

Tort Appeals: Three Cases Illustrate Recurring Problems and Solutions

By Cynthia Feathers

Appeals in tort cases involve unique challenges, including how to effectively present proof about events underlying the torts, whether the proof emerged at trial or in a summary judgment motion. Three appellate decision—a recent Labor Law § 240(1)¹ case against the state, a medical malpractice case with a pro se plaintiff,² and a motor vehicle accident case involving three defendants and the emergency doctrine³—help illustrate some recurring themes in tort appeals.

Labor Law § 240 Case: Reshaping Trial Proof

The “Scaffold Law” case went to a trial on liability, and the claimant’s version of events surrounding his fall varied markedly from that of other witnesses. But there was no dispute that the fall occurred from a makeshift plywood platform over an unfinished stairwell. The platform was itself a safety device, but no other apparatus protected the claimant from elevation-related risks. He presented no proof, expert or otherwise, about what other safety device should have been provided, and the state contended that such lack of proof was fatal to his claim. The Court of Claims agreed.

As is often the case with tort claims, the appeal was not about reciting how things unfolded at trial. Instead, there is often ample room to reshape the story of the case to advance your argument and re-frame the issues as presented at trial. Upon appeal, we ignored the factual conflicts and even much of our own client’s version of events. Instead, the goal was to present a compelling chronological narrative about the *undisputed* facts as they emerged at trial.

This approach was viable since what the claimant was doing in the moments leading up to the accident was not germane. It was undisputed that he tumbled from an unprotected platform, and there was no proof of any egregious behavior on his part that should have shifted the liability.⁴ Moreover, if we tried to defend our position in a credibility contest, we might well lose—even though the Appellate Division’s powers to independently review the evidence are broader in a non-jury case than in a jury case.⁵

Upon appeal, there is often room to reshape not only the facts, but also the law. While trial counsel may have presented some law, it is often appellate counsel’s job to delve more deeply into relevant cases. The legal discussion should often range from the very general to the very specific. The general discussion could convey concepts that advance your client’s cause. In Labor Law § 240(1) cases, that includes the liberal interpretation historically

given to the absolute liability statute designed to provide broad protection to workers.⁶

As to the specific, we wanted to fully explore a discrete body of cases finding liability where a claimant fell while building or dismantling a platform for which no protection was provided.⁷ We also sought to identify cases indicating that the claimant does not bear the burden of proving what expert devices could have been provided. While such proof is often presented, it is sometimes lacking.⁸

After you have identified the best cases on your salient issues, do not stop there. Rather than providing a long string cite, choose the most apt and favorable cases and discuss them at great length, analogizing them to your case. In that way, you can convincingly advance your contention that the court below has misapprehended or misapplied the law.

In the Scaffold Law case, concluding that the Court of Claims had indeed misapprehended and misapplied the law, the Third Department reversed, found in favor of the claimant as a matter of law, and remanded for a trial on damages. Finally, it may not be enough to discuss analogous cases, since torts are often so fact specific and sui generis. An analytical discussion relating general principles set forth in the applicable Restatement or treatise as to the dynamics at play in your case can be extremely illuminating and persuasive.

The Labor Law case demonstrated another issue that often arises in tort appeals: what to do when you lose a motion for summary judgment. While in most negligence scenarios, it is uncommon for the plaintiff to prevail on liability as a matter of law, that is not the case under the Scaffold Law.

If your motion for summary judgment is denied, as our claimant’s was, there is a strategic choice to be made. You can take an interlocutory appeal⁹—after weighing the costs of appealing immediately versus going to trial and after considering whether you can likely win a stay of the trial.¹⁰ In the alternative, if you go to trial and lose, the appeal from the final order will bring up for review every non-final order that necessarily affected the final judgment¹¹—including the order denying the motion for summary judgment.

Be sure not to limit the scope of the notice of appeal. Instead, appeal from each and every part of the challenged order. There is rarely a sound reason to do otherwise, since you can narrow, but not broaden, the appeal issues later.¹² It may seem counterintuitive to think that

you could argue that there should never have been a trial when one has in fact occurred, but you can indeed make such an argument and it may advance your appeal or settlement prospects.

