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Trial News

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Special Focus: Product Liability

Product Liability and The People's Republic of China

by Philip G. Arnold and Jeffery M. Campiche

THE PROPHECY: "It shall be assumed that, when present on a machine, a hazard, will sooner or later lead to an injury ...."[1]

THE HAZARD: Longshore crane mechanic Jeffrey Surber (Jeff) was decapitated by a pinch point.

THE MACHINE: The defective product was a 2004 Ship-to-Shore Crane designed to load and unload containerized cargo ships. The crane was owned by a private entity.

THE MANUFACTURER: Shanghai Zhenhua Heavy Industries Co., LTD., a/k/a ZPMC, (Shanghai) manufactured the crane in China. The sole owner of Shanghai's stock is China Communications Construction Company Limited, a holding company owned by The People's Republic of China. It is a state-owned company.

MECHANISM OF INJURY

The following pictures show the cause of Jeff's death. Shown is the subject crane, number 5, at the Pierce County Terminal in Tacoma, Washington.

Jeff worked as a crane mechanic maintaining these giant cranes. Critical to the crane's safe functioning is its wire cable (wire rope). OSHA mandates monthly inspection of these cranes' cables to detect wire breaks, excessive wear, and corrosion threatening the integrity of the cable. By industry practice crane mechanics run the cable through their cupped hands to feel for wire breaks on the non-visible side of the cable. At the time Jeff was crushed, he was inspecting cable in the trolley pit, which runs on wheels the length of the crane boom.

As the trolley moves along the boom, it crosses under several fixed rollers.

The location of the inspected cable along the sides of the trolley place the crane mechanics in the zone of danger from the fixed rollers. To do their job the mechanics must position themselves along the wall of the trolley.

While the mechanics' attention is on the inspected cable, they must maintain peripheral vision of the hazard from the approaching fixed rollers. The mechanics' attention is divided between the inspection job and avoiding the fixed rollers. The prophecy, foreseeing injury from existing hazards, foresaw the death of Jeff. The bottom left photograph reconstructs the decapitation.

Before filing a complaint in federal court substantial pre-trial investigation work was undertaken to develop the case. China's state secrecy laws prevent trial discovery of documents by elevating commercial secrets to national security matters.[2] We knew we had to develop our case assuming no information of value would be generated by discovery. Compounding the lack of pre-filing information, Jeff's employer refused to provide any assistance, would not share the crane's manuals, and would not provide any other

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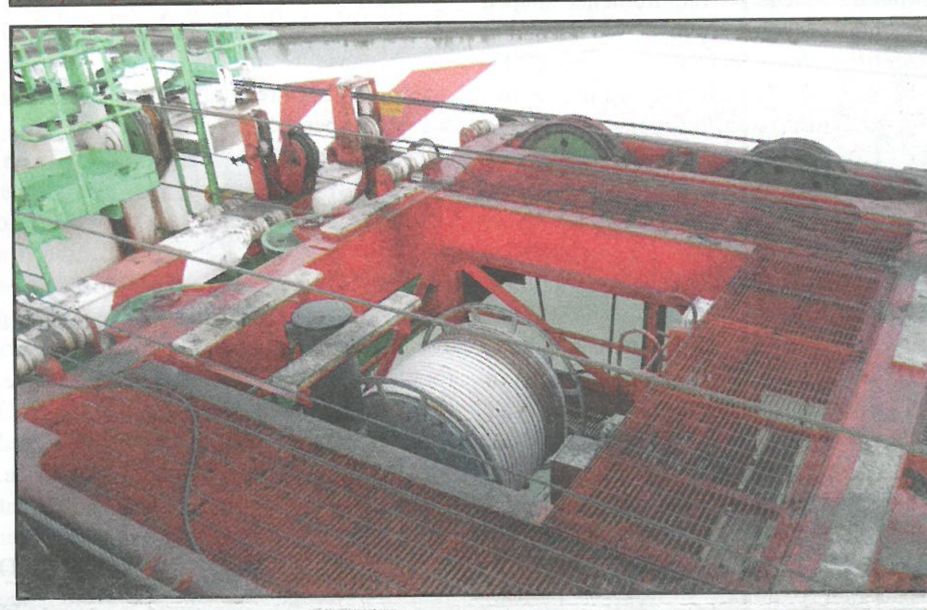

