HANDLING THE TRUTH

Knowledge of the Rules of Evidence Is Critical to Proper Claims Evaluation

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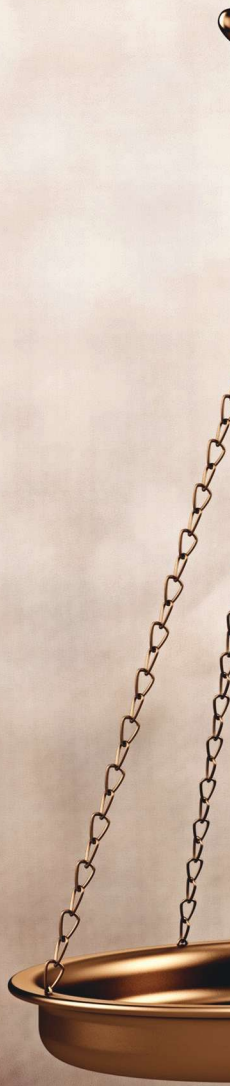
Trial lawyers love courtroom drama in cinema. Film often mirrors life, and great movies have inspired countless individuals to become trial lawyers. An iconic example is the heated courtroom scene in *A Few Good Men* when Lieutenant Kaffee (Tom Cruise) grills Colonel Jessep (Jack Nicholson) on the witness stand by repeatedly asking, "Did you order the Code Red?" An agitated Jessep initially chastises, "You can't handle the truth," before loudly conceding, "You're goddamn right I did!"

It was incredibly fortuitous for Kaffee's case that an adverse witness simply volunteered critical testimony entirely dispositive to his theory of defense. Asking the question was a gamble because, under the applicable rules of evidence, Jessep was not required to answer. Recognizing this risk in a scene prior to the famous exchange, while Kaffee argued with his colleague Captain Galloway as to whether he should put Jessep on the stand, he reaffirmed, "It doesn't matter what I believe. It only matters what I can prove."

This cinematic wisdom is a good reminder for claims professionals: It does not matter what you or defense counsel believes. It only matters what you can prove.

We regularly see claims evaluated without consideration of the rules of evidence or the statutes and common law of the local jurisdiction but instead on gut instinct. However, the savvy claims professional and defense attorney should recognize that the rules of evidence can play a major role in how a theory of



defense ultimately is proved at the time of trial. Early recognition of the jurisdiction's applicable evidentiary rules and laws is critical to proper claims analysis.

While this article is written from a New York perspective, these issues arise in every jurisdiction. We examine some of the most common situations of which all claims professionals should be aware.

Adult Supervision of Infant Children

In a recent case, an eight-year-old plaintiff climbed up to the window of her fourth-floor apartment, pushed an air conditioner out of the window, and followed it, falling four stories. She suffered serious injuries, including a traumatic brain injury and multiple limb fractures requiring surgery.

The claims professional for the case had a $10,000 reserve on the file. Why? He rationalized the low reserve on the irrelevant fact that the young plaintiff and her infant brother were left home alone by their mother. The claims professional felt the accident was entirely the mother's fault and wanted that conclusion to form the basis of the defense theory. What the claims professional did not realize was that the jury would never hear about the child being left home alone.

New York does not recognize a cause of action for negligent supervision by a parent or foster parent. In an action by a child to recover for personal injuries, with a derivative action by a parent to recover for loss of child services, it is an error to instruct a jury to consider the parent's negligent supervision of the child.

However, there is an exception. A parent may be responsible for failing to use reasonable care if she intentionally entrusted or left in the child's possession an instrument of harm in view of the nature of the instrument; the age, intelligence and disposition of the child; and the child's prior experience with the instrument. For example, it has been held that intentionally placing a motorcycle in the hands of a 16-year-old with impaired vision may provide grounds for a negligence claim against the parents.

With the eight-year-old falling out of a window after pushing an air conditioner through it, the mere fact that the child happened upon the device in her parent's absence is insufficient. Needless to say, the claims professional's reserve went from $10,000 to the policy limits and is now being reported to the excess carrier.

Police Reports

Consider a garden-variety automotive subrogation action. The adverse carrier's subrogation correspondence contains a repair estimate, photographs, and a police report. The police report indicates

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that three eyewitnesses stated that the adverse operator was speeding at the time of the accident and had changed lanes without signaling. Conversely, there is nothing in the police report to indicate that the insured operator acted improperly.

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In 1930, the New York Court of Appeals issued its seminal ruling in *Johnson v. Lutz*, which established that police reports do not benefit from the business records exception to the rule against hearsay. The court recognized that police reports, unlike traditional business records, are replete with statements from individuals, typically eyewitnesses, who are under no business duty to report their observations with any truthfulness or accuracy.

Applying this principle to the police report in the hypothetical subrogation action, the officer who wrote the report did not observe the adverse operator speeding or changing lanes. That information came from three unsworn witnesses, all under no business duty to tell the truth. For this reason, the police report that the claims professional may rely on as the lynchpin of her liability analysis will never be seen by the jury. Instead, each eyewitness must be located, subpoenaed, and brought to court to testify.

