

# **GARDEN STATE CLE LESSON PLAN**

**A 1.5 credit course**

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LESSON PLAN AND EVALUATION**

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## **TRYING A VERBAL THRESHOLD CASE**

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**With**

**Kevin Riechelson, Esq.**

**And featuring**

**Robert Ramsey, Senior Instructor**

### **Program description**

Don't give up on a verbal threshold case. Your client may still qualify for a just recovery. This 1.5 credit CLE seminar will show you how.

**I. Introduction**

- **Kevin Riechelson, Esq.**
- **Admitted in NJ and PA for 22 years**
- **Primarily plaintiff's personal injury, construction cases, auto cases**
- **Different venues – different procedures (liberal v. conservative venues)**

**II. Who is your adversary?**

- **Plaintiff's attorneys must take into consideration who the carrier is on the other side**
- **Most difficult carriers to deal with: NJ Manufacturers, Allstate, Geico**
- **Carriers tend not to settle cases as quickly and don't settle verbal threshold cases**
- **Not settling many cases pre-lawsuit as much as other carriers**
- **These companies tend to try more cases**
- **Allstate has in house counsel to try cases (verbal threshold cases)**
- **Verbal threshold cases are more like to go to trial**
- **No verbal threshold or exception to threshold – likely to be more reasonable**
- **Hypothetical: verbal case, good liability, bad damages (compound fracture) – if demand on Geico with a 15 policy – what would happen?**
  - **They would probably tender the policy**
  - **Downside risk is greater with a policy of that size – if \$100K policy they may want to fight more**
  - **Clear case to overcome the verbal – economics comes into play as to cost to defend**
  - **When there is a defense companies will spend \$30K to protect the policy to deter attorneys from taking these cases**

**III. Basic Verbal Threshold Information**

- **ACRA – Automobile Insurance Cost Reduction Act (1998) – to keep down insurance costs**
  - **Who was beneficiary of this law? Policy holders?? Insurance companies?**
  - **Policies have not come down in price**

- **Insurance companies or agents/brokers explain to policy holders what they have purchase and what they have given up in selecting verbal threshold**
- **After an accident, most people don't realize they have verbal threshold**
- **People save \$1K with a verbal threshold policy**
- **PIP – Personal Injury Protection coverage – in PA minimum coverage is \$5K because health insurance kicks in after \$5K; not the same in NJ; bringing down \$250K PIP in NJ can reduce costs; doctors will over-treat if know that \$250K PIP coverage – not so much in PA because smaller policies, get less treatment if no health insurance**
- **ACRA changed the landscape of PI work regarding auto cases in NJ**
- **Biggest problem with verbal threshold is exceptions and general exceptions (permanent injury) – very subjective and that is what is left to a jury – which makes it difficult to determine possible outcomes – must then evaluate jury pool/venue**
- **Middlesex, Atlantic, Camden more liberal; then moderate counties, and then others you need catastrophic injury to get a jury verdict**
- **Intention of verbal was the weed out allegation of personal injury that does not meet threshold set by statute**
  - **Death**
  - **Dismemberment**
  - **Loss of a fetus**
  - **Displaced fracture (not a tooth – teeth are not bones per caselaw – although jury could determine it as permanent injury)**
  - **Significant scaring (depends on location of scar and size of the scar, and also age of person, and sex of person)**
  - **Catch all**

IV. **New client – steps to take**

- **Look at policy**
- **Determine liability**
- **Get police report**
- **NJ favorable on rear end accidents**
- **How sure do you have to be on liability issue to go forward?**

