me still with my Lord Cobham, and yet will not produce him…let Cobham be here, let him speak it. Call my accuser before my face." Cobham was never brought forth and the jury convicted Raleigh.[6] Some legal scholars[7] mark the denial of Raleigh's request as the point in history from which the English common law right to confront witnesses gained recognition.[8]

Our Present-Day Right to Confront Adverse Witnesses

In reference to the confrontation clause, the United States Supreme Court has held that this overarching right of confrontation encompasses two underlying protections: (1) the right to a face-to-face confrontation of adverse witnesses[9] and (2) the right to cross-examine adverse witnesses.[10] In *Coy v. Iowa*,[11] the Court described "the irreducible literal meaning of the Clause" as "the right to meet face to face all those who appear and give evidence at trial."[12] Just two years later in *Maryland v. Craig*,[13] the Court declared that "although face-to-face confrontation forms the core of the values furthered by the Confrontation Clause,…it is not the sine qua non of the confrontation right."[14] They noted, "We have never held… the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial."[15] The central concern of the Clause is "to ensure the reliability of the evidence against a criminal defendant."[16]

The Confrontation Clause of the Illinois Constitution

This concern observed by the Court in *Craig* extends to state matters through the fourteenth amendment.[17] Indeed, our Illinois confrontation clause was amended on November 8, 1994, to remove the "face-to-face" language it previously contained and to conform this state's confrontation clause to that of the Sixth Amendment of the United States Constitution. Our state constitution now provides, "In criminal prosecutions, the accused shall have the right…to be confronted with the witnesses against him or her..."[18]

Providing Access to Justice through Video Conferencing

As we have seen, the landscape of the American criminal justice system has changed considerably throughout the centuries, which has required our courts to examine how old rights apply to new procedures.

With the history and jurisprudence of the Sixth Amendment in mind, the discussion will now turn to the implications the present-day pandemic continues to have on the confrontation clause. With the understanding of the importance of ensuring stability in our judicial system, on May 26, 2020, effective immediately, the Illinois Supreme Court announced the repeal of Illinois Supreme Court Rule 185 and the creation of new Rule 45, as well as amendments to Rule 46 and Rule 241. These rules all relate to the use of remote hearings via telephone or video conferencing in the courts and the official recording of these court proceedings.

Testimony through video conferencing provides the intangible benefit of placing the witness effectively in the same room, albeit on the same screen, as the defendant. It also provides the opportunity to place the witness under oath. This setting provides judges and lawyers an opportunity to

simultaneously observe and listen to the testimony of a live witness thereby judging the witness' demeanor and credibility during a real-time transmission. It also allows the witness to not only see the defendant, but to see the judge and the lawyers as well. Documents and other exhibits can also be viewed by the parties while video conferencing on the same screen.

Video Conferencing Held Constitutional

In *United States v. Gigante,*[19] the second circuit held that the Confrontation Clause was not violated where the trial court allowed an unavailable ill witness enrolled in the Witness Protection Program to testify via a two-way video conference stream. The Second Circuit affirmance was based on the fact that the video conference procedure implemented by the trial court preserved all the constitutional factors of in-court testimony. The witness in *Gigante* was placed under oath and subjected to cross-examination. The testimony was also presented in full view of the jury, court and defense counsel. Lastly, and more importantly his testimony was relayed right in front of the defendant. In fact, while the Court still applied many of the reliability factors used in *Craig,* the Court did not find it necessary to apply the full *Craig* test because the video conference technology provided "face-to-face" confrontation. Unlike in Sir Raleigh's trial, here the co-conspirator was brought before the accused. It should be noted while the *Gigante* court chose not to follow the *Craig* test *per se* the prudent path might be to follow the precedent set by *Craig.*

Video Conferencing Found Not Constitutional

The Sixth Circuit has had the opportunity to consider the impact of the confrontation clause within the environment of video conferencing. In *Wilkins v. Timmerman-Cooper,*[20] the Sixth Circuit found that the defendant stated sufficient facts to survive a motion to dismiss his constitutional claim when he alleged that during his video conference parole revocation hearing the "video camera was positioned in such a way as to prevent him and his counsel from making eye contact with the witnesses, and the hearing officer from observing the demeanor of the witnesses." Thus, with the *Wilkins* case in mind, counsel may want to confirm that the webcam on the computer being utilized during the proceeding is level to avoid any awkward angles so that everyone can be seen on the screen.