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information. Jeff's employer was hired periodically by Shanghai to perform crane warranty work on crane number 5 and other cranes. The employer wanted to keep Shanghai's business. Our very able paralegal, Leslie Harris, found a case against Shanghai in California and obtained a similar crane's manual from that case's California OSHA investigator. The California case involved a Shanghai Ship-to-Shore crane but the cause of injury was dissimilar to Jeff's death. That manual was fundamental to understanding this crane. The Washington Labor and Industries investigation provided some information regarding the mechanism of injury and was helpful. A thorough review of all American, European, European Community, International, and Chinese machine design safety standards formed the basis of liability in our case.[3]

THE COMPLAINT

Recent U.S. Supreme Court long arm jurisdiction decisions[4] and the *Iqbal*[5] and *Twombly*[6] pleading requirements shaped our initial pleading strategy. We needed to establish that Shanghai purposefully availed itself of conducting business activities in Washington, invoking the benefit and protection of Washington law for long arm jurisdiction.[7] Freedom of Information (FOI) requests were made to the Port of Seattle (POS) regarding its purchases of several Shanghai Ship-to-Shore cranes. The information obtained from the POS disclosed that Shanghai shipped and erected these cranes in the State of Washington using Shanghai employees. Substantial Shanghai activity on the Seattle waterfront was required to meet quality control before the cranes were accepted by the POS. We found our long arm jurisdiction.[8]

Iqbal and *Twombly* pleading rules threw out notice pleading in federal courts. Factual pleading and not conclusions must be pled. The FOI discovery gave us names, dates, and activities of Shanghai's presence in Washington for our complaint to establish long arm jurisdiction. The decision was made to file directly in federal court rather than fall in the trap of filing in state court with the more relaxed notice pleading rules. Clearly complete diversity existed[9] and Shanghai had a high probability of removing a state court filing to federal court. A state court notice pleading complaint would be insufficient in federal court.

It was our strategy to plead a pure unsafe product design and forego any claim of inadequacy of warnings and instructions.[10] The manual for our crane was insufficient and supported a defective instructions' cause of action[11], but defendants seek to turn a defective design case into a failure to train or warn case blaming the worker, employer and/or crane owner.[12] This defense tactic focuses the case on the conduct of the plaintiff (a journeyman crane mechanic) and the responsibilities of the employer under OSHA/WISHA to its employees. For plaintiff to claim an insufficiency in the user manual's instructions supports the defendant's defense that the employer could put into force safe procedures too. For example, Shanghai sought to introduce evidence of the employer's failure to do a hazard analysis which would show that a spotter should have been used to stop the unsafe movement of the trolley.[13] In our case the hazard was known and obvious, and therefore a lack of warnings could not be a proximate cause of the death.[14] The complaint clearly articulated unsafe design as the only basis of recovery. Our frame was unsafe design, while minimizing focus on comparative negligence and employer conduct.

The complaint became a tool of discovery because of the *Iqbal* and *Twombly* specificity requirements. In the complaint, we pled specific design principles citing the ISO standards.[15] Predictably defendants deny most complaint allegations. Shanghai pled the lack of knowledge to deny the International Organization for Standardization (ISO) standards. The Shanghai Fed. R. Civ. P. 30(b)(6) speaking agent had to admit that Shanghai's answers to the standards' allegations were false. The Chinese standards[16] applicable to this crane simply adopted the ISO and stated the same in the Chinese standard's preface. Knowing the Chinese standards meant knowing the ISO standards. Another example was the complaint's specific ISO standard allegation that "maintenance points should be located outside of danger zone."[17] It was admitted that Jeff was killed at a "Maintenance Point." This cardinal principle was denied by Shanghai's answer—another admittedly false answer—the Chinese standard again adopted this ISO standard. The complaint and Shanghai's false answers were a serious credibility problem for defendant.

