

New York Injury Times

A MONTHLY NEWSLETTER PUBLISHED BY THE LAW OFFICE OF GERALD M. OGINSKI, LLC

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March 06'



Gerry Oginski, Trial Lawyer

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Question Time

Q: At a civil trial, when a judge says "Objection Overruled," what does that mean?

A: It means that one side has objected to the question being asked. It also means that the judge has rendered an immediate decision on the objection and decided that the question can be asked and answered.

Q: What does it mean when a judge says "Objection Sustained"?

....Continued at p. 2

My Father Was a Malpractice Victim

Read a True Story

...page 4

LEGAL NEWS

...page 3

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In This **March** Edition, We Look At

HOW TRIALS WORK

Continued from page 1

A: It means that one party has objected to the question. It also means that the judge has decided that the attorney asking the question CANNOT ask the question, and that the witness is NOT to answer the question. There are many legal reasons why a judge would decide that an attorney could not ask a particular question.

Q: At a civil trial, when an attorney objects to a question with the following comment "I object. It assumes facts not in evidence," what does that mean?

A: It means that the attorney raising the objection believes that the witness is being asked a question that asks him or her to assume facts that have not been introduced into evidence. If true, then the witness would be answering questions based on speculation or guessing.

To remedy this problem, an attorney can ask a witness hypothetical questions. "Assume Mr. Witness that the car was 10 feet away and also assume that it was a blinding snowstorm. In that circumstance is there any way you would have seen that car..."

Or in a malpractice case we ask the accused doctor whether there were departures from good care with hypothetical questions. These hypothetical questions bear directly on our case, since our client has testified (or will) that

these facts are true and existed at the time of the event.

Q: What are jury instructions?

A: They are legal principles that are given by the trial judge at the end of a case. The judge instructs the jury on the law as it exists. The jury must determine what the actual facts are, and then apply the current law to their findings of fact to come to their decision.

Q: In a civil trial in New York, how many jurors sit on a jury?

A: Six jurors will sit in judgment, and as a safety measure the court will usually have 2-3 backup jurors who sit through the entire trial as well. These backup jurors are called alternate jurors.

Q: Why can't lawyers in New York use testimonials in their marketing or advertising?

A: Each State has their own specific rules on what lawyers can and cannot do. If you go on vacation and look through the yellow pages under 'lawyers' you might find ads that have statements by former clients saying things like "My lawyer was the best one in the world! He got me millions, and I know he can do the same for you too!"

In New York, lawyers are not permitted to say things like this. Why? Mainly because every case is different. If we obtained a great result for our last client, doesn't necessarily mean that our next case will be a good one, or that we'd win your case at trial. The Bar Association doesn't want to give the public a false impression that a lawyer can guarantee a result, when he can't. Nor do they want potential clients to hire an attorney solely on puffery or self-laudation (showing what a great lawyer he or she is).

The same thinking applies to an ad that has a person smiling, holding a poster-sized check, with a lot of zeros after some number, giving the appearance that this person got a lot of money, and so can you.

Q: In a jury trial, who decides how much money to ask for?

A: I do, or your attorney does. The court does not give specific guidelines about how much an injury is worth. Rather, the attorney may suggest a figure together with an explanation of why they feel it is justified. The jury is free to accept, reject, increase or decrease any suggested number by the attorneys.

Q: What are 'leading questions'?

A: A leading question is one where the answer is suggested in the question. For example, instead of asking "Where were you last night?" I could ask "You were with Jim last night, weren't you?" The first question is open ended and allows the witness to give an explanation. The second question leaves no room for an explanation and only allows a yes or no answer.

Q: Why is a courtroom so formal, and why do we have to stand up when the judge walks in?

A: Our system of justice has developed to the point where we, as a democracy, respect the rule of law. It is only through that respect that laws can be followed and obeyed. In the event those laws are broken, there are consequences.

Standing up when a judge enters the courtroom is a sign of

respect- that he or she is the sole arbiter of the law in that room. The courtroom is controlled by the judge and he or she has wide discretion as to what happens in that room.

Of course, if the judge oversteps their bounds, a higher court can review the events and overturn an improper decision.

Q: I went to two other lawyers before coming to you. Each of them told me my case was worth millions. Why aren't you telling me the same thing?

A: Simple. What those lawyers did was tell you something they could never guarantee.

There is no way for them to know how much money they could obtain for you, especially before any case is started on your behalf. Even if I were to give you a number that I believe you are entitled to, it would be absolutely wrong.

At the beginning there is so much information to obtain about your injuries, your medical records and how your injuries have affected you that it is impossible to tell you what your case is really worth at the outset.

The job of a good lawyer is to gather ALL of your information, and then formulate the chances and likelihood of success of your case. A lawyer who does that stands a much better chance of explaining to a client the approximate value of their case.

I'll let you in on a little secret. I suspect that those other attorneys who told you your case was worth millions did so primarily to have you sign up with them as opposed to going to another attorney.

No matter what any lawyer says, it is impossible to guarantee such a result. If you don't believe me, just ask the lawyer to put that promise in WRITING. See how quickly they backtrack when you ask them to do that!



Legal News!

\$7-million medical malpractice suit moves ahead

Canada, CBC News

More than six years after a Saskatchewan woman had her limbs amputated and suffered brain damage, a \$7-million malpractice suit against a former surgeon is progressing through the courts.