Conclusion

In the days and months ahead, keep in mind the words of Chief Justice John Marshall as he observed in McCulloch v. Maryland, our Constitution aspires "to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[21] In these difficult times that we live-in let's be guided by these words to insure that the right of confrontation continue as a just and fair means of exploring honesty and truthfulness.■

Currently serving as a judge on the Illinois Appellate Court, First District, Fourth Division

1. See U.S. Const. amend. VI.
2. *California v. Green*, 399 U.S. 149, 176, n.8 (1970).
3. *Crawford*, 541 U.S. at 43.
4. Chamber's Journal of Popular Literature, Science and Art, (5th Series), In the Royal Court of Hants, Esta. By William & Robert Chambers, 332-333 (May 24, 1890) Pub by W & R Chambers, Limited (London & Edinburgh).
5. *Id.* at 333.
6. https://wiki.harvard.edu/confluence/display/GNME/THE+TREASON+TRIAL+OF+SIR+WALTER+RALEIGH.
7. *California*, supra note 2 at n.10.
8. As an aside, some legal scholars question this direct legal lineage to the American colonies. See Graham, Kenneth. *Confrontation Stories: Raleigh on the Mayflower*, UCLA Public Law & Legal Theory Series (04/21/2005) (available at https://escholarship.org/content/qt1r75q666/qt1r75q666.pdf). The United States Supreme Court, however, has referred to Raleigh's trial in a number of cases when addressing the application of the Confrontation Clause. See *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006) & *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). As can be found in Justice Kennedy's dissent in *Melendez-Diaz*, "The infamous treason trial of Sir Walter Raleigh provides excellent examples of the kinds of witnesses to whom the Confrontation Clause refers." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 344 (2009).
9. *California*, supra note 2 at 156-57.
10. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987).
11. 487 U.S. 1012 (1988).
12. *Id.* at 1021.
13. 497 U.S. 836 (1990).
14. *Id.* at 847.
15. *Id.* at 844.
16. *Id.* at 845.
17. *Pointer v. Texas*, 380 U.S. 400 (1965).
18. See Illinois Constitution, Section 8 (1970, amended 1994).
19, 166 F3d 75 (2nd Cir. 1999).
20. 512 F.3d 768, 772 (6th Cir. 2008).
21. *M'Culloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

Staying Active, Healthy, and Productive at Home

BY MICHAEL B. HYMAN, E. KENNETH WRIGHT JR., & ERIN CLIFFORD

Most legal professionals have either been working from home or not working at all due to the COVID-19 pandemic. This is cause for anxiety and stress for us and anyone who lives with us. According to experts, embracing a healthy lifestyle maintains overall health. We offer a few suggestions to help you better manage working from home.

A Home Office

In uncertain times, structure is essential. Our minds do better with plans. Set a schedule for the entire workday and keep to it. A daily routine increases productivity, and in turn, creates healthier moods. Make sure to block time not just for the tasks that need attention, but also for stretch and snack breaks. Ask others living with you to respect your boundaries when working. The more distractions and background noise, the less productive you become. If space is scarce, get noise cancelling headsets or headphones.

Create workspace, if possible**,** near a window or an area that offers good lighting. Looking outside will brighten your frame of mind; dark workspace may strain your eyes and make it difficult to focus. Be disciplined and follow the routine that works for you.

A recent *Forbes* magazine article recommends against multitasking. Forbes reported that studies found people who work on "one task at a time are calmer and more effective and productive." In addition, the article suggests pacing oneself, "Productivity isn't a marathon it's a sprint, and studies show that productivity is enhanced with balance. Plodding puts you at the finish line in time plus you can enjoy life on your way. Remember, the tortoise, not the hare, won the race."

Steps to Boost Wellness

Exercise provides the best defense against coping with life's daily stressors. Being active distracts from daily worries while boosting feel-good endorphins. Experts recommend at least two-and-a-half hours of moderate exercise or seventy-five minutes of vigorous exercise each week. Can't go to a gym? That's not an excuse to stop working out. Make a point to keep up with a fitness routine at home. Workouts are available on YouTube or on exercise apps.

As long as you practice social distancing, enjoy the outdoors. Go for a walk, a run, a hike, or a bike ride. Spending time in nature provides much needed fresh air, sunshine, and a change of scenery.

What you eat makes a difference. Enjoy foods that support a healthy immune system like fruits, vegetables, nuts, and seeds. These foods also can provide fiber, protein, and healthy fats. Limit foods high in sodium, added sugar, and saturated fat. A healthy diet also includes two fish meals a week.

