

Head Injuries and Workers' Compensation Law

Employer funding of New York's Workers' Compensation system was intended to limit recovery for an injured employee to Workers' Compensation benefits. The system was conceived to eliminate employer tort exposure in exchange for mandating employers to maintain adequate Workers' Compensation coverage. Although direct actions by workers against their employers were prohibited, the purpose of the system was evaded through impleader actions wherein employers were sued as third-party defendants.¹

An injured worker's suit against the owner or general contractor would precede the owner's or general contractor's action for common law contribution or indemnification against the worker's employer. Likewise, third-party claims against employers often followed actions against manufacturers of workplace equipment.

In response, Workers' Compensation Law was amended in 1996 to bar such common-law actions, except when employees suffer "grave injuries," defined in §11 as:

death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain ... resulting in permanent total disability.

The Court of Appeals endorsed a narrow reading: "The grave injuries listed are deliberately both narrowly and completely described. The list is exhaustive, not illustrative; it is not intended to be extended absent further legislative action."²

Consequently, first-party defendants have been unable to maintain actions against employers when workers have lost five fingertips, suffered temporary paralysis, lost vision in one eye, retained use of a hand despite suffering a severe and disabling injury, and lost a thumb.

However, litigants have developed and taken advantage of confusion over methods for determining whether brain injuries, secondary to head trauma, result in permanent total disability under the statute.

Courts have employed different tests to determine whether a so-called closed head injury results in statutory disability, while others have found the determination so fact-intensive as to preclude pretrial disposition. Competing rules for the allocation of burdens of proof and the relationship between §11 and CPLR 3212 compound the problem. It seems clear that head injuries now offer fertile ground for the courts' expansion of the scope of grave injury exceptions, circumventing the exclusivity of workers' compensation remedy.

Most of the enumerated injuries are defined functionally and descriptively. Defining injuries descriptively, such as the loss of an ear, affords easy application. Likewise,



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deciding whether an accident results in the loss of one or multiple fingers is a discrete quantitative inquiry. Fingers need only be counted.

The language also contemplates "permanent and total loss of use" of particular faculties, thereby defining injuries functionally. Where the statute provides for both functional and descriptive alternatives, courts can decipher the functional grave injury by way of its equivalent descriptive definition.

For example, in *Trimble v. Hawker Dayton*,³ a worker suffered a "severe and disabling" injury when his hand was crushed by a machine. Since the worker retained some functionality of his hand, the court found no grave injury because the disability was not equivalent to the consequences of amputation. The statute designates grave injury as the "permanent and total loss of use or amputation of [a] hand."

A few of the enumerated injuries are defined exclusively in terms of functionally, including total and permanent blindness and deafness and "an acquired injury to the brain ... resulting in permanent total disability." Defining and diagnosing total blindness or deafness does not pose a great challenge; the threshold disability is total and unqualified.

The same approach could apply to totally disabling brain injuries, however courts and commentators understandably have been unprepared to define the grave brain injury in relation to its absolute descriptive equivalent: the absence of the organ. Consequently, courts have attempted to quantify threshold degrees of disability, something they have not done with blindness or deafness.

Brain injury claims reflect a broad spectrum of severity — from intermittent, episodic problems to clinical brain

death — and can incorporate a range of symptoms, including memory loss, disorientation, dizziness, cognitive and linguistic deficiencies, motor problems, and depression.

Moreover, neurologists concede a certain amount of indeterminacy regarding the permanency of symptoms. Because injuries evade straightforward descriptive definition (notwithstanding the Legislature's attempt to codify them) and because of diagnostic imprecision, courts have employed functional tests to designate permanently and totally disabling injuries, with mixed results.

The Appellate Division, Second Department, focuses on the injured party's "ability to engage in day-to-day functions" and perform basic self-care, to indicate the absence of total disability.⁴ However, the Third Department, in *Way v. Granting*, found that total disability "relates to the injured party's employability and not his or her ability to otherwise care for himself and function in a modern society."⁵

An injury may be designated "grave" in one department, while a qualitatively identical injury may afford an employer summary judgment in another.

The Third Department rejected consideration of whether an injured party could engage in routine household functions. In fashioning its standard — that total dis-

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ability is such that it forecloses competitive employment — the court considered the comparative magnitude of other grave injuries. In *Way*, the court noted that “with the exception of death, paraplegia and quadriplegia, none of the other categories of ‘grave injury’ would have the likely effect of preventing the injured party from engaging in routine household functions.”

Arguably, the court improperly resorted to comparison with other enumerated injuries, thereby treating them as “illustrative” in derogation of the opinion of the Court of Appeals in *Castro v. United Container Machinery*.⁶ In finding that the partial loss of multiple fingers was not “grave,” as distinct from “loss of multiple fingers,” the Court of Appeals clarified: “[w]hile it is doubtful that any list that purported to be the complete catalog of ‘grave’ injuries would — or ever could — meet with universal approval ... we may not lightly alter this legitimate exercise of legislative prerogative.”

Despite trouble determining grave brain injuries, when the courts filter out cases by use of workable judicial standards the amendment’s underlying intent is sustained. As asserted by the Court of Appeals in *Castro*, its clear aim is the reduction of third-party actions “by barring suits except in extremely limited, defined circumstances.” Nevertheless, the competing standards (and the fact-intensive inquiries required) threaten to eviscerate the grave injury threshold in the context of head trauma claims.

