Telling the Full Story: *Vanoosting* and *Klingelhoets*

by Ryan T. McNulty

> "The trial of a lawsuit is not a game where the spoils of victory go to the clever and technical regardless of the merits, but a method devised by a civilized society to settle peaceably and justly disputes between litigants. The rules of the contest are not an end in themselves. Unless the rules tend to accomplish justice, strict compliance is not always required."[1]

This quote is from an opinion that was written over sixty years ago by an appellate court justice in San Francisco. The opinion reversed a directed verdict for the defense. The plaintiff was represented by Melvin Belli, a trial lawyer who rarely lost a jury trial on the merits. The defendants' argument on appeal was premised on what could aptly be described as a technicality in the rules. The court rejected the defense's argument and the notion of using the rules of trial as the panacea of the controversy. Unfortunately, this technique did not die on remand as the various rules of trial are still often used to impede justice.

The Rules of Evidence are frequently used as a shield between the jury and critically important facts. A common way this occurs in personal injury trials is when a plaintiff has to discontinue medical treatment before fully recovered, and the rules are used to prevent an explanation to the jury as to why the treatment was stopped. For instance, when a plaintiff has to discontinue medical treatment because they do not have health insurance or cannot otherwise afford to pay for the treatment, the rules are often used to keep this important information from the jury. When the jury does not hear the truth about why treatment was discontinued, the defense typically fills this void with implication and innuendo that the plaintiff is no longer injured, and the lapse in treatment is used to curtail damages.

When the Illinois Rules of Evidence became effective on January 1, 2011, Rule 102 was implemented to outline the purpose of the Rules.[2] Rule 102 requires all the rules to "be construed to secure *fairness*."[3] Rule 102 further provides that the purpose of the rules is the "promotion of growth and development of the law of evidence to the end that the *truth* may be ascertained and proceedings *justly* determined."[4] Since the codification of the rules, Illinois courts seem to be abandoning the outdated and archaic strict application of the rules for an approach that promotes truth, justice and fairness. For instance, two recent appellate court opinions have provided a road map for getting critically important information to the jury when a plaintiff is forced to discontinue treatment due to financial obstacles. Both opinions seemingly elevate the ascertainment of truth over the strict application of the rules.

Vanoosting v. Sellars

Kathryn Vanoosting filed a complaint against Carl Sellars for injuries resulting from a March 6, 2006, rear-end automobile collision.[5] Vanoosting's complaint sought damages for past and future pain and suffering, disability, loss of normal life and loss of earning capacity.[6] Before trial, defendant Sellars admitted negligence, leaving Vanoosting's damages as the only issue for the jury.[7] The first time the case proceeded to trial it resulted in a mistrial for reasons not relevant here.[8]

On the first day of the second trial, the parties gave their opening statements and Vanoosting presented her case in chief.[9] On cross-examination, defendant elicited from Vanoosting that she had not been to a doctor during the three years prior to trial.[10] On re-direct, Vanoosting's attorney asked her if she had health insurance presently or at the time of the collision. Vanoosting answered "no."[11] After Vanoosting rested, defendant moved for a mistrial based on the testimony regarding health insurance. Vanoosting opposed the request for a mistrial, arguing that the jury should instead be instructed on the issue of health insurance.[12] The trial court declared a second mistrial.[13]

Prior to the third trial, Vanoosting filed a supplemental motion *in limine* seeking to introduce evidence that she did not have health insurance in order to rebut defendant's claim that she had not sought medical treatment in the three years prior to trial.[14] Alternatively, the motion sought to bar defendant from any claim or argument regarding Vanoosting's lack of medical treatment for three previous years.[15] The trial court denied Vanoosting's request to introduce the evidence, but granted her request to bar defendant from claiming or arguing that she had not sought medical treatment for three years.[16]

After the trial court's initial ruling

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on the motion *in limine*, Vanoosting asked the court to clarify its ruling. The trial court indicated that it wanted to "stay away from the health insurance issue" and assured Vanoosting that "the only question he's [defense counsel] going to ask is, when was the last time you went to the doctor, and not elaborate on why, when, any of those issues."[17] The trial court and Vanoosting were assured by defense counsel that he would be "very circumspect" with the issue.[18] Nonetheless, Vanoosting expressed concern that the jury would inevitably infer that she is no longer injured and in pain if she is not allowed to explain her three year lapse in treatment.[19] Consequently, Vanoosting advised the court that she planned to make an offer of proof on the issue at trial.[20]