Consume alcohol in moderation. Alcohol is not a health food and encourages unhealthy food choices. The National Cancer Institute recommends that men have no more than two drinks per day and women have no more than one drink per day. (A drink serving is 12 ounces of beer, five ounces of wine, or 1.5 ounces of liquor.)

Managing Stress

Mindfulness or the "science of chill" can effectively manage stress and anxiety. Meditating even a few minutes a day has a positive effect on emotional and physical health. Mediation puts you in the present moment, away from the latest news or stressing about the future. Any time you start to feel stressed or anxious, do breathing exercises to refresh your mind. For example, the 4-7-8 (inhale for 4 seconds, hold for 7 seconds, exhale for 8 seconds).

Dealing With Anxiety and Depression

Social isolation can lead to mental health problems. Over an extended period, social isolation has been known to cause negative thoughts, severe anxiety, and depression. Positive thinking can help mitigate these feelings.

While it may be tempting to think more about the things that you've given up, it's healthier to think about the things that you've gained. For instance, maybe you're spending quality time with your spouse, your children, or your pet. Or, you picked up that book you have been wanting to read for who knows how long.

Positive thinking takes effort, but that effort can make a big difference to your well-being. Among the ways to generate positive thoughts are reading inspiring books, listening or watching uplifting podcasts, television programs, or movies, and downloading apps that encourage positive thinking such as Shine, Motivate, Headspace, Moodscope, and Moodpath.

Health Precautions

The safest place to avoid COVID-19 is at home. This means stocking up on groceries, medications, and other essentials to minimize trips to stores. It also means being wary of "high touch" surfaces. These include elevator buttons, door handles, credit card machines, and handrails. Use a tissue or your sleeve, and wash your hands as soon as possible. Of course, always wear a mask when in public places.

Experts say wearing gloves doesn't do enough to avoid the spread of germs. Gloves come in contact with multiple objects that might contain the virus, and spread it elsewhere. Experts recommend frequent hand washing as the single most effective way of protecting yourself. Gloves should be used for specific tasks such as cleaning

infected areas, disposing of waste, and pumping gas.

Physical Distancing, Not Social Distancing

You need to stay in touch and connected with your personal community. Call or FaceTime, Facebook, or Skype with people you care about. If you're part of a breakfast club or book group, continue it remotely. Hold a virtual party, a virtual dinner, or a virtual game night. And if you haven't heard from someone, chances are they and you could benefit from your reaching out to them. These measures can reduce stress and anxiety associated with social isolation and blunt depressive thoughts.

Self-Care and Staying Connected

Take mental time outs. Call a friend, a family member, a colleague. Read a book or watch a good movie. Cook a meal. Play a game on-line or with friends. Limit listening to the news.

On average, you need seven to nine hours of quality sleep. This is crucial for maintaining the body's immunity. A good night's sleep stabilizes mood-regulating serotonin levels. Lack of good sleep inhibits brains from rebalancing.

Conclusion

These are uncertain and stressful times. But by staying active, healthy, and productive, they need not be so stressful. As it has been said, "If life was easy, where would all the adventure be?"■

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If Not Section 137 Pleadings, How About Incivility Toward a Party?

BY HON. STEVE PACEY, RET.

In the interest of full disclosure, I was at all times discussed herein and still am a member of the Paxton-Buckley-Loda School Board. Obviously, the opinions contained in this article are the author's and do not represent those of either the PBL School Board or the ISBA.

On November 8, 2016, the voters of the PBL School District passed a $31,425,000 bond issue to: 1) make improvements to the high school; 2) make improvements to the lower elementary school; 3) build an addition to the lower elementary school to house the upper elementary school; and 4) demolish the the 1925 upper elementary school (Eastlawn) previously used as the high school and then the junior high. The referendum was approved by 70 votes out of 3978 votes cast (2024 to 1954). In the more than one-year time period leading up to the vote on the referendum, there was considerable public opposition to demolition of the historically significant school building.

Between the passage of the referendum and the scheduled vacating of the building to be demolished at the start of the 2019-2020 school year there continued to be public discussion by individuals suggesting that the building should be preserved or repurposed or lamenting the scheduled loss of an historic structure. At no time between November of 2016 and October of 2019, was any specific plan for saving the building submitted to the school board or proposed to the general public.

In May 2019 the school board approved a bid and signed a contract for the demolition. In August 2019 preliminary interior demolition began with fixture removal and asbestos abatement. Final exterior demolition was scheduled to begin November 4, 2019.

