Heading for the Light: Something for Everyone in Recent Pain Pump In Limine Rulings

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Last week, the court in a pain pump case, *Musgrave v. Breg, Inc.*, 2011 U.S. Dist. LEXIS 113661 (S.D. Ohio Oct. 3, 2011), denied ten plaintiff motions *in limine*. That, in itself, is good news. The rulings aren't especially intricate. You might even call them easy. Some of the language employed by the court to explain why the rulings were so easy might give some of us defense hacks reason to pause. We'll get to that in a moment.

We're not saying the *Musgrave* case isn't interesting -- it is. But we have to admit that it's not nearly as interesting as the Martin Scorsese documentary on George Harrison that aired on HBO last week: **Living in the Material World**. Harrison is the Drug and Device Daughter's favorite Beatle, and it's easy to respect that choice. The Quiet Beatle was spiritual and cool. It was inevitable that he would be overshadowed by the Lennon/McCartney songwriting juggernaut, but Harrison did pretty well in his own write. "Don't Bother Me" was a great early Beatles song, and "Something" was a great late one. Moreover, Harrison's post Beatles career suggests that he was a better collaborator than the others. George worked successfully with Clapton, Dylan, Petty, and Orbison. By contrast, John worked with Yoko. Paul worked with Linda. Ringo has worked with assemblies of All Stars, but only to redo old hits, not to create something new. And Harrison single-handedly saved **Monty Python's Life of Brian**.

So as a silly way of honoring Harrison and keeping ourselves amused, we're going to 'cite' some Harrison songs while discussing the *Musgrave* rulings.

It Don't Come Easy - Yes, it's a Ringo song, and Harrison isn't credited, but Harrison actually co-wrote it and a demo exists of George performing it with a guide vocal for Ringo. Before the *Musgrave* court issued its rulings, it spent time - way too much time - emphasizing how tough it is to preclude evidence via in limine motions: "To obtain the exclusion of evidence under such a motion, a party must prove that the evidence is clearly inadmissible on all potential grounds." 2011 U.S. Dist. LEXIS 113661 at *5. The court expressed a strong preference not to issue *in limine* rulings but, rather, to wait for trial proceedings to supply "proper context." *Id*. at *6. It almost sounds like a presumption against *in limine* rulings. But waiting for "context" isn't always necessary. It can make trial preparation and/or settlement more difficult, and that "context" might mean that the inadmissible, prejudicial material has already been paraded in front of the jury. So while we like this court's rulings, we aren't fans of the prologue.

Handle with Care - This was the hit single from the first **Traveling Wilburys** album. Harrison sang the lead, but Dylan, Petty, Orbison, and Jeff Lynne (of ELO fame) all chimed in nicely. Great team effort. Harrison took the title from a label on a nearby box when the band was rehearsing the song. The first motion *in limine* in *Musgrave* is the most interesting. The plaintiff sought to exclude evidence that the FDA had cleared or considered the pain pumps for intra-articular use, or that the FDA had never expressed any concern regarding the pain pumps. That's a breathtakingly bold and crazy motion, and one would be thunderstruck by a court that would keep such crucial information from the jury. Talk about context! Luckily, the *Musgrave* court did the right thing, concluding that the probative value of FDA approval was not outweighed by whatever prejudice the plaintiff claimed. The plaintiff argued that if FDA approval and lack of concern were admissible, then also admissible should be the fact that a U.S. Attorney's office had subpoenaed documents from the defendant as part of an investigation regarding possible off-label marketing of the pain pumps. The *Musgrave* court correctly held that the issuance of subpoenas was simply not relevant. *Id*. at *9. All a subpoena means is that an agent and a prosecutor think there is something worth reviewing. There might be no there there.

In Spite of all the Danger - This is a pre-Beatles song. It was performed by the Quarrymen and is credited to McCartney/Harrison. You can hear it on **Anthology, volume 1**. The plaintiff in *Musgrave* asked "the Court to prohibit Breg from utilizing the learned intermediary doctrine." *Id.* at *10. Why? The plaintiff argued that "at no time did Breg fulfill its duty to warn physicians." *Id*. Well, plaintiffs always argue that, don't they? And defendants always dispute that. They usually have some facts to back up that dispute. That, according to the court, was the case here. Whether the warning was adequate, and whether the learned intermediary had decided to use the pain pump after receiving the adequate warning, were questions for the jury.

Isn't it a Pity - A quintessential Harrison song from **All Things Must Pass**. It's deep and caring, and it grows on you. Sometimes for years. In the third motion *in limine*, the plaintiff sought to preclude evidence that any doctor negligence in implanting the device constituted an intervening or superseding cause. It turns out that the defendant wasn't intending to make that argument, so the issue was moot. But the defendant asked the court to make clear that it would admit evidence "of plausible alternative causes" of the shoulder condition, including the shoulder injury itself. Sad to say, but, according to some experts, the surgery itself can cause cartilage damage, and there's no reason why a defendant shouldn't be able to put that testimony and evidence in front of a jury. It's "relevant to causation" and is admissible. *Id.* at *12.

