

Tort Trends

The newsletter of the Illinois State Bar Association's Section on Tort Law

Chair's Column

BY JUDITH CONWAY

Dear Colleagues,

It is with great enthusiasm and a deep sense of responsibility that I welcome you to the 2025-2026 bar year on behalf of the Tort Law Section Council of the ISBA. I am honored to serve as Chair this year and look forward to working alongside such a talented and committed group of practitioners on our Council that are dedicated to the ongoing development and understanding of tort law within our state.

This Section Council plays a vital role in shaping the dialogue around tort-related legal issues, from legislative developments, to emerging trends in litigation, and dissecting new case law. Over the coming year, we will focus on providing practical CLE opportunities, engaging in substantive discussions, and serving as a resource for the greater ISBA on matters related to tort law.

We plan to host several CLE programs, publish thought-provoking content through *Tort Trends*, and actively engage with current legal issues that impact our practice and our clients. I encourage you to contribute ideas, share developments from your practice, and participate in our meetings and events. This Council thrives when its members are involved, and your voice matters.

Thank you for your commitment to the Tort Law Section Council. I look forward to a productive, engaging, and collaborative year ahead. Please don't hesitate to reach out to me directly if you have any questions, ideas, or simply wish to connect.

With appreciation,

Judith Conway ■

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Advocacy or Arrogance: Dangers of Social Media During Trial

BY ALBERT E. DURKIN AND JOSEPH SALVI

A \$43.8 MILLION VERDICT WAS vacated by the 1st District Appellate Court because of improper social media posts made by the Plaintiffs' attorneys during the trial.

In *Kroft v. Viper Trans., Inc.*, Plaintiffs Cynthia and Mark Kroft sued after Cynthia was catastrophically injured in a rear-end

collision with a semi-truck. Defendants admitted liability and the case went to trial on damages. In the first trial, the jury awarded \$43 million, but a mistrial was granted due to misconduct by the Plaintiffs' counsel for violating rulings on motions *in limine* and engaging

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in improper *ad hominem* attacks on defendants and their counsel.

The case was eventually reassigned to a different trial judge for a new trial to commence on July 5, 2023. Jury selection began on July 6 and continued through the morning of July 7.

During jury selection, multiple jurors stated that they recognized the Plaintiffs' attorney, Kenneth Allen, from his TV commercials.

At some point on July 7, a post titled "What Jurors Should Know But Don't" was published to Kenneth Allen's firm's website and public Facebook page, indicating that it was "posted by Kenneth J. Allen." The post discussed the previous trial in *Kroft v. Viper Trans., Inc.*, including the case number, the verdict award, and certain facts that Plaintiff was not able to discuss in her trial.

Defendants moved for mistrial on July 12, citing a comment made by a juror about a "retrial," as well as advertising of the original verdict on Plaintiffs' counsel's website. The trial court admonished the jury not to google the parties, or else they could be held in contempt. The court later denied the motion for mistrial.

On July 13, the defendants made a second motion for mistrial, citing the July 7 social media posts by Plaintiffs' counsel. Defendants argued that the posts were a deliberate and premeditated effort by the Plaintiffs' attorneys to influence the verdict. In response, the trial court polled the jury asking if they investigated anything about the case. No juror admitted to investigating. The trial court then denied defendants' motion but ordered the Plaintiffs' attorneys to immediately take down the posts.

Defendants renewed their motion for mistrial after closing arguments, which the trial court denied again. The jury thereafter returned a verdict of \$43.8 million for the Plaintiffs. Defendants then filed posttrial motions arguing *inter alia* that they had been deprived by a fair trial due to Plaintiffs' counsel's July 7

social media posts. While the trial court noted that the posts were inappropriate, it stated that it admonished and polled the jury regarding investigating the case. Defendants appealed.

Defendants' primary argument on appeal was that the trial court abused its discretion by denying their motion for mistrial and posttrial motion for new trial based on the July 7 social media posts.