On October 25, 2019, one of the school district residents most visible in arguing that the building should be preserved (even appearing before the school board on a couple of occasions), filed and personally verified a Verified Complaint For Injunctive Relief, requesting a Temporary Restraining Order to prevent demolition of Eastlawn. (Minetz v. Board of Education, 19-CH- 25, Eleventh Judicial Circuit Court of Ford County, IL.; 4-19-0771, Appellate Court of Illinois, 4th Dist., Rule 23).

The substance of the complaint was that the referendum was illegal because it contained 4 questions and that it did not permit voters to vote separately on each of the propositions. The pleadings also alleged that the building was historically significant, set forth 16 different combinations of ways voters could have voted on the proposal and claimed "(t)he Plaintiff and the citizens of the City of Paxton, the County of Ford, and the State of Illinois, will be irreparably harmed if the Eastlawn Elementary School building is demolished."

The circuit court, after hearing, denied the motion for a TRO and the Plaintiff filed a motion for emergency relief in the appellate court. On November 14, 2019, the Fourth District unanimously affirmed the trial court denial of a TRO in a Rule 23 opinion.

By way of background, the reviewing court noted that Plaintiff had voted in the November, 2016 election, determined in May, 2019 that Eastlawn was qualified to be listed on the National Register of Historic Places and appeared before the school board in May and October of 2019 objecting to demolition of the building. The Justices observed that Plaintiff argued in the trial court that "the case ultimately is about whether the referendum was illegal" and that she "did not have to establish the likelihood of success on the merits for cases involving destruction of property". (citing In re Marriage of Joerger, 221 Ill. App. 3d 400, 407-08 (1991).

In reaching its opinion the appellate court cited the requirements for injunctive relief: a clearly ascertainable right in need of protection; irreparable injury in the absence of an injunction; no adequate remedy at law; and a likelihood of success on the merits. The court stated that "mere opinion, conclusion or belief will not suffice" to "raise a fair question that each of the elements is satisfied". If the elements are met, "the court must balance the hardships and consider the public interests involved" a plaintiff "must show that (she) will suffer greater harm without the injunction than a defendant will suffer if it is issued".

With respect to the elements, the court said "it is difficult to discern exactly what right petitioner is asserting needs protection and petitioner has not addressed this issue in her motion to this court...petitioner appears to argue she has a clearly ascertained right in need of protection because the bonds funding the demolition resulted from an illegal referendum" While "a voter has the right to a free and fair election,... the right to contest an election is statutory and the statute must be strictly followed…. When a referendum or questions of public policy are submitted to the voters… any 5 electors... may contest the results...by filing a written statement in the circuit court within 30 days after the result of the election...petitions to submit public questions to a referendum... shall be deemed to be valid unless objection thereto is duly made in writing within 5 business days after the last day for filing…" The court observed that "Petitioner has provided no legal authority to support the claim she has such a right three years after the election." The Justices also pointed out "She does not otherwise object to the other expenditures associated with the bond initiative to improve other school sites…. She questions the legality of the referendum but only as it applies to the demolition of Eastlawn. If the referendum is illegal, then it is illegal in all respects."

Lastly the appellate court found: "Petitioner seems to imply she has some additional interests at stake...However, if she argues a protectable interest in Eastlawn, we are unable to discern any such interests are legally protectable. Her status as a resident, voter, or taxpayer gives her no legal or protectable interest in Eastlawn."

While the Justices made no specific criticism of the Plaintiff or her counsel, I doubt that many attorneys would list the case on their resume as an example of great advocacy. Clearly it would be fair to state that the Plaintiff was "schooled". The court's opinion (appropriately) did not cite the simple and non-legal analysis by which most upper elementary grade school students could have concluded that the pleadings were not in good faith: If voters had been able to vote separately on the 4 components of the overall building program, the electorate could have approved the demolition and rejected the new addition, resulting in upper elementary students without a school.

Rule 137 provides that a pleading signed by an attorney or party is a certification that the pleading "is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase the cost of litigation."

There is a general, and I think accurate, perception that "it takes a lot" to persuade a judge to impose sanctions. If there is already acrimony between the parties or counsel, it's creating a lawsuit within a lawsuit. In many cases which might warrant sanctions, the aggrieved party and/or counsel are likely to conclude that it's not worth the time, expense and distraction, particularly if the judge has expressed some displeasure with the offending party or indicated that the case should be moved along.