THE HAGUE SERVICE CONVENTION[18]

Service of process was complicated by The Hague Service Convention requiring specific steps to perfect service on China by serving the Chinese Central Authority. Our complaint and summons were translated from English to Chinese, as were other documents, by Lingling Martin of Los Angeles.[19] Service was made upon the designated Central Authority in China.[20] Once the Central Authority is served a response can take up to a year. Fed. R. Civ. P.4 (m) waives the 90-day requirement to perfect service for Hague Convention service. *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wash.2d 670, 10 P.3d 371 (2000), certified questions to our State Supreme Court regarding service under The Hague Convention. Our Supreme Court ruled that the 90-day requirement to perfect service to toll the statute of limitations was extended when making Hague Convention service, and the statute of limitations was tolled once service was made upon the designated central authority.

DISCOVERY

The problem of no document discovery with respect to anything but blue prints led to our strategy of showing the jury that the failure to produce documents either violated applicable standards or was unbelievable. Shanghai's failure to document its machine design process violated international standards.[21] Shanghai did not produce: the standards it used to design and manufacture the crane; studies regarding exposing workers to crushing hazards; alternative designs with respect to the size and location of the fixed rollers; written records of any hazard analysis of the maintenance platform carrying workers into the danger zone; and the use of Non-destructive Testing of wire rope by magnetic field used in the industry and sold by China to locate cable fractures, wear, and corrosion instead of a hands on inspection of cable. Perhaps the most incredible excuse from Shanghai was that all engineers who designed this crane were dead.

30(b)(6) DEPOSITION

The preliminary discovery, complaint, and formal discovery all built towards our 30(b)(6) deposition of Shanghai. This is the most effective tool for the trial

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Do machine design rules:		
Locate maintenance points outside of danger zones?	YES	NO
NATIONAL STANDARD OF THE PEOPLE'S REPUBLIC OF CHINA 中华人民共和国国家标准 GB/T 15706.2: 1995 (para. 3.12)	X	
EUROPEAN PARLIAMENT Directive of the European Parliament and of the Council (Annex paragraph 1.6.1): 89/392/EEC 1989 98/37/EC 1998	X	
European Committee for Standardization Comité Européen de Normalisation Europäisches Komitee für Normung European Standard (EN) 292-2: 1991 (para. 3.12)	X	
International Organization for Standardization International Organization for Standardization (ISO) Technical Report (TR) ISO/TR 12100-2: 1992 (paragraphs 3.12) ISO 12100-2: 2003 (paragraph 4.15)	X	

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lawyer—admissions. We videotaped this deposition to show the jury as a central piece of our liability case. That meant we prepared our trial exhibits and choreographed the sequencing of questions to remove non-essential testimony and maximize witness control. The standards of machine design gave us a means to control this adverse witness and create trial exhibits. Rodney Jew taught us the use of a "yes/no box" exhibit. The exhibit to the below is an example of one used at the Rule 30(b)(6) deposition.

Shanghai's witness checked the "yes" boxes, attesting that the standards identified adopted the exhibits principles—in this case the Safety Engineering Hierarchy. The witness completed our trial exhibit for us, which also became an admission with respect to the priority of design. The witness admitted these principles and standards applied to the crane. Shanghai (Rule 30(b)(6) witness) admitted: (1) That it did not eliminate the crushing hazard killing Jeff; (2) That it did not guard this hazard; and (3) That it relied on the least effective safety measure—warnings. The warning was a sign at the base of the crane that in no way met the Safety Engineering Hierarchy requirements.