In *Kroft v. Viper Trans., Inc.*, 2025 IL App (1st) 240220, the 1st District Appellate Court ruled that the defendants were denied a fair trial because of the July 7 social media posts. They reached the conclusion based on the multiple factors that lead the Court to believe the posts were made intending to somehow reach the jury.

First, the search terms that would be used by a person interested in the case were all used in the July 7 social media posts, including the case full caption, docket number, and names of the parties. Second, the sites on the internet where the posts were published, the Plaintiffs' attorney's website and Facebook page, were sites that a person interested in the case would look to for information. The Court also stated that because Kenneth Allen had a higher name recognition through TV advertising, it was more likely that potential jurors would be interested in accessing his firm's website or social media. Third, the social media posts were published on July 7, the second and final day of jury selection, through July 13. Finally, the headlines and texts of the posts were blatantly directed toward grabbing the attention of jurors.

Based on these factors, the Appellate Court ruled that the July 7 social media posts were a real and serious effort to reach the jurors deciding the case. Even if the conduct was not intentional, the July 7 posts were published with reckless disregard for the reasonable likelihood that they might draw the attention of the jury.

The Court also found that the trial court abused its discretion in the manner by which it investigated whether jurors

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were aware of the social media posts. Even though the trial court did investigate suspected attorney misconduct, it made the remarks before and after questioning jurors as a group suggesting that they would be in trouble if they acknowledged that they had seen Plaintiffs' attorney's social media posts. The Appellate Court stated that a reasonable judge would have recognized the risk that the jurors would not be forthcoming in that situation.

In the end, the Appellate Court vacated the verdict, sent the case back to Cook County Circuit Court for a third trial, and ordered the case to be tried before a different trial court judge. The Justices criticized the conduct of the Plaintiffs' attorneys. Justice Pucinski, in a special concurrence, stated "I write only to express my profound sadness that this vulnerable plaintiff will now be exposed to yet another trial because of the actions of her attorney."

Lessons learned

What lessons can be learned from this case? One must be very cautious on how they use social media, whether through a firm website, TV commercial, Facebook, etc., making sure they don't post anything regarding a current case about to commence trial or during trial pertinent to that particular case. The Appellate

Court herein went to great lengths stating, "Here, it is beyond dispute that the plaintiffs' attorneys reasonably should have known that the social media post they were publishing during trial included an egregious amount of information that would seriously threaten the fairness of the trial and the impartiality of the jury if such information was disclosed to jurors... [and] might well violate the letter or spirit of Illinois Professional Conduct Rule 3.6(a)." Trial lawyers typically tell their clients to stay off social media while their case is pending and should take their own advice.

Another lesson learned is that the first trial was granted a mistrial due to Plaintiffs' counsel's repeated violation of motions *in limine* regarding attempting to introduce medical evidence regarding brain damage not properly disclosed. One can only assume that as an admitted liability case, counsel was attempting to pad Plaintiff's damage claim with recently discovered medical information. If this information was critical to Plaintiff's continued degenerating condition, Plaintiffs' counsel could have moved for leave to amend disclosures, and if necessary, continue the trial. Even in admitted liability cases there are always ways to establish the seriousness of the incident and resultant ongoing damages through photographs and expert testimony.

Another critical issue learned from the facts of this unfortunate case is that once questions arose regarding potential juror misconduct or tampering, Plaintiffs' counsel should have insisted on the Court conducting *voir dire* individually in chambers in an effort to ferret out the source of the outside information rather than inquiring as a group which might have prevented the second mistrial.

The final lesson to be learned is what, if any, responsibility does Plaintiffs' counsel have to his client for his conduct resulting in two mistrials of \$43M verdicts? ■

Albert E. Durkin is a founding member of MDR Law with over 40 years of experience, currently serving Of Counsel to the firm since 2019. An active member of the Illinois legal community, Al is a member of ISBA's Founder's Circle and President's Club, along with a Silver Fellow in the IBF. Al held two terms on the Board of Governors, including as Secretary in his second term, and five terms in the ISBA Assembly.

