NEW YORK COURT OF APPEALS ROUNDUP:

NO-FAULT, INDIAN GAMING, IN UTERO INJURY

ROY L. REARDON AND MARY ELIZABETH MCGARRY*
SIMPSON THACHER & BARTLETT LLP

JUNE 9, 2005

The Court of Appeals' recent decision in a trio of no-fault cases has caused consternation in the plaintiffs' personal injury bar. This month we discuss that decision, along with the Court's decisions rejecting a challenge to New York's Indian gaming statute, and holding that there is no cause of action for emotional damage to the mother of a child who is injured *in utero* but survives. We also note briefly that a recent Second Circuit decision granting *habeas* to a defendant whose conviction was upheld by the Court of Appeals calls into question New York's ineffective-assistance-of-counsel test.

No-Fault Summary Judgment

The Court's unanimous opinion by Chief Judge Judith S. Kaye in *Pommells v. Perez*, describes a no-fault system in need of repair. The Comprehensive Automobile Insurance Reparations Act was intended to promote prompt resolution of claims, hold down insurance costs, and alleviate court congestion. Insurance covers "basic economic loss" from automobile accidents without regard to fault, and damages suits against the driver or car owner are permitted only in the case of "serious injury." However, the Legislature has not raised the $50,000 cap on recovery for basic economic loss since enacting the no-fault law in 1973, "provid[ing] incentive to litigate;" no-fault insurance fraud abounds; and "mountains" of suits are filed for injuries that do not meet the statutory definition of "serious."

The Court has sought to fix the only part of the system it has the power to influence by instructing trial judges to take a hard look when a defendant makes a prima facie case on summary judgment that the plaintiff's injuries are not serious and/or were not caused by the auto accident. In such circumstances, the plaintiff must produce "objective medical proof" of serious injury and causation, and even then summary dismissal of the complaint may be appropriate if "additional contributory factors interrupt the chain of causation between the accident and claimed injury – such as a gap in treatment, an intervening medical problem or a pre-existing condition."

* **Roy L. Reardon** *and* **Mary Elizabeth McGarry** *are partners at Simpson Thacher & Bartlett LLP.*

At the same time, the Court explained, an injured party does not have to continue unnecessary medical treatment simply to avoid a gap-in-treatment argument. Nonetheless, lawyers no doubt will think twice before advising a client that he may discontinue treatment in light of the Court's direction that a plaintiff who terminates treatment must provide a "reasonable explanation" for doing so.

The resolution of the three cases decided together in *Pommells* provides guidance to how trial courts are likely to treat summary judgment motions in no-fault cases from now on. Each involved alleged soft-tissue injury (here, herniated discs), the type of injury that the Court noted is approached with "well-deserved skepticism."

Plaintiff Pommells went to physical therapy for six months following his accident, but then stopped. Two years after the accident he experienced severe back and side pain from kidney problems, and his kidney eventually was removed. Defendants submitted affidavits from three doctors, each of whom found no serious injury. The only sworn report, and thus the only competent medical evidence plaintiff submitted, arose from an examination almost four years after the accident. That doctor stated Pommell's injuries were causally related to his medical history, which included the accident and kidney disorder, and thus failed to rule out kidney disorder as the cause of the injuries. No explanation for plaintiff's discontinuation of physical therapy was offered. The trial court's award of summary judgment to defendants was affirmed.

In *Brown v. Dunlap,* by contrast, defendants' motion should have been denied, the Court ruled. The sworn reports of three doctors submitted by defendants stated that plaintiff's injuries were not serious; two of those doctors admitted these minor injuries were a result of the accident, but the third described them as chronic and degenerative in origin. Plaintiff submitted unsworn MRI reports showing herniated and bulging discs, but a sworn doctor's report discussing the MRI was competent evidence. Plaintiff's doctor opined that plaintiff suffered severe pain and permanent injuries as a result of the accident, and also provided an explanation for the two-year gap in plaintiff's treatment – the doctor had suggested home exercise once he concluded that further treatment would merely have been palliative. Plaintiff's submission raised material issues of fact entitling him to proceed to trial.

Finally, in the strictest application of new standard, the Court in *Carrasco v. Mendez* upheld the grant of summary judgment dismissing plaintiff's claims despite the sworn report of a physician who relied upon an MRI and opined that, to a reasonable degree of medical certainty, plaintiff had sustained severe disabilities as a result of the auto accident. Defendant had submitted evidence of a pre-existing degenerative disc condition, and plaintiff's physician report "failed to rebut that evidence sufficiently."