Several standards state that warnings, training, or use instructions shall not be used as a substitute for hazard elimination—the first priority of the Safety Engineering Hierarchy.[22] The anemic warning sign above violates the fundamental precepts of safe machine engineering design.

Industry standards require safe maintenance points and platforms. This is visually presented to the jury using the below maintenance points yes/no box exhibit. Once again, the Rule 30(b)(6) on videotape checked the exhibits "yes" boxes.

David Ball reminds us to show not tell the jury. The "yes/no box" technique is a powerful way to visually show the jury defendant's admission in a summary fashion. Out-of-the-mouth of defendant comes liability. The witness is shown each standard which states the yes/no box principle on the Elmo. This controls the witness' response. A negative response inconsistent with the written standard powerfully prevents a no answer. A no answer when showing the standard's language on the Elmo is an evasion to absurd for even a hired gun to stomach—or too unbelievable for the jury.

JURY INSTRUCTIONS

There are several jury instructions that should not be avoided in a product liability law suit. 6 WPI 110.10 (6th ed. 2012) contributory negligence includes assumption of the risk language negating the defendant's duty of care to the plaintiff. Assumption of risk is an affirmative defense. *Hvolboll v. Wolff Co.,* 187 Wn. App. 37, 45, 347 P.2d 476, (2015). WPI 110.10's "assumption of risk" is the express or implied *primary* kind of assumption of risk relieving the defendant of its tort duty. *Primary* assumption of risk involves a potential risk not yet realized that the actor is willing to assume and is usually found in sporting event fact patterns. The crushing hazard killing Jeff already existed by design at the time the crane was manufactured.

These facts implicate the legal doctrine of "implied *unreasonable* assumption of the risk." Implied *unreasonable* assumption of risk "arise[s] where plaintiff is aware of a risk that already has been created by the negligence of the defendant, yet chooses voluntarily to encounter it. In such a case, plaintiff's conduct is not truly consensual, but a form of contributory negligence ...." *Anderson v. Akzo Nobel Coatings, Inc.,* 172 Wn.2d 593, 613, 260 P.3d 857, (2011) (emphasis added), (quoting *Leyendecker v. Cousins,* 53 Wn. App. 769, 773-74, 770 P.2d 675 (1989).) On the other hand, "implied *primary* assumption of risk arises where a plaintiff has implied-

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Do the following standard making institutions publish machine design rules that once a designer has specified the limits of the machine and identified the hazards and assessed the risks:

The designer shall, in all circumstances, in the following order:

1. Remove the hazards or limit the risks as much as possible by design;
2. Design Guards and/or safeguards against any remaining risks; and
3. Inform and warn the user about any residual risks?

	YES	NO
GB NATIONAL STANDARD OF THE PEOPLE'S REPUBLIC OF CHINA 中华人民共和国国家标准 GB/T 15706.1: 1995 (para 5)	X	
CEN European Committee for Standardization Comité Européen de Normalisation Europäisches Komitee für Normung BS EN 292-1: 1991 (para 5)	X	
NATIONAL SAFETY COUNCIL "Product Safety Management Guidelines" 1997 (page 45	X	

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ly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks." *Scott v. Pac. W. Mountain Resort,* 119 Wn.2d 484, 498–99, 834 P.2d 6 (1992) (emphasis added).

"Implied *unreasonable* assumption of the risk is comparative negligence under our comparative fault system." *Supra, Anderson,* 119 Wn.2d at 613.[23] To instruct the jury on *primary* assumption of the risk as a matter of law makes the same conduct of Jeff Surber result in two different damage reducing factors – *primary* and *unreasonable* assumption of risk—a double dip.