We tend to think of incivility in the more egregious cases of denigrating, profane, sexist, racist, etc. language, but is there a case to be made that quite a few pleadings are not very civil even if they don't rise to the Rule 137 level? Is it professionally improper to say: "Counsel, your pleading may not violate Rule 137, but you aren't going to win any awards for civility"?■

Illinois Supreme Court Sculpts the Edges of the Collateral Source Rule in Class Action Economic Loss Case

BY EDWARD CASMERE

The Illinois Supreme Court recently solidified the boundaries of the economic loss doctrine and the collateral source rule in a class action case asserting a civil conspiracy claim. "We hold that plaintiffs who do not suffer any economic loss cannot maintain a tort action that is based on a claim that alleges solely an economic injury and no physical injury or property damage." *Lewis et al. v. Lead Industries Association et al.*, 2020 IL 124107 (May 21, 2020). The *Lewis* court also rejected the notion that a collateral source payor can stand as a surrogate to satisfy the injury element of the plaintiffs' claim. *Id.* at ¶ 45. The *Lewis* class action has endured almost 20 years of active litigation with multiple trips to the appellate courts ending most recently with an Illinois Supreme Court opinion that confirms some old borders in the legal landscape, while also drawing some new ones.

Three quick takeaways:

- The economic loss doctrine, and the exceptions to it, are alive and well under established Illinois jurisprudence.
- Incurring an obligation to pay medical bills under the Family Expense Act, is not sufficient to satisfy the injury element of the prima facia case for fraud. There must be an actual, not a theoretical or contingent, economic loss.
- A collateral source payor cannot be a surrogate for satisfying the injury element of plaintiff's cause of action. In economic tort cases if a plaintiff cannot prove actual economic injury due to a defendant conduct, they have no claim.

The plaintiffs in *Lewis* represent the class of parents seeking to recover the costs of screening their children for blood lead pursuant to the Lead Poisoning Prevention Act. The plaintiffs' second amended class action complaint alleged six counts against the former manufacturer (or alleged successor thereto) of lead pigments. The circuit court dismissed all six counts, and the appellate court affirmed except as to the civil conspiracy count. Upon return to the circuit court, plaintiffs pursued purely economic injuries—the costs incurred for lead screening—in the third amended complaint's sole remaining claim of civil conspiracy.

The third amended complaint included plaintiffs Lewis and Banks, both Medicaid recipients when their children were tested, and O'Sullivan who was privately insured. The defendants moved for summary judgment on the lone claim in the third amended complaint. The defendants argued that Banks and Lewis could not prove any economic injury because Medicaid paid the full costs of the screenings, neither received any demands for payment from Medicare, and state and federal law prohibited the medical providers or Medicare from seeking reimbursement. In response, the plaintiffs conceded that Lewis and Banks did not pay for the tests but argued that they incurred the expense of the services. Plaintiffs further argued that if they recovered the costs of the testing, then the State could seek reimbursement from the plaintiffs since it paid the medical providers. Plaintiffs argued that, under the collateral source rule, Medicaid's payment did not negate their economic injury, rather it gave them the right to be reimbursed even though a collateral source (Medicaid) actually paid the costs.

The trial court granted the defendants summary judgment finding that the plaintiffs suffered no injury. As to Lewis and Banks, the court found that neither paid for the tests nor could they incur any obligation or liability to do so under state and federal law. The court further noted that if a Medicaid recipient recovered the costs of medical care in a tort action the State may have a claim to a portion of that recovery, but any such recoupment comes from the judgment against the wrongdoer, and not the plaintiffs. Thus the "plaintiffs have no 'present, or even prospective obligation or liability to the State with respect to the medical screening.'" 2020 IL 124107 at ¶ 7. The circuit court rejected plaintiffs' collateral source argument holding that rule applies only to the measurement of damages in bodily injury cases.

O'Sullivan's claims were dismissed on the ground that she had private health insurance and was unable to present any evidence that either she, or her insurance carrier, paid anything for her children's lead screening. Plaintiffs' counsel waived the opportunity to name new class representatives and sought certification pursuant to Illinois Supreme Court Rule 304(a). The certification was allowed as to Lewis and Banks, but denied as to O'Sullivan. The circuit court's rationale for the split certification was that the summary judgment ruling as to Lewis and Banks rested on a legal analysis applicable to all Medicaid recipients for which immediate appellate review would expedite the ultimate disposition of the entire case, whereas the O'Sullivan ruling was based on fact-based determinations that would not be present for all potential class members. 2020 IL 124107 at ¶ 10.

The appellate court reversed, reasoning that plaintiffs had a legally sufficient claim of injury because they incurred an obligation for the cost of the tests. That neither plaintiff had actually paid anything for the tests, nor actually had an obligation to repay the state for the testing, did not matter because the Family Expense Act (750 ILCS

65/15 (West 2000)) codified the common-law rule making parents liable for the expenses of their minor children. 2020 IL 124107 at ¶ 11. The appellate court went further, holding that the collateral source rule applied to a case involving a purely economic injury. *Id*.