In 1999, Lisa Dawson underwent tubal ligation surgery at a hospital in Lloydminster. The surgeon was Kenneth Graham. She was released from hospital, but was back in surgery two days later for the repair of a two-millimeter bowel perforation. Graham was again the surgeon. She suffered a cardiac arrest. There were further complications. Her hands and legs were amputated. Dawson also suffered a brain injury, which limits her ability to speak. She now lives in a long-term care home in Saskatoon.

Dawson and Mark Baert have two children. They're suing Graham, the hospital and the Lloydminster District Health Board. Dawson's lawyer, David Risling, said it's hard to imagine how difficult things are for his client. "Her life has changed completely. She was the primary caregiver to her two little boys, she was a wife, and all of that has changed," he said.

Graham no longer practices medicine. His lawyer declined to comment on the case. In court documents, however, Graham said Dawson should have come back to the hospital sooner after her initial surgery. He also said that he provided good care to his patient and that the care he provided cannot be judged by the extreme outcome.

Jury awards \$160 million in nursing home suit

After hearing claims that a nursing home knowingly paired a frail 81-year-old man with a violent, mentally ill roommate who viciously pummeled him, a jury responded with one of the largest civil judgments ever awarded in San Antonio.

Finding that Summit Care Corp., its Texas affiliate and two nursing home employees shared the blame for the beating and its after effects, the jury awarded a total of \$160 million to the estate of Tranquilino Mendoza, who died less than three years after the attack, from unrelated causes.

Laurie Weiss, attorney for the defendants, said members of Mendoza's family agreed during trial that he received excellent care at the Comanche Trail Nursing Center until the attack. She said medical records demonstrated that Mendoza recovered quickly and fully from his injuries.

During a trial that ran nearly two weeks before 73rd District Judge Andy Mireles, attorneys for the plaintiffs offered evidence that Mendoza's roommate was involved in 30 assaults before he was paired with Mendoza.

On Sept. 28, 1997, two days after they were assigned to live together, the roommate beat Mendoza with a water pitcher, a glass and his fists.

Few such awards are ever paid. They are typically settled, dismissed or reduced on appeal.



MY FATHER WAS A MEDICAL MALPRACTICE VICTIM

A TRUE STORY

I was 14 years old when my mother came home from the hospital and told me my father had died. "How did it happen?" I asked. "Why did it happen," my brother questioned. "What happened?" asked our dazed and confused family.

From that day forward, I began to learn what a malpractice lawyer does. I learned that we had more questions than answers. My dad was young, only 46 years old. He wasn't supposed to die. He had a family with three young children. He was gainfully employed and worked hard to provide for our family.

Our lawyer got the hospital records, and he had a medical expert review the records. The more our lawyer probed the more questions we raised. "Why was he given that medication?" "When did the nurse arrive?" "Why wasn't a blood test ordered?" "What happened when...?"

Years later, while I was in college, our case came up for trial. I joined my mom for part of the trial, since it was during final exams. Being in Court was unfamiliar territory. Everything was formal. The procedures, the words, the questions-all needed explaining. Our lawyer was a big-time lawyer whose hair was gray and was respected by numerous lawyers who passed him in the hallways in the courthouse. Their nods and greetings were deferential- with respect for his accomplishments and greatness.

I watched with fascination the rapt attention everyone had during cross-examination of the primary target in the case- a young doctor in training who committed the gravest of medical sins. Our lawyer was intense. The barrage of questions put to the young unapologetic doctor was non-stop. The answers were not satisfactory to our lawyer, or to the jury, so it seemed to me.

The tension in the Court room was palpable and created knots in my stomach. The defense attorney was gentlemanly and put on airs. In my book he was a phony and I was hoping the jury would see through it.

Closing arguments came after three weeks of trial. I managed to arrive just as the trial resumed that day. I rushed from school to be in Court with my mom. What I witnessed that day caused me to apply to law school. Before that day, I was a biology major and was intent upon applying to medical school. You see, my father was a doctor and most of my family is doctors. I thought that was the path I'd naturally take. Not after witnessing closing remarks.

It is now twenty three years later and I vividly remember the day our famous lawyer made his closing remarks to the jury hearing our malpractice case. Neither the lawyer nor my mother is alive today, but my memory of that trial lives on till today.

I remember most clearly the accusations directed at the young inexperienced doctor. I saw his red face and neck. I wanted to reach across the aisle of the courtroom and pummel him with my fists. That would be true justice! That would satisfy my anger that had built up for years waiting for this disputed case to come up for trial.

Fortunately for the doctor, my senses overcame my desires to quash this little bug. He never knew what I wanted to do to him that day.

On that day, I realized that this lawyer- this ordinary looking, gray-haired man, who had accomplished great things legal- was telling a story so simple and clear that I realized anyone could do this. That day, I decided to become a lawyer.

One would think that with such a great lawyer anything would be possible. Unfortunately for my family, the results were not what we would have hoped. Despite this second loss, the first being losing my dad, I picked myself off and sent out those law school applications. I had one thing on my mind...to become a trial lawyer.

I've been a medical malpractice trial lawyer for 17 years now. The first 4 years as a defense lawyer representing doctors, hospitals and folks sued in accident cases. The next 13 years representing injured victims in their quest for justice. When asked by a colleague which I prefer- representing injured victims or the wrongdoing doctor, my answer has always been clear...the injured victim.

My experience has helped me understand what injured people endure. It has allowed me to be more compassionate with the people I have the privilege of representing. This is my calling.



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