The defense will argue for an employer intervening superseding cause instruction which should be anticipated and resisted. Propound the appropriate questions at the Rule 30(b)(6) deposition to obtain admissions needed to form proper jury instructions. Shanghai's speaking agent admitted that this was a reasonably foreseeable crushing injury. "[T]he theoretical underpinning of an intervening cause which is sufficient to break the original chain of causation is the absence of its foreseeability." *Herberg v. Swartz,* 89 Wn.2d 916, 927-28, 578 P.2d 17, (1978). Defendant Shanghai admits that this crushing injury was reasonably foreseeable before it manufactured the subject crane. Inspecting wire cable by running the cable through the hands on a moving trolley was reasonably foreseeable to defendant as admitted by its speaking agent.

An intervening act becomes a superseding cause only if the intervening act falls outside the reasonably foreseeable general risk of harm created by the original actor's negligence. "Thus, the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owned by defendant." *Maltman v. Sauer,* 84 Wn.2d 974, 981, 530 P.2d 242, (1975) and *see* WPI 15.05. Here, the same harm reasonably foreseen by the defendant from its crane design killed Jeff. No other act by third persons changed this continuing risk of harm.

For the original defendant's wrongdoing to be the cause in fact of plaintiff's injuries, the "original negligence of the defendant, which placed him in his present imperiled predicament, must be an active factor in the course of events which ultimately culminates in injury to the plaintiff."

McCoy v. American Suzuki Motor Corp, 136 Wn.2d 350, 357-58, 961 P.2d 952, (1998) (quoting, *Maltman v. Sauer,* 84 Wn.2d 975, 982, 530 P.2d 254, 259 (1975).)

EXPERTS

Our invaluable primary experts were: Ergonomics and crane design, Steven Wiker, Ph.D, wiker@ergotech.net (877-374-6835); crane design and rigging, Anthony Bond, Haag Engineering, tbond@haagglobal.com (281-313-9700); and controls, non-destructive testing, Tom Doyle, tdoyle@gmail.com. Dr. Wiker was instrumental in negating the defense claim of comparative negligence by Jeff for failing to perceive the hazard and step out of the way. Dr. Wiker worked many years in academia and has been the force in developing several university ergonomic labs including the University of Washington. He is an expert of national stature. Mr. Bond knows cranes and heavy machine design. Mr. Bond's engineering experience is broad including design of mobile cranes, aerial lifts, structural components for booms, platforms, turrets, and many more. Both Dr. Wiker and Mr. Bond were conversant with the applicable standards. Mr. Doyle never testified before and is a Control Systems Engineer with practical experience in a broad range of industries for example: nuclear, power plants, port facilities, and ship building. This team of experts supported the elimination of the fixed overhead rollers, down-sizing them, and the use non-destructive testing to inspect the cable out-of-harm's way.

THEME

Rodney Jew advocates the use of theme boxes in opening statement. It is an educational tool combining visual elements and written ones. Our theme box is below. We were unable to use this theme box in our opening statement. The case resolved.

The case was styled by Maxine Surber, personal representative of the Estate of Jeffrey Allan Surber, v. Shanghai Zhenhua Industries Co., Ltd., a/k/a ZPMC, a People's Republic of China corporation, cause number 3:14-cv-05279, before United States District Judge Ronald B. Leighton. Defendant was very ably and professionally represented by G. William Shaw and Jason N. Haycock of K&L Gates, LLP. Maxine Surber was represented by Jeffery M. Campiche and Philip G. Arnold who were assisted by retired attorneys Lucy R. Richard and J. Murray Kleist.

Manufacturer knows its product has serious risk of harm	+	Manufacturer does not eliminate or safeguard the risk	=	Manufacturer is responsible for serious harm

Philip G. Arnold *and* ***Jeffery M. Campiche,*** *EAGLE members, practice at Campiche Arnold in Seattle.*

[1] European Standard EN 292-1 (1991) Safety of Machinery—Part 1, para. 6.1 (Risk Assessment), Note 1, and National Standard of the People's Republic of China GB/T 15706.1-1995, para 6.1 (Risk Assessment), Note 1.