In the Illinois Supreme Court, the defendants argued that this case involved an intangible economic injury wherein a plaintiff must show that an actual out-of-pocket loss has, or is reasonably certain to occur. Plaintiffs argued that their injury was the cost they incurred to pay for the testing, even though they never actually paid for it. The Illinois Supreme Court confirmed that "the prevalent rule at common law is that a plaintiff cannot sue in tort to recover for solely economic loss without any personal injury or property damage. 2020 IL 124107 at ¶ 24 (citing *In re Chicago Flood Litigation*, 176 Ill.2d 179, 1980988 (Ill. 1997); *Moorman Manufacturing Co. v. National Tank Co.,* 91 Ill.2d 69, 84 (Ill. 1982)). While acknowledging the continued viability of the economic loss doctrine, the *Lewis* Court noted that the claims here, while clearly asserting pure economic losses, fall within the *Moorman* exception. 2020 IL 124107 at ¶ 27. That exception applies in economic loss cases alleging fraud and intentional misrepresentation, and the surviving conspiracy claim here was grounded on just such a theory. The court noted, however, that an actual injury has long been considered an essential element of fraud (which plaintiff must establish to a high degree of certainty), and such injury is measured by the harm to the plaintiff, not any benefit the defendant received. 2020 IL 124107 at ¶ 30. The Illinois Supreme Court consequently held "that plaintiffs were required to establish actual economic loss as an essential element of their claim of intentional misrepresentation." *Id*. at ¶ 31.

The question thus became whether incurring an obligation to pay the medical providers was sufficient to establish a compensable injury. The appellate court reasoned that under the Family Expense Act the parents had the obligation to pay the medical expenses of their minor children, and under the collateral source rule the parent's right of action is not affected because a third party actually paid those expenses. *Id*. at ¶ 35. The Illinois Supreme Court disagreed.

The *Lewis* Court reasoned that the Family Expense Act obligates parents to pay "expenses" owed to "creditors," but the medical providers who screened the children were not "creditors" within the meaning of the Act because the plaintiffs never became indebted to the providers. The court explained that "Illinois regulations require providers to agree, as a condition of participation in Medicaid, to accept the payment they receive from the Department of Healthcare and Family Services as 'payment in full' and not to 'bill, demand or otherwise seek reimbursement' from a Medicaid recipient or a relative or representative thereof." 2020 IL 124107 at ¶ 38 (*citing* 89 Ill. Adm. Code 140.12(i)(1) (2014)).

The plaintiffs also argued that, even assuming medical expenses are paid by Medicaid, the State retains a right (pursuant to the Illinois Public Aid Code) to proceed against a Medicaid recipient who recovers for expenses paid by the State for which a third party is liable. In other words, plaintiffs claimed that they incurred a recoverable injury because they might recover from a third party, and if they did Medicaid could recover against the plaintiffs. That "liability" may be contingent, plaintiffs argued, but it is a "liability" nonetheless. The *Lewis* Court was unpersuaded noting that the State's recoupment rights, whether directly or by way of subrogation, are only exercisable against the wrongdoer, not the plaintiffs. 2020 IL 124107 at ¶ 41 (*citing* Public Aid Code, 305 ILCS 5/11-22, 11-22a, 11-22b (West 2012)).

Here, it was undisputed that the plaintiffs claimed pure economic injury arising from the costs of their children's lead screening tests. While the action could proceed in light of the *Moorman* exception to the economic loss doctrine, plaintiffs still needed to prove that an economic injury actually occurred. Because a cause of action tort does not arise absent an injury, the court held that "the Family Expense Act cannot be extended to create a liability or expense where one never arose and thereby allow a parent to sue an alleged tortfeasor where there was no underlying personal injury claim filed on behalf of the child." 2020 IL 124107 at ¶ 43.

The Illinois Supreme Court also rebuffed the appellate court's expansion of the collateral source rule: "[w]e reject the notion that the collateral source rule can be used to satisfy the injury element of plaintiffs' cause of action." *Id*. at ¶ 45. The problem, the *Lewis* Court held, was that the collateral source rule applies to bar a jury from hearing about collateral sources of payment, and it bars a defendant from reducing a compensatory award by the amount paid by a collateral source, but the rule has nothing to do with whether a plaintiff actually has an injury. *Id*. In short, the collateral source rule does not create an injury where one otherwise did not exist. "Applying the collateral source rule to pure economic-loss tort cases like the one before us would obscure the very nature of the cause of action," the court said, adding that to do so "would allow plaintiffs who have themselves suffered no injury, economic loss, or damages to sue anyway." *Id*. at ¶ 50.

