NEW YORK COURT OF APPEALS ROUNDUP

DEFIBRILLATORS, PAID FACT TESTIMONY, CONSECUTIVE SENTENCES

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In this column, we discuss an appeal concerning the effect of Section 627-a of the General Business Law. The court found that, while the statute requires health clubs to maintain defibrillators, it did not create an inherent duty to use the device when a gym member is in cardiac distress. We also cover a case in which the court found that a $10,000 payment to a fact witness in connection with his appearance at trial did not require the exclusion of his testimony. Finally, we address an appeal in which the court determined that a sentencing judge was not required to inform a criminal defendant that, as a repeat felony offender, his sentence would be served consecutively to a previously imposed sentence for other crimes.

Before we discuss these cases, we note that on Feb. 12, 2013, just one day after her confirmation, Judge Jenny Rivera assumed her seat on the Court of Appeals and began hearing argument. It appears that, before Rivera's arrival, during the period in which the court was sitting as a five-judge bench, there was only one matter in which the court was unable to assemble a majority of four votes to bring about a decision. That case is scheduled for reargument on May 2 when it is expected the court will be back to its full seven member complement. The task of actually naming the remaining new justice began when the Commission on Judicial Nomination, chaired by Former Chief Judge Judith S. Kaye, provided the Governor with a list of seven potential candidates to succeed Judge Theodore Jones Jr. This appointment will complete the court.

Use of Defibrillators

The Court of Appeals recently found that a statute requiring health clubs to maintain defibrillators and staff trained in their use did not create a duty to actually use the equipment when a club member suffered a heart attack. *Miglino v. Bally Total Fitness of*

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Greater New York, involved the application of General Business Law §627-a which requires health clubs with more than 500 members to have at least one defibrillator and an individual certified in its use present during staffed business hours.

Gregory Miglino collapsed and suffered a fatal heart attack while playing racquetball at a health club owned and operated by Bally Total Fitness of Greater New York in March 2007. A Bally employee placed an emergency 911 call and an ambulance arrived shortly thereafter to take Miglino to a hospital where he could not be revived and was pronounced dead. In accordance with Section 627-a of the General Business Law, Bally maintained a defibrillator and had at least one employee certified in its use. That employee, however, did not use the defibrillator to revive Miglino despite the fact that another employee had retrieved the defibrillator and placed it by Miglino's side.

Miglino's executor brought a negligence action against Bally based upon its failure to use the defibrillator.[1] Bally moved to dismiss the complaint on the grounds that it was immune from liability as a result of Public Health Law §3000 (the "Good Samaritan Law") which provides that a person who voluntarily renders first aid or emergency treatment outside a hospital or doctor's office to an injured person is not liable for death or injuries to that person unless they are caused by the volunteer's gross negligence. The Good Samaritan Law is expressly incorporated in Section 627-a.

The trial court denied the motion, and the Appellate Division, Second Department, affirmed. The Second Department found that, by requiring health clubs to maintain defibrillators and trained staff, the Legislature created an inherent duty to use that equipment when necessary. The Second Department found that the Good Samaritan Law would only apply to a claim that a defendant was negligent in the use of a defibrillator but not here where plaintiff's claim is based on Bally's failure to employ the device at all.

Judge Susan Phillips Read, writing for a four-judge majority, disagreed but nevertheless joined in affirming the Second Department's decision. The majority found that Section 627-a did not create a duty running from a health club to its members to use the defibrillator and that, if the Legislature had intended to impose such a duty, it would have said so expressly. The court declined to reverse the Second Department, however, because it found that plaintiff had alleged enough facts regarding Bally's alleged breach of a common law duty to survive a motion to dismiss.

Chief Judge Jonathan Lippman dissented in part. He noted that the majority's interpretation would render the statute virtually meaningless because the presence of a defibrillator will be of no use to someone in cardiac distress unless it is actually employed. The chief judge suggested that the Legislature may want to revisit the statute to clarify that health clubs are under a duty to use the defibrillators that they are

required to maintain at their premises. Given the lack of clarity in the statute, the Legislature may take the chief judge up on his suggestion.

Paid Fact Testimony

In *Caldwell v. Cablevision Systems*, the Court of Appeals ruled that a $10,000 payment to a fact witness for an hour of trial testimony did not render the testimony inadmissible but that it did require a specific jury instruction regarding the compensation of fact witnesses. In October 2006, plaintiff Bessie Caldwell was walking her dog during a heavy rainstorm in an area in which Communications Specialists Inc. had been installing fiber optic cable for Cablevision Systems Corporation. Communications Specialists had dug and backfilled a number of trenches and pits in the roadway but the road had not yet been permanently repaved. Plaintiff tripped and fell in the roadway and allegedly sustained injuries. She and her husband subsequently sued Cablevision and Communications Specialists alleging that Communications Specialists failed to properly backfill and resurface the trenches and pits they had dug.

At trial, the plaintiff testified that she had tripped on one of the pits dug by Communications Specialists. Communications Specialists called as a fact witness Barry Krosser who was the emergency room physician who treated the plaintiff the night she fell. Dr. Krosser did not remember treating the plaintiff but testified that his consultation notes—which were admitted into evidence as a business record—indicated that plaintiff had told him that she was injured when she tripped over her dog while walking in the rain.