Medical Malpractice Action: Finding the Meaning of a Key Case

A recent medical malpractice case demonstrates the maxim that, even in summary judgment appeals, you can tell the story in a new way to achieve a new result. In the nick of time, trial counsel had commenced the action, but then declined to prosecute the appeal. The tenacious client proceeded alone against an aggressive law firm representing the surgeon and hospital.

She did not know how hard it can be to prevail in medical malpractice cases based on claims of negligent surgery and lack of informed consent. She only knew that she had had two surgeries to correct an inward turning eye, did not realize the risks involved, and now had double vision and a host of other intractable problems. While the plaintiff did extract many salient documents during an arduous discovery process, the expert affidavit she submitted did not include the kind of detail on negligence and causation usually needed to survive summary judgment. The defendants' motion was granted, not only regarding her claim as to surgery, but also—in a perfunctory ruling—as to her lack of informed consent.

The appeal presented a frequent situation in tort appeals. If there are two issues, one weaker and one stronger, should you abandon the weaker one or present it second in the argument section of your brief? Sometimes to provide context, you may present the weaker issue at the outset of your argument. That was the case here, where the claim as to the surgery provided a context for the lack of informed consent claim.

Often embedded in summary judgment papers are the raw materials for a cogent version of your client's story demonstrating that there are indeed material issues of fact warranting a trial. If you simply list and characterize the pleadings and summarize who said what in each affidavit, you are forgoing a critical opportunity to fully engage and convince the appellate court.

Dig into the record to find favorable facts and then highlight them. For example, in the medical malpractice case, where there was a sharp dispute about whether the doctor really spent 20 minutes discussing risks, we thought it might be helpful to draw attention to certain facts: the only written record of his claim was a terse jotted note, the blanket consent forms did not list one of the eye muscles operated on, and on the day of alleged lengthy disclosure, records showed that the doctor actually saw the plaintiff (for an exam) and another patient during a double-booked 15-minute time slot.

If there is a dispute about how to interpret an applicable statute, and a key case is cryptic, do not guess at what the decision means. In the medical malpractice matter, there was a terse, not entirely clear, decision on the question of what expert proof was required and when, as to the qualitative sufficiency of the disclosure of risks.¹³

You can read the briefs underlying such a case to find out what is behind the decision. If the results of your investigation help your case, then ask whether the Appellate Division will permit you to annex to your brief a copy of the briefs filed in that significant case.¹⁴ The court's written rules of practice may not cover the question, but there may be unwritten rules of practice, too. In our medical malpractice case, the appellate court cited the key case¹⁵ when it reinstated the lack of informed consent claim.

Emergency Doctrine Case: Contrasting Cases and a New Spin

Never underestimate the power of a cogent narrative and specific case authority to salvage a situation, nor the liberality with which the preservation requirements are applied when it comes to summary judgment motions. Those were among the lessons of *Schlanger v. Doe*.¹⁶

In that personal injury action, an employee of defendant one secured onto a tractor trailer for transport a backhoe manufactured by defendant two. As the tractor trailer traveled beneath a highway overpass, a window in the backhoe shattered, sending glass flying toward defendant three, who swerved to the left and struck the plaintiff's vehicle, causing serious injury.

Supreme Court had denied the motion by defendant one for summary judgment dismissing the complaint, based on the doctrine of *res ipsa loquitur*, in that a backhoe on a tractor trailer exclusively controlled by a defendant would not ordinarily shift in position in the absence of the negligence of such defendant.

Also kept alive was the claim against defendant two, based on circumstantial evidence of a manufacturing defect, in that the window did not perform in its intended manner due to some apparent flaw in the fabrication process. However, the motion court had exonerated defendant three as a matter of law based on the emergency doctrine.

On appeal, for the first time, we used the deposition testimony presented by the plaintiff and all three defendants to weave a cogent narrative of the events leading up to and including the accident. On appeal, for the first time, we pointed out that defendant three could apparently have moved safely to the right shoulder, but instead had moved into the left lane in a manner that ostensibly violated Vehicle and Traffic Law § 1128(a). That section states that a vehicle must not be moved from its lane until

the driver has first ascertained that such movement can be made with safety.

