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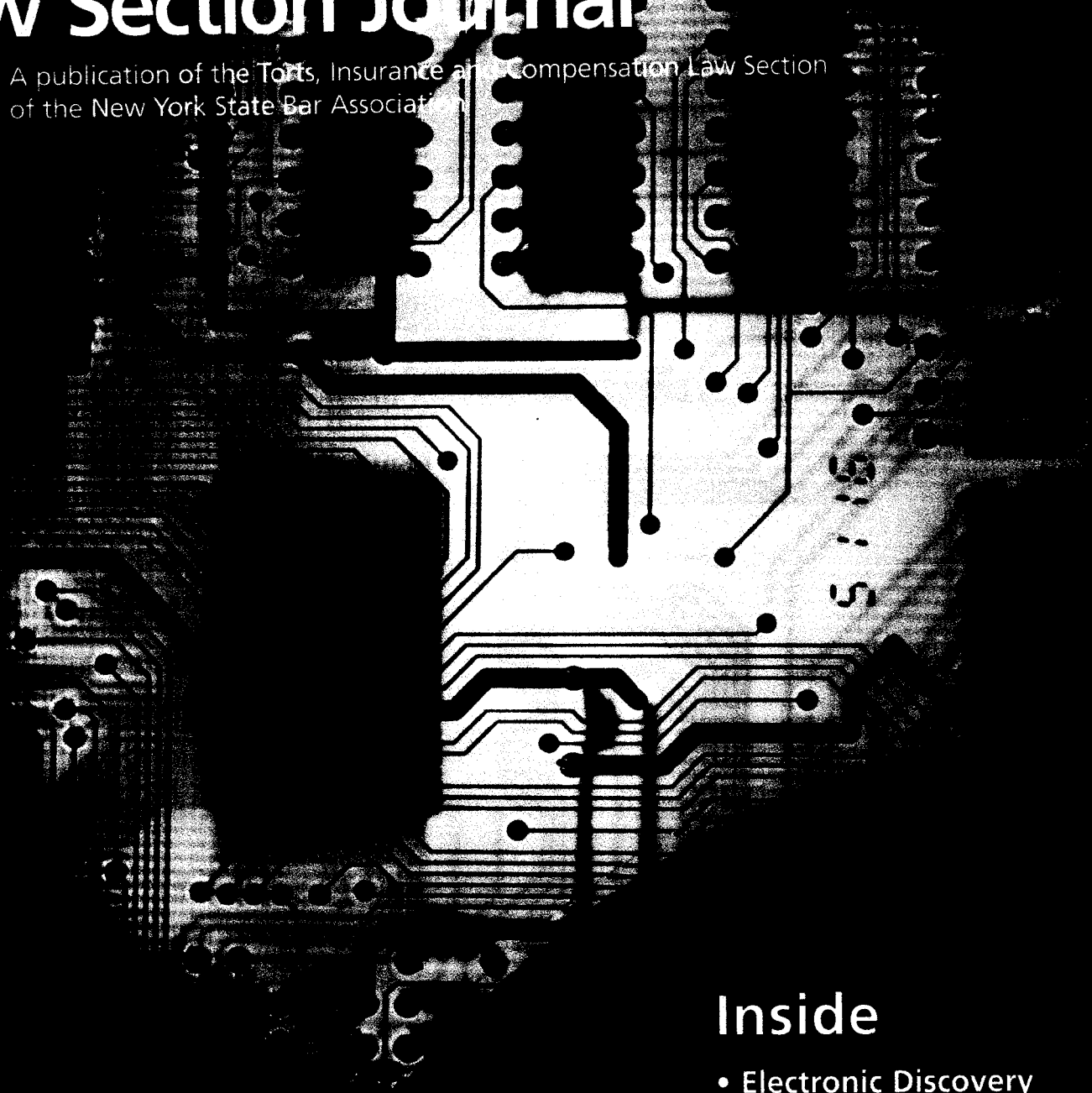

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Making a Lightning Bug

By John Bosco

Mark Twain said that "[t]he difference between the almost right word & the right word is really a large matter—it's the difference between the lightning bug and the lightning." In their explanation of causation, the keepers of the doctrine developed a distaste for the word "proximate" so they discarded it.[1] Unwilling to let causation stand on its own, they selected the word "substantial" as a better companion for "cause." In so doing, they have introduced the language of size into causation. This is contrary to New York law. When a lack of size is considered in causation, it eliminates liability. In the state of New York, however, the lack of size of a defendant's conduct is supposed to diminish liability, not eliminate it. Instead of making lightning, the keepers of the doctrine of the doctrine of causation have made a lightning bug—an inferior type of illumination—to enlighten the minds of jurors on the subject of causation.