Monte Carlo, NY

In 84 pages of opinions, the Court in *Dalton v. Pataki* sustained an 81-page gambling bill pushed through the Legislature by Governor Pataki shortly after 9/11. It was a bill that legislators were given no time to read before the vote and, because it also included initiatives to ameliorate the effects of the 9/11 tragedy, a bill that even those against the expansion of gambling in the State could not oppose.

But however one may feel about the State legislative process, it was a federal statute that ultimately determined the outcome of a core part of the case. The Indian Gaming Regulatory Act of 1988 ("IGRA") persuaded the majority of the Court, in an opinion by Judge Carmen Beauchamp Ciparick, that the federal government had preempted the field of Indian gaming so that even New York's Bill of Rights had to bow to IGRA's dictates.

The majority's decision provoked a vigorous dissent by Judge George Bundy Smith, broadly attacking the legislation based upon Article I, § 9 of the New York State Constitution, which flatly prohibits the Legislature from enacting legislation authorizing commercial gambling and requires the Legislature to prevent it. A partial dissent by Judge Robert S. Smith concluded that Article I, § 9 prohibits the diversion of funds derived from the video lottery terminals ("VLTs") for any purpose other than education.

The plaintiffs consisted of citizen taxpayers, State legislators and not-for-profit organizations opposed to "the spread of gambling." They challenged the constitutionality of three parts of Chapter 383 of the Laws of 2001, authorizing (a) the Governor to enter an agreement with the Seneca Nation of Indians (and other unnamed tribes for three additional gaming facilities in Ulster and Sullivan Counties) allowing casino "gaming" (as defined by IGRA) on Indian lands, (b) the use of VLTs at racetracks, and (c) participation in the "Mega Millions" multi-jurisdictional lottery.

At the heart of IGRA is the principle that Indian tribes have sovereignty over their lands that is subordinate only to the federal government, and not the States. More specifically, IGRA clearly provides that gaming is allowed on Indian lands in any State that permits gaming for *any* purpose by anyone. The Court concluded, therefore, that because New York permits limited gaming under the Constitution – for charitable purposes – gaming for commercial purposes may be conducted on Indian lands if authorized by a tribe and carried out under a tribal-State compact, like that entered into with the Seneca Nation.

What should perhaps be of more concern to those opposed to the spread of gambling in the State, and of keen interest to those wishing to expand gambling facilities, was the Court's decision with respect to land that was not Indian land but is newly acquired by the Secretary of the Interior after the enactment of IGRA and held "in trust" for an Indian tribe. IGRA provides that gambling may be carried out on such land if the Secretary of the Interior

(presumably in her discretion) finds that it is good for the tribe and not detrimental to the surrounding community, and the Governor of the State agrees. Plaintiffs argued that New York's Constitution and policy against commercial gambling denied the Governor the power to make the determination that he agreed with the Secretary. This argument was rejected. From this interpretation of IGRA and the "blank check" the Legislature wrote the Governor to enter into additional tribal pacts, it must follow that *anything* in New York that the Secretary of the Interior and the Governor agree upon is free from challenge by anyone if it is on land owned by or for Indians. Under that analysis, how far is New York from Las Vegas?

Video Lottery

Article I, § 9 authorizes lotteries, but provides that the net proceeds from the sale of lottery tickets shall be used exclusively for education. Plaintiffs argued that the VLTs permitted at racetracks by the statute were, in fact, slot machines. In a detailed analysis of how VLTs function, the majority found the VLTs to be a form of lottery, and therefore constitutional. The remaining issue was the planned allocation of lottery revenues. It was this provision that formed the basis for Judge Robert S. Smith's dissent and had caused the Appellate Division, Third Department, to find for the plaintiffs.

Under the statute, VLT revenues were to be partially reinvested in a breeder's fund and increasing racetrack purses – not for education. The plaintiffs argued that this was but a way for the Legislature to escape "the constitutional restriction." The majority disagreed on the theory that reinvested funds were a vendor's fee and thus not part of "net" proceeds. Determining the reasonableness of the vendor's fee is within the province of the Legislature, unless "so excessive as to constitute nothing more than a flagrant end-run around the requirement" that proceeds be used exclusively for the purpose of education – a purpose in dire need of financial help.