When the case proceeded to trial for the third time, defendant was expectedly less "circumspect" with the issue of Vanoosting's three year lapse in medical treatment than previously indicated. Indeed, during opening statement defendant told the jury that Vanoosting had not sought medical treatment in three years.[21] Defendant further alluded that Vanoosting's doctors told her to come back if she had any problems and insinuated to the jury that Vanoosting must no longer be injured or in pain because she had not returned in three years.[22] Vanoosting's three year lapse in treatment quickly morphed from a "circumspect" issue to the focal point of the defendant's case. In fact, during cross-examination of each physician who testified for Vanoosting, defendant emphasized that Vanoosting had not seen any of the physicians in the previous three years, despite each physician being available to provide treatment.[23]

Vanoosting testified that she experienced pain in her neck, shoulders, arms and back after the collision.[24] She was referred to physical therapy and six weeks after the collision she requested a clean bill of health from her physician because it was required by her employer to return to work.[25] Despite obtaining a clean bill of health, Vanoosting continued to treat with a specialized dentist for issues with her jaw that began after the collision. The specialized dentist also referred Vanoosting to physical therapy due to muscle spasms in her back and neck that involved her jaw.[26]

Vanoosting testified that the pain she experienced after the collision interfered with her daily activities but she tried to endure the pain for a year.[27] Vanoosting's attorney then asked her "And from the two year anniversary of this wreck, forward – and I don't want to know why, because we can't tell why – have you had obstacles that prevent you from seeking the medical care you desire?"[28] Vanoosting answered affirmatively and defendant objected.[29] The court instructed the jury to disregard the question. The jury was then removed so Vanoosting's could make an offer of proof.[30]

During the offer of proof, Vanoosting testified that she did not have health insurance when the collision occurred in 2006, but she did have automobile insurance.[31] Her automobile insurance paid her

medical expenses for two years after the collision. After two years, she did not seek further treatment due to her lack of insurance and inability to otherwise pay for the treatment.[32] She testified that if awarded future medical expenses she plans to seek treatment for her neck and back pain.[33]

During cross-examination of Vanoosting, defendant again highlighted that she had not received any treatment in the three years before trial.[34] Vanoosting then rested and defendant never presented a case in chief. In closing, Vanoosting asked the jury for $18,000.00 for past medical expenses, $12,000.00 for future medical expenses, $30,000.00 for pain and suffering, past and future, and $30,000.00 for loss of normal life, past and future.[35] The total award requested was $90,000.00. During defendant's closing, he expressed his concerns about an award for future medical expenses given Vanoosting's three year lapse in treatment.[36]

After closing arguments, the jury was instructed to consider past and future medical expenses, past and future pain and suffering and past and future loss of normal life as elements of Vanoosting's damages.[37] The jury was also given I.P.I. 3.03, which instructed the jury to refrain from any inference, speculation, or discussion about insurance.[38]

The jury returned a verdict for $30,286.46.[39] The jury awarded $18,286.46 for medical expenses, past and future; $12,000.00 for pain and suffering; and $0 for loss of normal life.[40] The amount awarded for past and future medical expenses mirrored the amount of Vanoosting's past medical expenses, indicating that no award was given for future medical expenses. The trial court entered judgment on the jury's verdict.[41] Vanoosting filed a motion requesting a new trial, arguing that she was deprived of a fair trial when the court refused to allow her to testify that she did not seek medical treatment for three years due to her lack of health insurance.[42] After briefing and argument, Vanoosting's motion was denied. She timely appealed to the Fifth District Appellate Court.[43]

The appellate court began its analysis with an overview of the admissibility of health insurance, which it found to be generally inadmissible based on the traditional relevancy standard.[44] However, the court noted that evidence of health insurance may still be admissible when necessary to prove relevant issues raised in a case.[45] The court examined Illinois Rule of Evidence 401 which defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[46] Under this framework, the court found that Vanoosting's testimony was of consequence to her claim for future medical expenses, and to rebut defendant's theory that she was no longer injured and in pain.[47] Consequently, the court found Vanoosting's testimony relevant under Rule 401.[48]

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The court then analyzed Illinois Rule of Evidence 403 to determine if Vanoosting's testimony was unduly prejudicial. Rule 403 provides that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[49] Under this framework, the court held that Vanoosting's testimony concerning her lack of health insurance should not have been excluded.[50] The court noted that any concerns about Vanoosting's financial status arousing the sympathies of the jury could be adequately addressed by Illinois Rule of Evidence 105 and I.P.I. 3.03.[51] Rule 105 allows the court, upon request, to restrict evidence to its proper purpose and scope, and the court further noted that I.P.I. 3.03 could have been tailored to the specific facts of Vanoosting's case.[52] Based on these reasons, the court held that it was error to exclude Vanoosting's testimony.