"[T]he express policy of the state of New York is clear: size pertains to culpability and a lack of size does not knock a culpable defendant off the liability hook."

On opening, in summation and in the request to charge, a plaintiff's attorney ought to talk about causation in the following manner. Causation is the chain of events that began somewhere, includes the defendant's conduct and ended in the accident. In deciding the question of causation, the role of the jury is to decide whether the defendant's conduct is a link in the chain of causation or a stranger to the chain. It is not the job of the jury to evaluate the size of the links in the chain of causation. Links in the chain of causation can be big or small. If a defendant's conduct is a link, it is a cause of an accident no matter its size; only if a defendant's conduct lies outside the chain of causation is a finding of no causation justified. The doctrine of causation is *not* intended to filter out small-cause cases, only no-cause cases.

In a liability trial in the state of New York, there are two parts: culpability and causation. By law, the size of a defendant's conduct is accounted for in the culpability part of a liability trial. According to the relative sizes of conduct[2] a jury allocates percentages of culpability. Differences in size merit differences in percentages. A small size merits a small percentage; a large size merits a large percentage. Therefore, the express policy of the state of New York is clear: size pertains to culpability and a lack of size does not knock a culpable defendant off the liability hook.

While deliberating on culpability in the liability part of a trial, jurors form opinions, as New York law requires, about the size of a defendant's conduct. It is simply "make believe" to pretend that jurors leave these opinions behind when they move on to deliberate about causation. A juror who has already formed an opinion that a defendant's equitable share is "small" will undoubtedly argue that the defendant's conduct was not a substantial factor and, hence, for a verdict of no causation.[3] At what percentage does such an argument cease to be persuasive? Ask yourselves, "Does 10%, 20% or 30% evoke in your minds something substantial, or does 70%, 80% or 90%?" Without direction, juries are left to speculate about the whereabouts of the point of transformation from "trivial" to "substantial" and tend to pick, induced by the word "substantial," higher rather than lower percentages. Assuming a 2-1 scored in the bottom of the ninth in a baseball game, a single is certainly a cause of a victory even though it took a homer to clear the bases. Yet, if size were pertinent to causation, a single, being a lot smaller than a homer, might not measure up. Causes that are small are still causes.

The problem of a lack of size often stays hidden in the one-on-one case but shows itself in the one-on-many case. In fact, as the number of defendants grows, the likelihood also grows that a jury will dismiss defendants on account of the small size of their conduct even though the jury firmly believes they are a cause of the accident. Having been instructed that it's necessary for a defendant's conduct to be "substantial," can anyone blame a jury for finding "no causation" in a case of four defendants each of which the jury believes is merely 25% responsible for an accident? What about a two-defendant case in which a jury believes one defendant is 95% responsible and the other only 5%?

Revisiting size in causation also invites duplicity into the halls of justice. A jury can have absolutely no doubt that a defendant's conduct was a cause of an accident. The very same jury may also believe that the size of a defendant's conduct falls below the level needed to be "substantial." The jury, however, is not given the opportunity to announce a defense verdict based on a lack of size. It is forced to commit forensic fraud.

Believing that there is causation, it is constrained to announce a verdict of no causation. Given the current wording of the causation interrogatory on the special verdict sheet, it is impossible to know whether a jury is making a finding of no causation based on a lack of size or a lack of cause.

"To consider size in causation permits a jury to eliminate liability instead of merely reducing it—a result contrary to the laws of the state of New York."

Because size belongs to culpability not causation, the causation interrogatory should simply ask, "Was Defendant's conduct a cause of the accident?" Isn't this what a jury is supposed to decide on the question of causation? Moreover, doesn't it have a nice, sonorous, onomatopoeic flow to it from conduct through causation to accident, imitating the flow of causation from cause to effect? Size matters but it should matter only once, not twice, solely in culpability, never in causation. To consider size in both culpability and causation cheats the plaintiff by double-charging him. To consider size in causation permits a jury to eliminate liability instead of merely reducing it—a result contrary to the laws of the state of New York.

Endnotes

1. *See* Comments to PJI 2:70; *DiMaggio v. O'Connor Contr.*, 175 Misc. 2d 253, 668 N.Y.S.2d 449 (1998).
2. *See, e.g.*, CPLR 1411 and 1601.
3. *See* concurring opinion and dissent in *Kovit v. Estate of Hallums*, 690 N.Y.S.2d 82; 2002 WL 32137120 (2d Dep't 2002).