[2] The Chinese government has enacted several laws to protect the commercial secrets belonging to State, Provincial, and local government state-owned businesses. The "Law of the People's Republic of China on Guarding State Secrets" defines state secrets as "matters that have a vital bearing on state security and national interests …" This broad and indefinite description carries series criminal penalties for violating the secrecy act.

[3] Risk assessment: EN 1050 (1996); GB/T 16856 (1997); ISO 14121 (1999); and ISO 14121 (2007). European Directives issued from the European Parliament: 89/392/EEC (1989) and 98/37/EC (1998). Safety of Machinery: EN 292 (1991); ISO/TR 12100 (1992); GB/T 15706 (1995); ISO 12100 (2003); GB/T 12100 (2007); and ANSI/ISO 12100 (2007). National Safety Council: Accident Prevention Manual (1955) and Product Safety (1997).

[4] *McIntyre Machinery, Ltd., v. Nicastro,* 564 U.S. 873 (2011).

[5] *Ashcroft v. Iqbal,* 556 U.S. 662, 678-79 (2009).

[6] *Bell Atlantic Corp. v.Twombly,* 550 U.S. 544, 555-57 (2007).

[7] *McIntyre,* 564 U.S. at 880.

[8] We did not have the contract of sale. Check the contractual relationship between the purchaser and manufacturer for "hold harmless" or "indemnification" agreements. If the manufacturer agrees to hold harmless or indemnify the purchaser in the performance of the contract—the manufacturer purposely invokes the law of the forum state for long arm jurisdiction. *Ballard v. Savage,* 65 F.3d 1495, 1498 (1995) (continuing obligation to the forum resident is sufficient for long arm jurisdiction).

[9] 28 U.S.C. § 1332

[10] RCW 4.72.030.

[11] RCW 4.72.030(1)(b)

[12] RCW 4.22.070 prevents placing the employer on the verdict form for purposes of proportionate fault but courts still allow this evidence to be placed before the jury on the issue of whether the employer is the sole proximate cause of injury. *Fenimore v. Donald M. Drake Construction,* 87 Wn.2d 85, 89 (1976) and *Lamborn v. Phillips Pac. Chemical,* 89 Wn.2d 701, 706 (1996).

[13] The crane operator sits under the trolley and is unable to see the hazard with only

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Division One clarifies what acts are discretionary for purposes of an affidavit of prejudice

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that, since Judge Chung never should have had occasion to rule on Valet Parking's motion for sanctions, the sanctions order was vacated too.

As a final note, let me add that as of press time, *Shoval* is an unpublished opinion. But thanks to the recent amendment of GR 14.1(a), the opinion by Division One – while having neither precedential value nor binding effect on any court – may still be cited as a "nonbinding authority" and given such persuasive value as deemed appropriate.

***Andrew Bergh**, WSAJ EAGLE member, former prosecutor and insurance defense attorney, now limits his practice to plaintiff's personal injury cases, including medical malpractice and insurance bad faith. He also now has a photography website – www.berghimages.com – specializing in fine art photography for lawyers.*

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the lower legs of the mechanics visible.

[14] *Little v. PPG Indust. Inc.*, 92 Wn.2d 118, 123 (1979).

[15] ISO 12100-1 Safety of Machinery … General Principles for Design.

[16] GB/T 15706.1

[17] ISO 12100-2, ¶4.15 and Chinese standard GB/T 15606.2.

[18] Fed. R. Civ. P. 4 (f) (1) provides for Hague Convention service. "Practical Handbook on the Operation of The Hague Service Convention" is an excellent Hague practice manual and maybe purchase from the HCCH (Hague convention) web site.[19] Ko & Martin, 310-634-5365, lingling@komartin.com. She also was our translator at the Fed. R. Civ. P. 30(b)(6) deposition. It was well worth the expense of flying her to Seattle for this deposition given the Chinese engineer witness' English was limited.