The *Vanoosting* Court noted that an error in admitting or excluding evidence alone does not automatically trigger a new trial, unless a party is prejudiced or the result of the trial has been materially affected by the error.[53] Significantly, the court noted that the contested testimony about Vanoosting's lack of health insurance related directly to the "central controversy" of the case; specifically, the extent of Vanoosting's damages.[54] The court indicated that any doubts as to whether the contested testimony related to the "central controversy" of the case were alleviated by defendant's strategy of continuously highlighting that Vanoosting had no treatment in the three years before trial.[55] This, coupled with what the court described as the "closeness of the evidence," entitled Vanoosting to a new trial.[56]

Klingelhoets v. Charlton-Perrin

On October 25, 2006, Stacia Charlton-Perrin struck pedestrian Gwen Klingelhoets with her sports utility vehicle while making a right turn from a parking lot onto a major roadway.[57] Klingelhoets filed a lawsuit against Charlton-Perrin for the injuries sustained in the collision. Prior to trial – as in *Vanoosting* – defendant Charlton-Perrin admitted liability, but, naturally, disputed Klingelhoets' damages. Consequently, the matter proceeded to a jury trial exclusively on the issue of damages.[58]

After trial, the jury returned a verdict for Klingelhoets for $713,601.82.[59] Amongst other elements of damages, the verdict included an award for future loss of normal life, future pain and suffering, future medical expenses. The trial court entered judgment on the verdict. Defendant filed a motion for a new trial or remittitur. The trial court denied the motion.[60]

Defendant timely appealed to the First District Appellate Court, claiming that the trial court made five errors

that, alone or in combination, deprived her of a fair trial.[61] The only claimed error relevant here is defendant's contention that it was error for the trial court to allow Klingelhoets' testimony that she did not continue with physical therapy treatment because of the cost.[62] Defendant's claim was specifically premised on two statements made by Klingelhoets and a comment made by her attorney in closing argument.[63] Defendant claimed that these three comments were unduly prejudicial because they improperly evidenced the wealth of the parties.[64]

The first comment made by Klingelhoets about the cost of physical therapy treatment was actually in response to a question from defendant. When defendant cross-examined Klingelhoets, she suggested to the jury that Klingelhoets stopped treatment on her own accord because she was no longer in pain.[65] Defendant further highlighted that Klingelhoets had not seen a physical therapist in the previous 15 months. Klingelhoets responded to this line of questioning by stating that the physical therapy treatment was costly.[66] Defendant objected and the trial court sustained the objection.[67]

Defendant continued to cross-examine Klingelhoets on this issue and elicited that she did not have any future appointments scheduled with a physical therapist.[68] On redirect, in an effort to rebut the defendant's suggestion that she stopped seeing a physical therapist because she no longer needed the treatment, Klingelhoets' attorney asked her why she was no longer seeing a physical therapist. Klingelhoets responded that physical therapy was too costly.[69] Defendant again objected, but this time the trial court overruled the objection.[70]

The final claimed error concerned a comment Klingelhoets' attorney made during closing arguments. Klingelhoets' attorney explained to the jury that the trial was the only opportunity Klingelhoets had to recover for her injuries.[71] Klingelhoets' attorney pointed out that she could not come back to court in the future to request additional compensation for more costly physical therapy or other medical treatment. Defendant objected to this comment, and the trial court overruled the objection.[72]

The *Klingelhoets* Court ultimately held that it was not error to allow the contested testimony.[73] First, the court noted that defendant's initial objection was sustained, thereby eliminating any basis for the claimed error. Second, when Klingelhoets testified the second time that she did not continue with treatment because it was costly, she was actually responding to defendant's suggestion to the jury that she had stopped treating because she was no longer in pain.[74] The court noted that defendant's suggestion to the jury "clearly invited" Klingelhoets' response as to why she was no longer seeing a physical therapist.[75] The court pointed out that Klingelhoets' response was particularly invited because defendant knew she discontinued treatment

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because of the cost.[76] Finally, the court held that there was no basis to sustain the objection to Klingelhoets' attorney's comment in closing that she could not come back to court in the future to ask for more money for future costly treatment. The court held that there was no basis to sustain the objection because the comment was, "simply put, true."[77]

Importantly, the *Klingelhoets* court found *Vanoosting v. Sellars* to be instructive in reaching its decision. The court noted that just as the contested evidence in *Vaoosting* related directly to a contested issue, so did the contested evidence in Klingelhoets's case; namely, the extent of the plaintiffs' damages.[78] The court further pointed out that the trial strategy of the defendant in *Vanoosting* mirrored the strategy of the defendant at Klingelhoets' trial: both defendants repeatedly highlighted for the jury the lapse in the plaintiffs' treatment and both inferred to the jury that the plaintiffs discontinued treatment because they were no longer in pain.[79] The court held that just as the contested testimony in *Vanoosting* went to a "central controversy" of the case, so did the contested testimony at Klingelhoets' trial.[80] Therefore, the trial court properly admitted Klingelhoets' testimony.