Joseph Salvi is an associate at MDR Law, where he focuses on personal injury, products liability, and medical malpractice. Joseph earned his Juris Doctor from the University of Illinois College of Law in 2020. He graduated cum laude from American University in 2017, where he was a two-year starter on the wrestling team. Joe grew up in Hawthorn Woods, Illinois, and attended Carmel Catholic High School. Outside his legal practice, he enjoys cheering for the White Sox and Bears, doing crossword puzzles, and spending time with family and friends.

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The Swearing In of Judge Bridget Duignan as the 149th President of the ISBA



Photos by Drew Pertl Photography

BY DANIEL E. O'BRIEN

As the Editor of Torts the last few years, I always say you can write about anything that effects our group either directly or indirectly. It can literally be anything. Something you come across that is of interest to you, something you observed, a motion you did. Anything. The following is a prime example of this. We all attend events or seminars or are moved by something in the law or the people we meet along the way. The following illustrates that the contribution sometimes does not have to even be your own. It can be something you want to reproduce (with the person's permission) that was inspiring but not heard by everyone. When you read this, please keep that in mind when you are contributing to our group.

Not long ago I was invited to attend the swearing in of Judge Bridget Duignan. As you would expect there were so many people that had touched her life in attendance from family to dignitaries. When I have had the opportunity to attend events such as this, I have found that listening to the individual's life path

is something that really resonates with me. We all come from somewhere and our paths and experiences shape who we are as lawyers, and in my humble opinion sharing them is incredibly important. I was very moved by Judge Duignan's remarks as they have formed who she is and how she got to this place in time. I asked her permission to reproduce her remarks so that we can all hopefully think about our own individual journeys and perhaps in doing so help the next generation of lawyers realize that anything is possible.

For those of you who know our President, I think you would agree that she is one of the kindest people you will meet. She is off the charts smart, she's engaging, empathetic and so thoughtful. These remarks brought out a life path and experiences that I had no idea about. Her path was very hard at many times, but despite that she has persevered. This is such an inspiring story and needs to be shared.

Thank you to Judge Duignan for allowing me to do this, and I hope you all enjoy reading this as much as I enjoyed hearing it.

Remarks By Judge Bridget Duignan, 149th President of the Illinois State Bar Association

Good afternoon to our esteemed Justices of the Illinois Supreme Court, distinguished members of the bench and bar, colleagues and mentors, and my beloved family and friends. Thank you, Sister JoAnn, Dina, Jerry and Justice Walker for your prayers and kind words.

I am incredibly honored to be standing before you today as the 149th President of the Illinois State Bar Association. Each one of you are here today because you've had some impact on my life. Thank you from the bottom of my heart for your trust, your confidence, and your unwavering support and encouragement, which has brought me to this moment.

First, I want to acknowledge the leadership of our outgoing President, Sonni Choi Williams, who could not be here today, but has worked tirelessly to establish a qualified judiciary through her work with the JA Polls Committee, and spearheaded our outreach to specialty bars in the Chicagoland area. I'd like to thank our officers, Perry Browder and Sarah

Toney who have worked closely with me this year, joining our purposes with action that will sustain beyond our respective presidencies. Heather, congratulations on winning your election and joining, Perry, Sarah, and me. We looking forward to having a front-row view to your compassion for the law and for the lawyers practicing throughout the entire State of Illinois. To all of the presidents who preceded us, especially those who are here today, thank you. I truly appreciate the opportunity to have watched you from afar and learn from you while you led this organization. Your legacies are the ISBA's legacy and I am both honored and humbled to walk in your footsteps.

And of course, to the ISBA staff, thank you for who you are and for what you do. None of the successes of this organization are possible without your work and your commitment.

And a special thank you to my mom, a single mom, who instilled in me my work ethic and taught me that anything

is possible for anyone who wants it. I suppose that is how I landed my incredible husband, Jose. Jose for the past 20 years, I haven't done anything of any significance without careful deliberation with you, oftentimes to the detriment of our children, bored, at the dinner table. Anything that I have accomplished of value is because of you, standing beside me and walking with me. You remind me every day of what matters. You do so with your generosity and selflessness, your candor, and of course, with your humor. We have these three beautiful children who remind me every day of how lucky we are. Jose, Rafa, Finian and Ela, I am better because of you. My life is full because of you.