- **Look at police report**
- **Intersectional accidents – must look at intersection – controlled? Not controlled?**
- **Weather conditions? Driving too fast for poor conditions – no liability**
- **Sometimes attorneys need to reject cases based on liability – be up front with clients in the beginning – attorneys must evaluate cases because usually on contingency fee basis**
- **Verbal threshold case with injury – evaluate how you can get over the threshold**
- **Initial intake:**
  - **Have they been treated at all: ER, family doctor, etc.**
  - **Prior accidents or injuries? (causation issue)**
  - **Age of client (older clients injuries can be attributed to degeneration of bone structure, etc.)**
- **Not easy to get over threshold for summary judgment – most judges not granting summary judgment on verbal threshold**
  - **Change in caselaw: DiProspero v. Penn (183 NJ 477 (2005)) – changed standard for verbal threshold cases; used to have to prove significant impact on life – Supreme Court decided that is not in the statute and therefore cannot be a requirement.**
  - **Jury still has to decide on the issue of the “catch all” exception of the threshold**
- **Look at injury to determine if you can get over verbal threshold – need experts!**
- **Most cases involve bulges or herniations – must prove that they are related to accident – therefore younger clients more likely can show from accident**
- **Certificate of permanency – must be filed within 60 days of the complaint, or defendant answering**
  - **Tell doctor you need this document and doctor will provide document to attorney**
  - **Usually the final “catch all” category that doctor will “check off” on the list because other options are clear**
- **Motorcycles usually don’t carry PIP**
  - **If you are hit by a motorcycle or commercial vehicle, then you can overcome the threshold because one exception is if you are hit by a vehicle that does not have PIP**

- **If defendant's vehicle is insured by a company that writes policies in NJ, then the verbal threshold applies – Deemer statute (a provision that such policies will provide coverage at least equal to NJ's standard policy)**
  - **Pedestrian hit by car (or passenger in someone's car) – still verbal threshold if policy is a verbal threshold policy**
    - **Except if commercial vehicle or one that does not have PIP coverage**
  - **Deemer statute – if you are verbal threshold in NJ and in out of state accident, then threshold still applies; but if in PA where threshold is not applied, then no threshold**
  - **If NJ driver gets hit by PA vehicle, then PA has jurisdiction so you can bring suit in PA where verbal does not apply – similar to a long arm statute (a legal provision that allows a state to exercise jurisdiction over an out of state defendant)**
  - **Client is passenger in vehicle that has no verbal but his own policy has a verbal – always follow “home policy” – whatever you have selected is what you get**
    - **Applies to people in the household, depending on relationship to person in household (family members, i.e. parent to child, but not child to parent – goes down family tree not up)**
    - **Adult siblings of an insured would not apply to but would apply to your children in household**
  - **Always look to try to get the case out of the threshold**
- V. **Factors to consider when deciding to take a case**
- **Soft tissue injuries are not worth the investment after paying for the experts and preparation – unless you can show significant impact to plaintiff (i.e. athlete and career ending, unique work requirements and unable to work)**
  - **Can still collect economic damages even with threshold**
  - **Other injures:**
    - **Extreme pain**
  - **Have to evaluate whether adjuster is going to want to settle case – there is no math to determine, could just be the person is taking a stand on the case or could be a quota issue for resolving cases**
    - **Mostly economics – if on 15/30 case need to evaluate cost of litigation with tendering policy**

- **9 months to 1 year out determine whether you want to take the case and make a decision and contact insurance company**
  - **Statute of limitations? Should tell client at least 6 months out of statute to allow them time to get a new lawyer**
  - **Have to look at whether client is still treating in order to determine ability to move forward with case**
- **Facts of case? To establish liability**
- **Policy**
- **Nature of injury and extent**
- **Know who is insurance company and their likelihood to settle**
- **Know coverages**
- **Know the cost to litigate**
- **Gut feelings/experience**
  - **No right or wrong answer to value of case**

**VI. What to do next?**

- **Send a package to the insurance company that want to settle the case**
- **More advantageous to speak with adjusters than attorneys because adjusters make the decisions**
- **Some insurance companies have computer programs that assess the value of a case and adjusters would not be likely to settle with a different number unless plaintiff has some exceptional issues to address**

**VII. Setting client's expectations**

- **Need to set expectations very early**
- **Some clients will trust you and just go with what attorney recommends**
- **Some clients have unreasonable expectations and you have to ask the client what their expectations are and let them know when they are unreasonable – what case is worth to client vs. what a jury or insurance company believes the case is worth**
- **Tell clients that the case is theirs and it is their decision to accept or reject – but give them best advice**
- **If you can discuss with clients early the expectations, then that is the best situation**
- **Try not to talk about recoveries and monies up front because don't want to set a number too early**
- **Don't put a range for possible settlement on the case**