[20] We used Rick Hamilton (1-855-521-2905) of ABC Legal for the international service of The Hague Convention documents and pleadings.

[21] ISO 14121, para 9, "Documentation on Risk Assessment."

[22] EN 1050 (1996) ¶7.3.4; NSC, Product Safety Management Guidelines, (1997), page 37 and 65; ISO 14121 (1999), ¶7.3.4; ANSI/ISO 12100 -1 (2007), ¶5.4 and ¶ 5.5 & figure 1; EN 292-2 (1991), ¶5.1.2 and Annex, ¶1.7.2; ISO/TR 12100-2 (1992), ¶5.1.2; and ISO 12100-1 (2003), ¶5.4 and ¶ 5.5 & figure 1.

[23] The U.S. Dist. Court for the Western Dist. of Washington certified the question of whether assumption of the risk was a damage-reducing factor in a product liability action to the Washington State Supreme Court in *South v. A.B. Chance*, 96 Wn.2d 439, 635 P.2d 728 (1981). The Supreme Court answered in the affirmative. *Id.* at 440.

Practical Resources

What will you be able to prove with the medical literature in 2017?

Richard Schenkar

Of the 635 new search terms that became available last month for searching the medical literature on the U.S. National Library of Medicine databases, some collections in several subject areas are of particular interest to lawyers. These include causation concerns, brain research issues, shoulder and arm injuries, patient management concerns, and genetics issues.

What you will be able to prove with the medical literature from year to year depends on what concepts are being indexed and cataloged now. Indexers and catalogers at the U.S. National Library of Medicine go through a complex decision-making process each year to decide what search terms will be added, modified, or dropped. What they decide determines what you will find online. Those decisions are made public in the middle of December each year when documentation for the new version of MEDLINE is published and it debuts on the National Library of Medicine computer systems and web site. You may search the MEDLINE database directly by going to its Internet interface PubMed, at http://www.ncbi.nlm.nih.gov/pubmed.

The new search terms of interest to lawyers this year are here noted in bold so that you know the reference is to the search term; the material in quotation marks is from the National Library of Medicine definition of the noted term.

Causation

Causation concerns this year include **distracted driving, crush injuries, minimally clinical important difference** ("a statistically significant minimum set of clinical outcomes that demonstrates a clinical benefit of an intervention or treatment") and **medically unexplained symptoms** ("persistent health symptoms which remain unexplained after a complete medical evaluation.")

Brain research

Brain issues raised this year include **brain contusions, traumatic brain injuries, diffuse brain injuries, attentional bias, cognitive remediation, sleep hygiene, health personnel alert fatigue, life history traits,** and **work-life balance.**

Shoulder and arm injuries

Shoulder and arm injury new terms include **rotator cuff injuries, rotator cuff tear arthroplasty** (an operation to manage rotator cuff injuries), **shoulder injuries, shoulder prosthesis,** and **elbow tendinopathy.**

Patient management concerns

New terms related to patient management include **patient comfort, patient portals,** and **patient reported outcome measures.**

Genetics issues

Terms raising genetics issues include **gene editing** and **pseudoautosomal regions** (regions at each end of chromosomes that are active in genetic recombination).

You can check the definitions of all of these terms online by accessing the Medical Subject Heading list (it is referred to as "MESH.") If you are using the U.S. National Library of Medicine's web site on the Internet, look for the "MESH Browser" hyperlink and click on it (or check your system documentation for how to access the file). It is important to use that file to make sure that you have used every permutation of your search term in your search strategy.

The Medical Subject Heading file will tell you how your recently added concept was indexed in earlier portions of the database. MEDLINE started in 1966 and has changed along with the changes in terminology. Being aware of these changes and compensating for them in your search strategy will make your search more complete and will give you more confidence in the search result.

***Richard Schenkar**, WSAJ member, is an attorney connecting attorneys with information they need to be effective, and may be reached at richard@richardschenkar.com.*

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