Statements in Hospital Records

If the claim involves bodily injury, there will be medical records in the file. Often, the earliest medical records are from the emergency room. Suppose a careful claims professional, who receives a summons and complaint alleging a sidewalk trip-and-fall, notices a narrative by the attending ER physician indicating that the plaintiff presented on the date of loss with a fractured fibula "status-post fall in shower this AM." This is critical information that is inconsistent with

the plaintiff's allegations of a sidewalk trip-and-fall.

However, similar to police reports, narrative portions of hospital records are inadmissible at the time of trial. There is only one exception to this rule: when the plaintiff's narrative of the accident is germane to the medical treatment being provided.

The hypothetical fall-in-the-shower narrative likely would not benefit from this exception because the fact that the plaintiff fell in the shower is irrelevant to the treatment being rendered for a fractured fibula. Only when the individual who took the statement from the plaintiff is brought in to testify and a proper foundation is laid for the underlying records can the statement be introduced as an admission.

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Alcohol on Breath

Consider the wet-surface slip-and-fall claim you have on your desk. You have a hospital record that provides a history of "27-year-old male, alcohol on breath, slipped and fell two hours ago and presents with a bi-malleolar right ankle fracture." You may salivate upon seeing this entry. After all, the plaintiff was drunk, and liability will therefore be in the insured's favor.

Not so fast. To submit the issue of intoxication to the jury, it is insufficient for there to be evidence that the plaintiff had been drinking or that there was alcohol on his breath. The mere notation "AOB," or alcohol on breath, is not admissible to show intoxication. Proof of intoxication must be based on tests showing alcohol in the blood or on an expert toxicologist's testimony evaluating objective medical indicia, such as bloodshot eyes, staggering, and slurred speech.

However, building on the rule permitting medical narratives if germane to

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treatment, a hospital record that contains a report stating, "no history available due to heavy ethanol (ETOH) intoxication" is admissible since the hospital record that contains that report is pertinent to diagnosis and treatment of the patient.

Driver's License

In a case where a plaintiff ran a red light and was operating her vehicle without a license, the first reaction may be to judge the plaintiff's ability to drive based on her failure to be licensed. Consequently, the claims professional may evaluate the case predominantly against the plaintiff's actions as a cause of the occurrence.

New York law rejects violation of motor vehicle licensing statutes as proof of negligence. The absence or possession of a driver's license is only evidence of the driver's authority to operate the vehicle and the driver's credibility. In the hypothetical under consideration, defense counsel must establish the plaintiff's comparative fault through other means, namely, the manner in which the vehicle was operated, not the lack of license to operate it.

Suicide

A commuter rail accident was caused when the plaintiff jumped in front of a

moving train, leading to his death. An eyewitness confirmed that the plaintiff appeared to intentionally jump in front of the train. The initial evaluation may be that the plaintiff committed suicide and, for that reason, there should be no liability on the part of the insured train operator.

However, New York law imposes a presumption against suicide. The party asserting suicide as a defense has an affirmative burden of establishing facts sufficient to exclude any reasonable hypotheses of accidental death. Establishing the affirmative defense of suicide is an endeavor that will likely require defending the action through the time of trial. In the hypothetical train suicide, defense counsel likely will not be able to dispose of the case on a pre-answer dispositive motion nor even on summary judgment.

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Internal Corporate Findings of Fault

Consider an insured food delivery service that imposes a code of conduct on its drivers that includes the maxim "every accident is preventable." The written code prohibits drivers from making right turns at red lights, even if state law allows it. A claim comes in involving an insured driver who hit the plaintiff's vehicle while making a right turn at a red light. The claims professional evaluates the claim entirely against the insured.

Courts in New York consistently have held that, while internal operating rules may provide some evidence of whether reasonable care has been taken, the jury must not be permitted to consider a corporation's internal operating rules if those rules impose a higher standard of care than the common law reasonable

care standard. Conclusions set forth in any internal accident report are typically inadmissible, as they often turn on standards higher than the common law standards.

For the hypothetical food delivery driver, neither the fact that the insured maintains a policy that "every accident is preventable" nor that its drivers may not turn right on red will ever come before the jury because internal rules require a standard of care higher than mere reasonable care.

A prequel to *A Few Good Men* never went into production, so it is unclear whether Lieutenant Kaffee ever had a career as a claims professional before entering military service. But if his admonition to Captain Galloway was any indication, he would have made a fine claims professional. He understood what all claims professionals and defense counsel must recognize: It doesn't matter what you believe. It only matters what you can prove.

As the foregoing discussion indicates, a claims professional's gut feeling as to what may have happened in a loss, even if true, may never be heard by a jury. To the contrary, the rules of evidence often exclude relevant evidence in service of more pressing legal concerns. It is therefore critical that such evidentiary issues are recognized as early as possible in the claims process so litigation strategy may be developed proactively to avoid trial day surprises. CM

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