In *Lewis*, the Illinois Supreme Court made clear that in economic tort cases dollars are not just damages, they are the very claim itself—and if plaintiffs cannot prove economic injury due to defendants' conduct, they have no legally cognizable claim. *Id*. at ¶ 53.■

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The Other Pandemic

BY JUSTICE MICHAEL B. HYMAN

These words of the Greek poet Hesiod in 'Works and Days' seem to refer to the new reality in which we find ourselves:

"With ills the land is rife, with ills the sea;
Diseases haunt our frail humanity,
Through noon, through night, on casual wing they glide,
Silent..." (Elton TR.)

Rarely does a single event emerge with enough momentum to "haunt our frail humanity." COVID-19 transcends geography, age, health, lifestyle, education, and social status. And, as Hesiod reminds us, diseases carry a grim specter.

Truly earthshaking, COVID-19 has achieved what no war, genocide, natural disaster, or famine has ever been able to effect—to prompt humanity to realize how fractured it is, how dismembered, how polarized, how disorganized, how fragile, how limited as a species.

Advances in technology, communication, and travel have diminished time and distance, but, as we now know, they have helped a highly infectious virus spread hundreds thousands of miles, taking a terrible toll. Not just the United States was woefully unprepared and ill-equipped. So, too, the world.

We all inhabit one world and only one world; yet, as individuals and as a society, Americans mostly hold tight to separating themselves from those who differ from them. We have yet to accept Dr. Martin Luther King's prophetic message that "we are caught in an inescapable network of mutuality."

Technology cannot untangle what separates humans from each other. Humanity has never been able to conquer its inability to unite; to accept the stranger; to embrace each other as equals; to appreciate differences like race, ethnicity, nationality, religion, sexuality, culture, economic wellbeing, and so on.

This fear, derision, and loathing of "the other," this pandemic of prejudice, has dwelled in the world for millennia, even though it, too, has caused death, suffering, decreased quality of life, and economic losses. It, too, "haunt[s] our frail humanity." It, too, challenges society. And, it, too, has fastened itself on COVID-19.

Few of us in the legal profession work on the front lines, directly involved in containing and ending COVID-19. Rather, our profession has been busy adapting and adjusting to current demands and preparing for what lies ahead.

Our profession can, however, take on the role of first responders to find cures for what I have called the pandemic of prejudice. By training and disposition, lawyers are perfectly suited to find ways to dismantle systemic barriers, to promote inclusivity and diversity, to combat overt or explicit bias, to advocate for a legal system accessible to all, and to illuminate the nature of unconscious bias and address its root causes.

We need to start locally. Chicago, sadly, has a reputation as a city divided in terms of education, economic, health, and legal outcomes. The pandemic of prejudice cannot be ignored as contributing to these disparities.

Hesiod spoke of disease gliding in silence on casual wings. Silence, like inaction, allows the pandemic of prejudice to thrive. Let our profession step forward and go to battle on the other pandemic which threatens us all.

Otherwise, "frail humanity" will not survive.■

Justice Michael B. Hyman is a member of the Illinois Appellate Court, First District, member of the Bench & Bar Section Council, and twice its chair. *This article originally appeared in the May/June 2020 issue of the CBA Record and republished with permission of the Chicago Bar Association.*

Take Care of the Best Machine You Own!

BY ROBERT FIORETTI, NICKI PECORI FIORETTI, & MARY PETRUCHIUS

[***Note: This article was in the works before COVID-19 entered our daily lives and now has taken on greater relevance.]***

If you are a car owner like many of us, with every dashboard light that comes on or any rattle we hear, we have our car into the shop to address the issue, right? Oil change, done. New brake pads, no problem. Fuel level low, that one we can take care of ourselves and we do.

But what about **YOU**?

"Your body is the most incredible machine you will ever own. If you don't take care of it, where will you live?" I'm paraphrasing, but that was a quote on the wall of a West Loop restaurant that my wife, Nicki, liked. And that quote stayed with me.

This introductory article will identify some of our realities and pose some questions to think about. Future articles will endeavor to help ensure we are taking care of our most important machines on our professional and personal journeys in life.

As lawyers, we navigate issues with our clients every day. That impacts our own physical, mental and financial well-being every day. If you think about it, most people really don't want to be with lawyers. Many come to lawyers by necessity. And let's not underestimate the energy it takes to engage a client, retain a client, and serve a client. When that energy is expended, what do we do to restore it?