Beware of Darkness - Another underrated song from **All Things Must Pass**. Clapton does a superb version of it in the **2002 Concert for George**. The plaintiff requested exclusion of the defendant's experts on general and specific causation. The court denied that motion, and we are fine with that. But the court's explanation is the usual thin gruel that gets dished out in rejecting defense motions to exclude plaintiff experts: the experts are qualified, the arguments go to weight, not admissibility, you can cross-examine ... blah blah blah. The court views its role as "simply to keep unreliable and irrelevant information from the jury because of its inability to assist in factual determinations, its potential to create confusion, and its lack of probative value." *Id.* at 13. Again, we like the ruling here, but, like the court's discussion on motions in limine generally, it sounds a little as if the court's general predilection is to wave things by. The court doesn't appear to have done a detailed analysis of the experts' opinions. If it had, it probably would've arrived at the same result. But sometimes that sort of detailed analysis is necessary to discharge the court's gatekeeping function to keep out plaintiff experts with threadbare data and 'flexible' methodologies.

Wah Wah - Harrison wrote this during the **Let it Be** sessions, when the Beatles were at each other's throats. Nice guitar riff. The *Musgrave* plaintiff asked the court to exclude evidence of his prior injuries. Unsurprisingly, the defendant argued that the plaintiff's "medical history and any past shoulder injuries bears directly upon whether his use of the Breg pump caused his shoulder condition." *Id.* at *13. The court agreed with the defendant that evidence of the plaintiff's "past shoulder injuries is relevant and probative of the issue of causation." *Id.* Nor was such probative value outweighed by prejudice. *Id.* at *14. What prejudice? It's like the criminal defense lawyer who sputters, "Objection your Honor, that's prejudicial - it tends to show guilt." It's whining. (The British call it "whinging," don't they?)

It's All Too Much - This one's from **The Yellow Submarine** LP. Probably one of the better songs on the group's worst effort. The plaintiff objected to introduction of "any evidence to compare the number of times pain pumps have been used with the number of patients who have developed chondrolysis." *Id.* at *14. It's hard to blame the plaintiff, because the evidence he was trying to exclude is so powerful. Plaintiffs like to focus on the numerator: the case at hand, plus, maybe, other instances of injury, perhaps in the form of adverse event reports. But how is it fair to look at the numerator without looking at the denominator -- all those times when nothing bad happened? We know this is powerful evidence because jurors have repeatedly told us so. For example, twenty adverse events don't look so bad, and the company doesn't look so negligent, when there are millions of successful uses of the product. Anyway, we think it's a no-brainer that the plaintiff's effort to exclude the denominator should fail. The court comes out the right way on this

important issue, but adds an interesting reason for its ruling: the plaintiff experts "considered the nonoccurrence of cases of chondrolysis following discontinuation of intra-articular pump use" and made much of the temporal relationship. *Id*. Apparently the court is saying that if the plaintiff experts want to exploit non-occurrence of injuries, so should the defense experts. That's all well and good, but the denominator needs to be admitted no matter what the plaintiff experts' approach was.

The Answer's At the End - From **Extra Texture (Read All About It)** (1975). The plaintiff anticipated that the defendant would attempt to "suggest to the jury that it is a 'good corporate citizen' that benefits society by making products that are life-saving or improve the quality of peoples' lives." *Id.* at *15. The defendant argued that it was premature to rule on this issue. Not surprisingly (given some of the other things the court says in its opinion), the court agreed. This time we have to agree with the court. What most courts end up saying is that the defendant can bring in its good conduct evidence, including wonderful things it has done in general, but then the plaintiff might get more latitude in introducing some not-so-wonderful things. It can be a tough choice for the defendant in terms of how many doors it want to open, or how wide. But in any event the decision does not need to be made before the trial begins.

Sue Me, Sue You Blues - The thing about Harrison is that he mostly seemed like a sweet, gentle guy, but he could also be incredibly cranky. By all accounts, he didn't suffer fools gladly. That comes across in the film **A Hard Day's Night**, where Harrison gets off many of the snarkiest lines. It also came across with the first song on the great **Revolver** LP, Harrison's angry masterpiece, "Taxman." And Harrison had his fill of the legal system. He lost a lawsuit where it was claimed that his "My Sweet Lord" was cribbed from "He's So Fine." Harrison later wrote yet another angry song, "This Song," as a commentary on how the legal system had hosed him. All of which is to say that we think Harrison would have liked us and would have agreed with everything we've ever written in this blog. We're just saying. We also think that George would have been amused by the final three motions in limine in the *Musgrave* case, where the plaintiff asked the court to prohibit the defendant from referencing the results in other pain pump cases (mostly defense wins), or referencing "lawyer-made" lawsuits, or in painting plaintiff lawyers in a negative light. *Id.* at * 16. Those motions in limine were deemed moot because the defendant said it did not intend to make any such references. We suspect that George might not have been so charitable to plaintiff attorneys.