Dr. Krosser also testified that he was appearing pursuant to a subpoena served by defense counsel, that he was being paid $10,000 for his appearance, and that in prior cases where he testified as an expert witness he had charged a fee because he would have otherwise been treating patients. Plaintiffs' counsel moved to strike Dr. Krosser's testimony or, in the alternative, for a jury instruction relating specifically to the payment to Dr. Krosser.

The trial court denied the motion and ruled that both counsel would be permitted to address the payment in their summations. The jury found that Communications Specialists had been negligent but that its negligence was not the cause of plaintiff's injuries and judgment was entered in favor of the defendants.

Plaintiffs appealed to the Second Department which affirmed the judgment. The Second Department found that the trial court should have given a jury instruction specifically related to the compensation paid to Dr. Krosser but that the failure to do so was harmless error.

The Court of Appeals, in a decision written by Judge Eugene F. Pigott Jr., in which the remaining judges concurred, affirmed the Second Department's decision. The court was troubled by the exorbitant nature of the payment given the minimal attendance at trial by the witness, but it noted that the $15 daily attendance fee provided for fact witnesses in CPLR §8001(a) is a statutory minimum that does not prevent counsel from paying a higher fee to a witness. The court noted that it is impermissible to enter into an agreement to pay a witness for favorable testimony but that this was not the situation before the court. The Court further cautioned that the distinction between compensating a witness for time and reasonable expenses and paying a witness for testimony can become blurred, but it declined to hold that Dr. Krosser's compensation fell on the impermissible side of that line.

The court also found that the trial court should have crafted an instruction specifically tailored to Dr. Krosser's compensation which explained that, while fact witnesses are entitled to compensation, the jury should assess whether the compensation was disproportionally more than what was reasonable to compensate the witness for his time. If the jury finds that the compensation is disproportionate, it should then consider whether that compensation had the effect of influencing the witness' testimony. The court agreed, however, with the Second Department that the failure to give such an instruction was harmless error because Dr. Krosser testified simply as to what was written in his consultation notes and, accordingly, his credibility was not a central issue in the case.

Concurrent vs. Consecutive

The court had before it an issue that arises not infrequently in the sentencing of criminal defendants. The question was whether a sentencing judge is bound by law to advise the defendant at his allocution that under §70.25(2-a) of the Penal Law a prison term imposed upon a repeat felony offender must run consecutively to a previously imposed sentence that is still being served.

In *People v. Belliard*, Judge Victoria Graffeo, for a four-judge majority, held that the mandatory consecutive sentencing of a repeat felon was a collateral consequence of pleading guilty and "[a] court's silence regarding collateral consequences will not warrant vacating a plea because they are peculiar to the individual." Chief Judge Jonathan Lippman dissented; Judge Rivera, sitting on the court for her first day, did not take part.

The underlying facts were not complicated. In 2006, Belliard was arrested for possessing cocaine and a loaded gun. In 2007 he pleaded guilty to all three felony counts of the indictment. At the time of his plea he was on parole on a prior undischarged sentence

on a state felony drug conviction; he also faced a federal violation of supervised release regarding two prior federal felonies.

At Belliard's allocution on the 2006 crimes, the trial court explained that as a second felony offender he would (by prior agreement) receive a 12-year sentence followed by five years of post-release supervision (PRS). There was no mention by the court or defense counsel as to whether the 12-year term would run concurrently or consecutively with the five years remaining on the sentence for his prior state crime for which he had been paroled. Belliard then pleaded guilty to the charges.

Soon thereafter he was sentenced to the 12-year term with five years of PRS on his 2006 crimes. The sentencing court permitted the 12-year sentence to run concurrently with the federal sentence under §70.25(4) of the Penal Law. Again the sentencing court made no mention that as a second felony offender, Belliard's 12-year sentence would run consecutively with his prior undischarged sentence. Belliard appealed, asserting that his guilty plea should be vacated as involuntary because he was not told that the sentences would run consecutively.

The Appellate Division unanimously affirmed, and the court granted leave.

The majority and the dissent strongly disagreed. The dissent asserted that the fact that his sentence had to be served consecutively with his prior, undischarged sentence is a direct and not a collateral consequence of a conviction and has to be explained to the defendant at allocution in order to meet constitutional requirements.

The majority clearly acknowledged that a sentencing court must advise a defendant prior to his plea of its full consequences so the defendant can make a voluntary and knowing choice among the alternatives. Nevertheless, because of individual differences among defendants, the majority determined that it would be "unfeasible" to require the court to advise a defendant of all of the ramifications of a guilty plea. Because of this, the majority concluded that the case law draws a distinction between direct and collateral consequences of a plea. Direct consequences, as the majority explained, have a "definite, immediate and largely automatic effect on defendant's punishment," while collateral consequences are those that are peculiar to the individual defendant and generally the result of action taken by agencies the courts do not control. Here the majority concluded the consequence was collateral.

Endnotes:

1. A negligence claim asserted against another defendant, Bally Total Fitness Corporation, was later dismissed because it did not own or operate the health club at issue.