The pressures on attorneys can be immense. Newer attorneys have the extra pressure of mountains of student loan debt. Recently admitted attorneys have the highest levels of anxiety, depression, and alcohol abuse. An attorney impaired is not only a danger to themselves, an impaired attorney is a risk to their clients, their communities and society at large.

In 2016, the Betty Ford Clinic conducted a study of 12,825 attorneys and learned the following:

- 20.6 percent of lawyers screened positive for hazardous, harmful, and potentially alcohol-dependent drinking.
- 28 percent of lawyers experience symptoms of depression.
- 19 percent of lawyers experience symptoms of anxiety.
- 23 percent exhibit symptoms of stress (from the 2016 Survey of Law Student Well-Being taken at 15 law schools).
- 43 percent reported binge drinking at least once in the prior two weeks.
- 14 percent reported using a prescription drug without a prescription in the prior 12 months.
- 17 percent screened positive for depression.
- 37 percent screened positive for mild to severe anxiety.

"The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," Patrick R. Krill, JD, LLM, Ryan Johnson, MA, and Linda Albert, MSSW. (J Addict Med 2016;10: 46–52)

How do we reduce stress and anxiety in a constructive way? It takes courage to take care of oneself. As attorneys, we need to convey an image that we have everything under control. That means taking care of client matters, family matters, civic matters. Where is there time left to take care of oneself?

How are we aware of the dangers that can build up slowly and have compounding negative effects on our wellbeing? What do we do to keep in shape physically? What do we do make sure our body and mind have proper nutrition to function well? What do we do to be mindful and have a clear head?

These are all important questions to regularly ask ourselves. Don't say you don't have time. You don't have time not to take stock.

To align with Mental Health Awareness Month, May 4-8, 2020 has been declared "Lawyer Well-Being Week." The aim of Well-Being Week is to raise awareness and encourage action across the profession to improve well-being for attorneys and their support teams. For more information, go to: https://lawyerwellbeing.net/the-report/.

We have agencies available through the ISBA to provide help for your personal wellness. Future articles will address eating right, exercise, and gratitude. If you have ideas for future topics to help us all be our best selves, we'd love to hear from you.

Resources for all of us:

Books

Jeena Cho and Karen Gifford, The Anxious Lawyer: An 8-Week Guide to a Joyful and Satisfying Law Practice Through Mindfulness and Meditation
Scott L. Rogers, The Six-Minute Solution: A Mindfulness Primer for Lawyers
Mark Williams and Danny Penman, Mindfulness: An Eight-Week Plan for Finding Peace in a Frantic World
Jon Kabat-Zinn, Wherever You Go, There You Are
Eckhart Tolle, The Power of Now

Websites:

www.theanxiouslawyer.com
www.mindful.org
www.umassmed.edu/cfm/
https://illinoislap.org/mental-healthresources/mental-health-videos/
https://lawyerwellbeing.net/the-report/
illinoislap.org

Apps:

Stop, Breathe & Think Calm Headspace

Videos:

There are thousands of meditation videos on YouTube. ■

Bob Fioretti is a partner at Roth Fioretti, LLC where his practice concentrates on complex litigation and municipal law. He was elected to two terms on the Chicago City Council as served as alderman of

one of the most diverse wards in the city, bringing economic development and creating over 8,000 jobs. Bob is a strong advocate of mental health resources for our communities.

Nicki Pecori Fioretti is the director of community affairs at the Illinois Housing Development Authority where she oversees a portfolio of programming focused on promoting and creating fiscally stable residents and communities. She holds a B.S. from Bradley University and an MBA from the Quinlan School of Business at Loyola University of Chicago.

Mary Petruchius currently serves on Hon. James McCluskey's ISBA Special Committee on Health and Wellness, along with Bob Fioretti. Mary was the recipient of the Illinois Lawyers' Assistance Program's (LAP) 2019 Michael J. Howlett, Jr. Award, which honors individuals or law firms in recognition of their promotion of LAP within the Illinois legal community. In 2018, after 26 years practicing criminal defense, juvenile, and real estate law, Mary changed careers and is now the pro bono attorney program coordinator for Prairie State Legal Services' West Suburban office.

Recent Appointments and Retirements

1. The circuit judges have appointed the following to be associate judges:

- Ella York, 1st Circuit. May 15, 2020
- Craig Belford, 18th Circuit, May 28, 2020

2. The following judges have retired:

- Hon. Michael J. Kick, 21st Circuit. May 10, 20201■