- **Look at medical treatment, surgery, herniation, etc., and say that a case like this may fall within a particular range, but there may be issues (liability, verbal threshold, etc)**
- **Higher expectation v. reality of the case**
- **Keep the expectations low – “you have been diagnosed with XX, but the defendant’s attorney is going to hire an expert who will examine you and will come up with an opinion that differs from our doctor and it will come down to a jury decision as to your injuries and whether they were sustained from the accident. If they do believe you, then they can come back with a \$20K-\$40K payment, but there is a possibility that they will come back and will not have a permanent injury and you will be no caused.”**
- **“I don’t know that you want to take a risk of taking your case to trial because a jury is only made up of people who are not smart enough to get out of jury duty.”**
- **When there is an offer on the table – determine the client’s risk assessment – if attorney thinks it is a good number, then recommend that client take the settlement number**

**VIII. Rova Farms letters and telling insurance company that you are not able to settle the case**

- **Rova Farms letter (in NJ) letter to carrier to state that the judgment in a case may exceed the coverage amount on the policy**
- **Offer of Judgment – tort reform law aimed at controlling unnecessary litigation and at encouraging settlement**
- **NJ courts don’t usually hit insurance companies with bad faith**
- **In PA – bad faith was something that meant something, assessed other damages and costs, including attorneys fees**
- **Rova Farms letter – there is a risk that the verdict in this case will exceed the policy limits and if it does we will come after the insurance company for bad faith**
  - **Some caselaw indicates that you do not need to put insurance company on notice**
- **Offer of Judgment – also a federal court rule – you can send a notice to the other side offering to take judgment for a dollar certain; if company does not pay that amount and gets verdict for more than that amount then subject to attorneys fees and**

**costs that post-date the offer of judgment – verdict in 20% in excess**

- **Some judges do not enforce Rova Farms and Offers of Judgment**

## **IX. Preparation for Trial**

- **Discovery phase**
  - **Most of discovery is defendant taking discovery from plaintiff because have medical records, police report, etc.**
  - **May take depositions of witnesses, defendant, police officer – if clear liability, then may not take depositions**
  - **Most of work is done pre-litigation**
  - **Treating physicians – participate?? For trial videotape them so that you don't pay for expert who is on call, etc.**
  - **Video depositions – most of experts know that this is part of the practice; taken where doctor is located to take as little time as possible**
  - **Experts – preference for client to treat with family doctor and get referred out – not to have attorney refer a doctor**
    - **Choosing an expert: most referrals to orthopedic or neurologic expert; most experts will do records and film review – do not recommend that the doctor has not physically examined patient**
  - **Preference for doctors to testify in person but with trial calendars changing, then cannot guarantee that doctor will be available**
  - **Remote location depositions are possible but don't always get a good feel for the witness – issues regarding exhibits can become an issue**
- **Focus groups to determine how a jury would react to a case?? – expensive for plaintiff's case – more likely from defense side**
  - **Can also rely on arbitration or mediation**
- **Jury consultants – more on defense side than plaintiff's side**
  - **Based on stereotypes mostly**
- **Preparing client for testimony**
  - **Don't feed them lines**
  - **Don't look rehearsed**

- **Prepared by going through direct examination but not telling them what to say**
- **Tell them to just tell the truth**
- **Explain what it is you are asking them – relate back to the deposition testimony as to injuries, etc.**
- **In the morning – how do you feel?**
- **In the afternoon – how do you feel?**
- **Literal questions are not always going to be the best way to prepare**
- **Preparing for cross examination**
  - **Look at case from defense side and know pitfalls in the case that the defense will ask about during trial**
  - **Want to know bad things up front so that you can deal with it in preparing for cross examination**

