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# TRANSPORTATION LAW UPDATE



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## PENNSYLVANIA

# NEGLIGENCE IS NOT ENOUGH



**James R. Callan**

Conceding negligence may be where a case begins rather than where it ends. In a recent personal injury case in the Court of Common Pleas for Philadelphia County, the defendant tractor trailer driver had stopped at a traffic light controlling an intersection. She then decided she needed more room to make a left turn, and began to back up without securing the area behind her. She unwittingly backed into the co-defendant's auto, which was slowly pushed into a van operated by the sixty-two year old plaintiff.

Plaintiff commenced a personal injury action and alleged that he sustained multiple cervical spine and lumbar spine disc herniations in this accident, with resultant pain and disability. The defendant admitted negligence in the operation of the tractor trailer, but disputed plaintiff's damages.

A careful review of plaintiff's medical records revealed references to prior injuries. Nonetheless, plaintiff testified during his deposition that he could not remember whether he had previously been treated for back injuries by his current doctors. He also testified that he never had, and never complained of, cervical or lumbar radiculopathy to his current doctors.

In his final narrative report, plaintiff's treating osteopath concluded that plaintiff had a nineteen percent (19%) whole person disability as a direct result of this accident, computed by

comparing plaintiff's symptoms with AMA guidelines. The osteopath made the mistake of quoting the applicable guidelines which required radiculopathy to be part of the clinical picture in order to arrive at the disability determination.

During the osteopath's video deposition, he read the cited AMA guidelines to the jury, but was unable on cross-examination to credibly explain how he had come to his disability conclusion using guidelines that required symptoms plaintiff had disavowed. Plaintiff's expert was visibly uncomfortable in the videotape attempting to explain the inconsistency.

At trial, the defense orthopedic surgeon and defense radiologist testified that there was no objective medical basis for concluding that plaintiff's alleged injuries and disability were caused by this low-speed accident. They also confirmed that plaintiff's medical history did not reveal any complaints of radicular symptoms.

In our closing to the jury, we contend-

ed that a tractor trailer cannot back up fast enough to cause the injuries claimed by plaintiff. We also argued that the testimony of plaintiff's medical expert was insufficient to meet plaintiff's burden of proving that this accident was the factual cause of his alleged injuries.

Within fifteen (15) minutes, the jury reached a verdict in favor of the defendant.

Following the trial, the jury members were outspoken that the testimony of plaintiff's treating osteopath was simply not credible, such that plaintiff had not convinced them that this accident was the factual cause of plaintiff's injuries.

Thus, conceding liability may be the beginning of the game rather than the end. Once a strategic decision is made to concede liability, discovery and depositions must focus on the remaining elements plaintiff must prove at trial in order to prevail on damages. The lack of objective medical evidence and inconsistencies in a medical ex-

pert's conclusions may save the day even where the defendant has admitted causing the accident.

**James R. Callan** graduated from Temple Law School in 1996 where he completed the Integrated Trial Advocacy Program and was a member of the Moot Court Honor Society. He also received his undergraduate degree from Temple University.

Prior to receiving his law degree, Jim was a television producer for advertising. Now, he focuses his energies on the defense of commercial motor vehicles and their insurers. He also has extensive experience handling insurance coverage matters in New York, New Jersey and Pennsylvania.

He is admitted to practice in New York, New Jersey and Pennsylvania, as well as the U.S. District Courts for the Northern, Eastern, Western and Southern Districts of New York, the Eastern and Middle Districts of Pennsylvania, the District of New Jersey and the U.S. Court of Appeals for the Third Circuit.