Law or Question of Fact?

Application of standards for discerning grave brain injuries, measured either against “employability” or “self-care,” requires fact-intensive consideration. Section 11 provides, in pertinent part, that:

An employer shall not be liable for contribution or indemnity to any third person ... unless such third person proves through competent medical evidence that such employee has sustained a ‘grave injury.’

The text is clear that the Legislature placed the burden of establishing grave injury on the first-party defendant (the “third person”), “through competent medical evidence.” It follows that an impleaded employer should be granted summary judgment in the absence of such a showing.

In *Ibarra v. Equipment Control*,⁷ the

Second Department followed the plain meaning in determining that “it is clear that the burden falls on the third party seeking contribution or indemnification against an employer to establish a ‘grave injury.’”

Likewise, the First Department, in *Barbieri v. Mount Sinai Hospital*,⁸ held that Mount Sinai’s action against the employer was barred because “plaintiff’s injuries, as pleaded and as amplified by the bill of particulars and supported by some evidence, [did not] constitute ‘grave injuries.’”

This statutory scheme for the allocation of burdens is at odds with the ordinary summary judgment rules under CPLR 3212, where the movant has the burden of proof and the non-movant need only raise a fact issue to survive the motion.

The Court of Appeals has addressed the issue. In *Castro*, it determined that the question of whether the plaintiff’s injuries were grave was a matter of law and not a question of fact that would preclude pretrial disposition. However, in a line of cases involving head injuries, some courts have retreated to the CPLR rules, due to the aforementioned definitional problems and the judicial aversion to pretrial fact-finding.

The Third Department, in *Way*, a case involving a claim of postconcussive syndrome, held that the CPLR rules trumped the text of §11. The court “reject[ed] third-party defendant’s contention that the burden was on the parties opposing the summary judgment motion to come forward with competent medical evidence [of plaintiff’s grave injury].”

The Fourth Department, over a dissent, in *Sergeant v. Murphy Family Trust*,⁹ denied employer’s summary judgment motion where the first-party defendant introduced plaintiff’s “deposition testimony in which plaintiff testified that he has experienced memory loss, anxiety, vision deficits, forgetfulness and personality changes.” Here, the court altogether dispensed with the requirement for competent medical evidence.

Despite these decisions, the state’s highest court has reiterated its assertion that grave injuries are to be determined as a matter of law.

In *Meis v. ELO Organization*,¹⁰ the Court of Appeals reversed a First Department decision which held that summary judgment was precluded where an employee lost his thumb.

The First Department denied the motion because it could not conclusively decide whether the injury constituted the “permanent and total loss of use” of the hand. In reversing, the Court of Appeals reiterated that

“Workers’ Compensation Law §11 does not list the loss of a thumb as a ‘grave injury,’ and plaintiff failed to demonstrate that due to the amputation of [the] thumb [the employee] suffers a ‘permanent and total loss of use’ of [the] hand.”

Further, the Court of Appeals denied leave to appeal the Third Department’s decision in *Tassone v. Mid-Valley Oil Company*,¹¹ where the Court granted summary judgment to an employer because medical tests revealed plaintiff’s normal brain function, notwithstanding proof of a “severe closed head injury.”

Conclusion

Despite plain statutory language and the Court of Appeals decisions, confusion persists regarding the allocation of burdens on employers’ motions for summary judgment invoking §11. Because of the difficulties defining grave brain injuries, lower courts are hesitant to make fact-intensive rulings and are much more likely to subject employers to third-party liability when employees suffer head injuries than for any other injury.

Imprecision in diagnosis should not undermine the clear legislative intent that grave injuries are to be determined as a matter of law — and when found absent — to bar third-party actions against employers.

In deciding future cases on the issue, the Court of Appeals may adopt either the “employability” or “self-care” standard, or better yet, the Legislature may refine the definition.

This distinction, while vital, is less important than the obligation of the courts to adhere to the statute’s plain meaning: that where first-party defendants fail to prove grave injury by competent medical evidence, third-party defendant employers are entitled to summary judgment as a matter of law.

1. “Dole impleaders,” following *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382 (1972).

2. *Castro v. United Container Machinery*, 96 N.Y.2d 398, 402, 736 N.Y.S.2d 287 (2001) (quoting Governor’s Mem approving L 1996, ch 635, 1996 NY Legis Ann, at 460).

3. 307 A.D.2d 739, 721 N.Y.S.2d 114 (3d Dep’t 2001).

4. *Rubeis v. Aqua Club, Inc.*, 305 A.D.2d 656, 658, 761 N.Y.S.2d 659 (2d Dep’t 2003).

5. 289 A.D.2d 790, 792, 736 N.Y.S.2d 424 (3d Dep’t 2001).

6. 96 N.Y.2d at 402.

7. 268 A.D.2d 13, 17, 707 N.Y.S.2d 208 (2d Dep’t 2000).

8. 264 A.D.2d 1, 5, 706 N.Y.S.2d 8 (1st Dep’t 2000).

9. 292 A.D.2d 761, 762, 739 N.Y.S.2d 790 (4th Dep’t 2002).

10. 97 N.Y.2d 714, 716, 740 N.Y.S.2d 689 (2002).

11. 291 A.D.2d 623, 623-24, 738 N.Y.S.2d 103 (3d Dep’t 2002), iv denied, 100 N.Y.2d 502, 760 N.Y.S.2d 765 (2003).