## X. **Trial**

- **Jury selection**
  - **Cases are lost and won on jury selection**
  - **In NJ judge picks foreperson – not in PA**
  - **Talk to the office staff in your office to see who likes and dislikes client – to determine who would be a good juror**
  - **Depends on who client may be – non-English speaking; young woman**
  - **Theory that older people will not empathize with someone with back pain because older people live with pain every day**
  - **Gut instinct – sometimes lesser of the evils – get rid of those people who you know will not like your client**
  - **Trust yourself and your abilities**
  - **Try the case to all the jurors simultaneously but sometimes see a juror nodding, then get good feedback on credibility**
- **Opening statement in verbal threshold case**
  - **Talking about the client as an individual**
  - **Need to tell the jury why this injury effects this person, and not someone else; i.e. athlete who can no longer play – think of how important it is to that person**
  - **Don't vilify the defense unless feel that defendant is lying or trying to cover something up – sometimes**

**defense attorneys will stipulate to liability and try to damages**

○ **Talk to jury about client credibility – client will not embellish testimony**

○ **Direct examination**

○ **Methodical**

○ **Questions asked so that client knows what attorney is asking them and what information they are looking for**

○ **Experts**

○ **Do juries really consider experts?**

○ **Demonstrative evidence is most effective tool to use for trial testimony**

○ **One expert draws out the injuries on the body – helpful for a jury to understand and explain why it is important and how injury effects someone's life**

○ **Day in the life films**

○ **As a defense always moved to exclude as prejudicial – not subject to cross examination and shows what plaintiff wants to show**

○ **Depends on status of plaintiff – whether he/she can come to court or whether there are witnesses that can testify as to what the person's life is like**

○ **Questionable whether certain judges will allow into evidence – could spend money and not be able to use it**

○ **Be careful with emotion – if it comes off phony then jury will not like it – need to humanize clients from the outset to make a connection with the jury**

○ **Clients must look credible**

○ **What you don't say is a powerful as what you do say**

XI. **Number one important thing for successful litigation**

○ **Credible plaintiff and credible doctor (expert or treating physician)**

○ **With orthopedic injuries need an expert who looks at the case before rendering an opinion – as opposed to someone who would just give an opinion for money**

○ **Can you make your client more persuasive?**

○ **Attorneys must be more persuasive than clients, as long as client is coming across well**

- **Attorneys can tell jury why client is such a good witness and point out shortcomings of other witnesses, i.e. doctors who won't concede a point**
  - **Who has more credible witnesses – address in summation**
  - **Client must know how to deal with questions**
    - **Read deposition**
    - **Tell the truth**
    - **Be yourself**
    - **No arguing**
    - **Don't answer question with a question**
    - **Don't lose temper or let them bait or provoke you**
  - **Some judges won't tolerate witnesses arguing, etc. so if judge gets involved it takes the focus away from your client's testimony**
  - **You will know what your client will be like on the stand during deposition – see how they can answer questions and how they interact with other attorneys**
- XII. **Likelihood of settlement after jury begins to deliberate**
  - **Usually unlikely unless there was an attempt to settle from the outset**
- XIII. **Jury charges**
  - **Most judges have jury charges already**
  - **Judges are not likely to allow you add charges unless your client's case has some extraordinary issues involved**
- XIV. **After verdict**
  - **High verdict – over policy limits**
  - **Remittitur application – lowering the amount of damages granted by a jury – need to shock the conscience of the court**
  - **What if you are “no caused” – prepare yourself for them in verbal threshold case because defense has advantage trying this type of case – jury charge about standard and defense will continue to mention throughout the case and sometimes judge will mention it**
    - **Plaintiff has to prove a significant injury with objective medical evidence**

- **In today's economy, juries are more conservative and not likely to give money away easily**
- XV. **How does internet affect the jury pool**
- **Don't have the ability to check on jurors to research in advance (i.e. facebook, etc.)**
  - **Only receive potential juror's name, town, and profession**
- XVI. **How can you make money representing plaintiffs in verbal threshold cases**
- **Good selection of cases**
  - **Volume will not help if you lose 9 out of 10 cases because costly for attorney**
  - **Most policies are not only 15/30**
  - **Remember that most clients do not understand what their insurance coverages are**