Opening the Door to Admissibility

Both *Vanoosting* and *Klingelhoets* suggest that when damages are the "central controversy" of a case, the Rules of Evidence should be interpreted to promote truth and fairness by allowing plaintiffs to appropriately respond to attacks on their claimed damages. This seems to be particularly so when the defendant contests the extent of a plaintiff's damages and "opens the door" for any explanation as to why the damages are as significant as plaintiff claims. In practice, damages are almost always at the forefront of contested issues in personal injury trials. While admitted liability remains a common defense tactic, it is exceedingly rare for the parties to agree on the extent of damages.

These cases appear to be so potentially beneficial because in order for a defendant to effectively argue against application, it seems that some concession needs to be made on the issue of damages. Nonetheless, there are multiple avenues that can be used to help demonstrate that damages are the "central controversy" of a case. For instance:

- The Statement of the Case typically points out that the defendant is denying liability and the extent of the plaintiff's damages.
- The I.P.I. 20 Series Issue Instructions often conclude with "defendant further denied that the plaintiff was injured or sustained damages to the extent claimed."
- Evidence depositions can be used to determine how damages will be contested at trial.

In both *Vanoosting* and *Klingelhoets*, the defendants knew about the financial restraints that prevented each plaintiff from undergoing additional treatment, despite the constant innuendos made to the jury. Both courts found this point significant. In practice, establishing the defendant's knowledge on this issue should not be difficult. This is particularly so because interrogatories now regularly inquire about a plaintiff's health insurance status as well as other benefits and forms of assistance. Also, the medical records and bills usually indicate if a plaintiff is insured, and the reason for discontinuing treatment is always explored at deposition.

Finally, it is worth noting that while *Vanoosting* and *Klingelhoets* both involved cases of admitted liability, there is nothing in either opinion that limits their application to admitted liability cases. Rather, these cases appear to be applicable whenever damages are a "central controversy" of a case. These two cases are shifting the trend of trials from that of games where the rules are too frequently used as an end in themselves, back to a civilized method of justly resolving disputes.

Endnotes

1 *Simon v. City and County of San Francisco*, 180 P.2d 393, 399, 79 Cal. App.2d 590, 600 (Cal. Dist. Ct. App. 1st Dist.)
2 Ill. R. Evid. 102.
3 *Id.*
4 *Id.* (emphasis added)
5 2012 IL App (5th) 110365 (2012), ¶3.
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.* at ¶¶3-4.
14 *Id.* at ¶4.
15 *Id.*
16 *Id.*
17 *Id.* at ¶5.
18 *Id.*
19 *Id.* at ¶6.
20 *Id.*
21 *Id.* at ¶8.
22 *Id.*

[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at ¶10.
[28] *Id.*
[29] *Id.* at ¶11.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at ¶12.
[35] *Id.*
[36] *Id.*
[37] *Id.* at ¶18.
[38] *Id.* at ¶16.
[39] *Id.* at ¶19.
[40] *Id.*
[41] *Id.*
[42] *Id.* at ¶20.
[43] *Id.*
[44] *Id.* at ¶22.
[45] *Id.,* citing *Tomaszewski v. Godbole*, 174 Ill.App.3d 629, 635 (Ill. App. 3rd Dist. 1988).
[46] *Id.* at ¶23, citing Ill. R. Evid. 401.
[47] *Id.* at ¶23.
[48] *Id.*
[49] *Id.* at ¶24, citing Ill. R. Evid. 403.
[50] *Id.* at ¶24.
[51] *Id.*
[52] *Id.*
[53] *Id.* at ¶25.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] 2013 IL App (1st) 112412, at ¶3.
[58] *Id.*
[59] *Id.* at ¶22.
[60] *Id.*
[61] *Id.* at ¶24.
[62] *Id.* at ¶1.
[63] *Id.* at ¶57.
[64] *Id.*
[65] *Id.* at ¶58.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at ¶59.
[74] *Id.* at ¶58.
[75] *Id.* at ¶59.
[76] *Id.*
[77] *Id.*
[78] *Id.* at ¶¶60-61.
[79] *Id.* at ¶62.
[80] *Id.*

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