Mega Millions

Plaintiffs fared no better in challenging the State's right to enter into agreements with other jurisdictions for a joint lottery. Because "Mega Millions" is "operated by the State," the Court held, it is permissible under the Constitution.

Finally, the Court rejected as without merit the plaintiffs' challenge to the Governor's "message of necessity," which allowed him to avoid the otherwise mandatory three-day period for the final form of a bill to be on legislators' desks for review and require an immediate vote.

All in all, a "Triple Crown" victory for the Governor. It occurs to us, however, that the purpose of a Constitution, approved by the People, is to render certain matters free

from political influences. If that principle is valid, it was not served here.

***In Utero* Injury**

In 2004, the Court created a cause of action for emotional injury to an expectant mother arising out of malpractice that resulted in stillbirth or miscarriage, even if the mother suffered no physical injury independent of injury to the fetus. *Broadnax v. Gonzalez,* 2 N.Y.3d 148 (2004). In the tragic case of *Sheppard-Mobley v. King*, the Court was called upon to decide whether such cause of action extends to instances in which malpractice causes *in utero* injury to a fetus who is later born alive, and unanimously held that it does not.

During her seventh week of pregnancy, Karen Sheppard was advised by a doctor to terminate her pregnancy because the presence of fibroids in her uterus made it unlikely that she would carry the pregnancy to term. That doctor referred Sheppard to another physician who concurred in the advice, adding that if Sheppard did not spontaneously miscarry the child would have severe problems, and recommended Sheppard undergo a non-surgical abortion. The second doctor administered two doses of methotrexate, which breaks down fetal tissue, and then informed Sheppard that there was no fetal heartbeat. Shortly thereafter Sheppard met with a third doctor, who performed a sonogram and also found no heartbeat.

During her 28th week of pregnancy, Sheppard learned that she was still pregnant because the methotrexate dosages she had been given were insufficient. She was told that the child likely would suffer serious congenital impairments from methotrexate exposure, and the child was so impaired at birth.

The issues on appeal were whether the infant had malpractice claims and whether Sheppard could recover for emotional distress. The opinion, by Judge George Bundy Smith, explained that *Broadnax* was intended to fill a gap – if malpractice caused injury in the womb and the fetus survived, the infant had a cause of action for damages, but if malpractice caused a miscarriage or stillbirth, there was no wrongful death action and the medical care provider would avoid liability for injuries sustained by the fetus. By permitting a mother to recover for emotional injuries when malpractice caused miscarriage or stillbirth, the *Broadnax* Court sought to rectify this "particular injustice." |

But in *Sheppard-Mobley* the Court did not perceive a similar gap creating an injustice. The infant in the case had a cause of action – not for wrongful life, as no such cause of action is recognized in New York, but because had defendants not been negligent in their advice to Sheppard she would have given birth to a healthy child rather than undergo the methotrexate treatments that injured him. Sheppard would also have a claim for emotional damages arising from the anguish caused by being advised incorrectly that she would not carry the pregnancy to term and should have an abortion, being erroneously told that the pregnancy had ended, and then learning that the pregnancy had continued and would likely result in a

child with congenital defects. Although Sheppard had failed to plead such emotional injury independent of the anguish of giving birth to an impaired child, the Court granted her leave to replead. To the extent that she had sought recovery for emotional damages due to *in utero* injury to the fetus, however, Sheppard's claim failed.

Ineffective Assistance

New York has long employed a test for ineffective assistance of counsel, enunciated in *People v. Baldi*, 54 N.Y.2d 137 (1981), that differs from the test articulated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The continued viability of *Baldi's* articulation was recently called into doubt. The Second Circuit previously had held that the *Baldi* standard was not contrary to *Strickland*. In *Henry v. Poole*, decided last month, however, the Second Circuit granted the *habeas* petition of a defendant for ineffective assistance based upon his counsel's presentation of an alibi – for the wrong day.

The federal Court held that the Court of Appeals' decision upholding the conviction, *People v. Henry*, 95 N.Y.2d 563 (2000), was "at least an objectively unreasonable application of *Strickland*." While the Second Circuit did not reject the *Baldi* test as a general matter, its rejection of that test's application to the facts of *Henry* calls into question whether New York courts should continue to evaluate claims for deprivation of the federal right to counsel under *Baldi*.