On appeal, for the first time, we pointed out that the danger posed by shattered glass paled in comparison to many situations involving objects to be avoided in the road, such as an oncoming vehicle crossing over lanes or a darting child, as reported in several telling appellate decisions declining to absolve a defendant as a matter of law. As long as there are facts in the record to support such arguments, upon appeal, in cases involving grants of summary judgment, a new spin on the facts is permitted and can be persuasive in winning your client his day in court.

Recurring Tort Appeal Issues

No matter what type of tort case you are handling, the sooner you can find time for thorough legal research and analysis the better. Often the fatal flaws in cases are discovered only after vast resources are invested. Often meritorious motions are lost because insufficient time is found to shape a compelling narrative and cite apt authority. You may discover too late the facts you should have gathered and arguments you could have made. Any experienced appellate attorney can relate frustrating tales about viable issues that were not well preserved for appellate review.

When the time comes to go to appeal, consider doing it yourself if you feel comfortable in that role. If not, you may wish to turn to an appellate attorney in your firm or outside counsel who can provide the requisite objectivity, time, and experience. You may want to avoid delegating the job to a junior associate, since only a seasoned attorney may possess the sound and sophisticated legal judgment needed for the job.

If you do work with appellate counsel, collaborating can yield excellent results. Appellate counsel will appreciate the insights you offer both at the outset of the case and upon reviewing the brief. If you are happy with the brief, consider rewarding appellate counsel with the chance to orally present his or her arguments. For experienced appellate counsel, oral argument can be a rewarding experience and a skill they have honed before judges who know them well.

As to fees, many appellate attorneys will do appeals for other firms on a flat-fee basis—perhaps one fee for the record, brief, and review of opposing counsel's paper, and a second fee if a reply brief and/or oral argument are warranted in a particular case. Tort appeals can provide special fee issues, since often the plaintiff's trial counsel is working on a contingency fee basis and must absorb the cost of the appeal until ultimate success, if any.

The appellate attorney will work just as hard on the tort appeal as on ones for which the litigant pays, so he or she may not be receptive to a discounted fee. However, some appellate attorneys may be willing to work on a contingency fee or a blended-fee arrangement.

Trial and appellate counsel who want to collaborate can find a way, so that they can win more decisions, help their clients, and make their mark on the law. Consider beginning that collaboration sooner, rather than later, when you are drafting your pleadings or responding to a motion for summary judgment designed to put a quick end to your case.

After all, while the aforementioned cases remind us of the hope appeals can give a losing litigant, surely everyone would agree that it is always better to enter an appeal as a respondent than an appellant.

Endnotes

1. *Cody v. State*, 859 N.Y. Supp. 2d 316 (3d Dep't 2008).
2. *Snyder v. Simon*, 49 A.D.3d 954 (3d Dep't 2008).
3. *Schlanger v. Doe*, ___ A.D.3d ___, 2008 WL 2682309 (3d Dep't July 10, 2008).
4. *See, e.g., Blake v. Neighborhood Housing Serv. of N.Y.C., Inc.*, 1 N.Y.3d 280 (2003).
5. *See, e.g., Martin v. State*, 39 A.D.3d 905 (3d Dep't 2007), *lv. den.*, 9 N.Y.3d 804 (2007).
6. *See, e.g., Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555 (1993).
7. *See, e.g., Kyle v. City of N.Y.*, 268 A.D.2d 192 (1st Dep't 2000), *lv. den.*, 97 N.Y.2d 608 (2002).
8. *See, e.g., sui generis, Figueiredo v. New Palace Painters Supply Co., Inc.*, 39 A.D.3d 363 (1st Dep't 2007).
9. *See* CPLR 5701.
10. *See* CPLR 5519.
11. *See* CPLR 5501.
12. *See* CPLR 5515; *Royal v. Brooklyn Union Gas. Co.*, 122 A.D.2d 132 (2d Dep't 1986).
13. *See* CPLR 4401-a.
14. *See* CPLR 4511.
15. *See Snyder v. Simon*, n. 2 *supra*, citing *Lowery v. Hise*, 202 A.D.2d 948 (1994).
16. ___ A.D.3d ___, 2008 WL 2682309 (3d Dep't July 19, 2008).

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