We often think of life as a straight line, one step leading to the next, one day, one week or one year at a time. We look forward to the next celebratory milestone or achievement whether it be standing here before you today, last day of freshman year, 8th grade graduation or an 11th birthday. But the truth is, life is more like a mosaic,

built by thousands of moments.

There are thousands of moments that have shaped my character, influenced how we raise our children, and how I try to live my personal and professional life. I was born and raised on the SS of Chicago. My mother is a Chicago native and my father was an immigrant from Northern Ireland. He was Irish Catholic who fled Northern Ireland to escape the troubles. When I was young, he shared with me a story that when he came to this country, he was told when he enlisted for the army, that if he joined, and served honorably, he would become a citizen. That turned out not to be true.

My undocumented father struggled finding stable work. He was a talented musician so he often found odd jobs singing and playing his guitar throughout the City, even making a few records when Irish music was popular in the 1970's in Chicago. His most stable job for most of my childhood was mowing the lawn at a golf course.



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My father was an alcoholic. My parents divorced when I was young, and because of alcoholism and job instability, my father also struggled with stable housing. I learned as an adult that there was a period when he was homeless. During that time, in exchange for playing music at a bar, the owner allowed him to sleep in a booth after the bar closed.

We relied on public benefits for years, using food stamps to buy food. We relied on the constant kindness of family and friends. Every Christmas morning, we woke up to food and presents on our front porch. Because of this, I still believe in Santa Claus.

Despite his struggles, my father and I were very close. I would see him every Sunday, and I would sit on the floor in front of a wall clock and count the hours until he arrived. Until, in 1989 when I was 12 years old, he was killed in a car accident. It was a one-car accident, he hit a pole, he was probably drinking. He had just become a naturalized citizen before he

died. He had just gotten a “real job” with the county, before he died.

It was through that job that my sister and I became entitled to Social Security Death Benefits. Those death benefits allowed me the opportunity to pursue a solid high school education at Mother McAuley. Mother McAuley and the Sisters of Mercy instill in girls their value, and nurture their leadership qualities. It was the benefit of that education, along with some help from Pell Grants and Map Grants, and student loans, that I was able to attend college. Near the end of my college career, I took a U.S. Government and Politics class and a political philosophy class. I was hooked. It was then and there, where I tied together the opportunities afforded to me by our government and an obligation to return the favor. I didn’t have the money to apply to multiple law schools, and I would have to work full time at least in the beginning, so I applied to The John Marshall Law School, where I started as a night student.

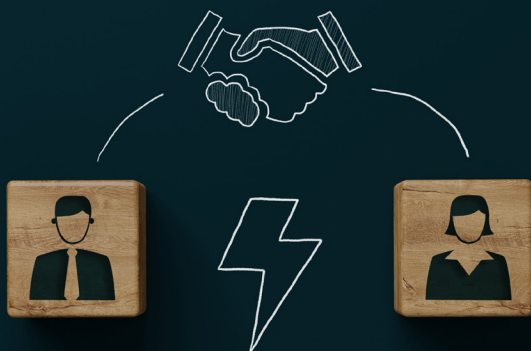
Dare I call myself the product of government benefits, because those words tend to make some feel uncomfortable. But for me, they represent something powerful: opportunity. Access. A belief that where you start doesn’t have to determine where you end up. A reminder of what is possible when society invests in its people. When we choose to lift instead of judge. When we recognize that behind every statistic is a person with potential—if they’re just given a fair shot. I am the first lawyer in my family because I was given a chance. I have been afforded the opportunity to meaningfully serve my community, greatly influenced by the stories of that single mom raising two girls, that immigrant father who struggled in a foreign country, and the two young girls who watched it happen day in day out.

I stand here now as a leader—not despite where I came from, but because of it.

It was from this perspective that I approached my role as a trial lawyer

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representing the voiceless against powerful industries, and it is why I became a judge. My favorite days on the bench are those when I have an opportunity to help an unrepresented litigant understand the legal process and give them confidence that the system is fair, and that they too have a shot. I am paying back the favor when I can help those in our communities navigate a confusing and intimidating legal system.

And today, as I take on the role of President of the ISBA, my perspective, influenced by this mosaic of moments, shape my purpose and my goals.

But first, it is a priority of mine to reengage our members on the benefit of being a part of a club with almost 30,000 members who share the same goal to improve, support, and defend our legal profession.

17 years ago, when I was elected to the Assembly, it was an honor. I couldn't wait to be a part of something bigger than myself. We debated the death penalty and not long after we voted to abolish it, the IL legislature did the same. We debated civil unions and the right to choose who you love. Not long after the ISBA voted in favor, Springfield did the same. The ISBA was also on the forefront for change in Illinois in support of same sex marriage. We voted in favor of the use of medical marijuana, also adopted by the IL Legislature shortly thereafter. These debates and the outcomes reveal that the Assembly matters; not just to our organization, but when you gather almost 203 lawyers and judges in one room and they debate the most important legal issues of the day, it matters to those in power. And let us not forget—the members of the Assembly are our future ISBA leaders. However, membership and engagement in the Assembly is at an all-time low. We are no longer engaging in debates on the ideas of the day—the Assembly's role has become passive. During the next year, we are reimagining the current role of the Assembly. This week we begin a pilot program requesting our members to lead our meeting, sharing with us the most pressing problems facing lawyers in their respective areas and sharing what the ISBA can do to help. These are the ideas of the

day, and they will guide my agenda for the next year.

In addition, we continue to both work with our Rural Practice Initiative and to expand former President Williams' outreach from Chicagoland bars, to our local bars across the state, to make certain that equal access to justice becomes a reality in Illinois. According to the IL Supreme Court Commission on Access to Justice, the legal aid and pro bono system of Illinois is able to address only a small fraction of the civil legal problems encountered by low-income and vulnerable Illinoisans. And consequently, the for-profit industry vultures, are circling. As a statewide organization, we have the resources to lift up and support the local county bars who work daily to bring equal access to justice in all areas of our state. Our members are the innovators who are seeking solutions to rural deserts and as the preeminent bar in the State, we are under an obligation to see to it that these barriers to justice, which prevent a fair and impartial legal system, are broken.

Although I have a lot more ideas that we do not have time for, I would be remiss if I didn't mention the looming threat to the integrity of the legal profession and the independence of the court system. The judicial branch is experiencing a notable increase in explicit threats of violence. Judges are being intimidated. There are calls for impeachment against judges who make unpopular decisions, regardless of a fair and impartial application of the facts to the law. Yet, courts are facing budget

shortfalls, with threats of additional cuts, which affect courthouse security.

Lawyers are also facing unprecedented threats. Law firm security clearances are being revoked and lawyers' access to federal courthouses have been threatened. Large law firms and lawyers who represent immigrants and whistleblowers are being sued because of who they represent, thereby challenging the promise of due process and derailing access to justice. All of this, against a backdrop of an eroding public confidence in the judicial system. There is a "courts can't make us" mentality that ignores the fundamental principle, that there can be no freedom without the law. The ISBA will continue to educate the public on the importance of an independent judiciary, we will defend and support the lawyers and the judges, as each of you work every day to uphold your oath to support and defend the Constitution. The ISBA will support your choice to represent the clients you choose to represent.

We are all leaders in this room and the future of this organization and the legal community is bright because of all of you. We are all in this together and I look forward to what we can accomplish together. ■

Daniel E. O'Brien has been practicing law since 1992 and is a member of the law firm Winters Salzetta O'Brien & Richardson, LLC. Dan concentrates in representing catastrophically injured clients who are injured through personal injury including but not limited to medical negligence, construction negligence, products liability, trucking negligence. Dan is currently Acting Editor of Tort Trends.



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