

ON THE PLAINTIFF'S SIDE

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Kassel McVey wins \$38m jury award in asbestos case

Lloyd S. Garvin worked as a maintenance man and millwright at various chemical and plastics plants throughout South Carolina from the 1960s through 2000.

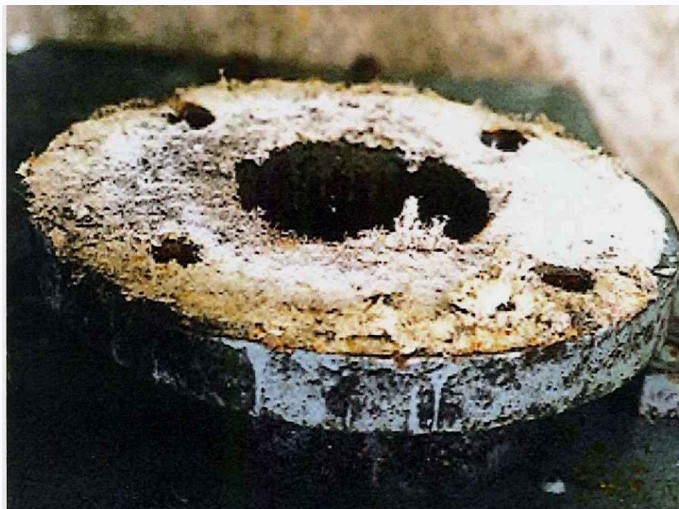
As part of his job, Garvin dismantled industrial pumps and valves, many of which contained corroded gaskets and packing materials made of asbestos. His decades of exposure to asbestos particles led to a diagnosis last summer of testicular mesothelioma, a potentially deadly cancer.

Kassel McVey served as co-counsel to Garvin, now 74, and helped him win a \$38 million jury verdict in September in a suit he and his wife had initially filed against 13 companies. Ultimately three manufacturers of the products that Garvin handled were found liable for the damages.

Theile B. McVey of Kassel McVey tried the case alongside Jessica M. Dean, a partner at Simon, Greenstone, Panatier & Bartlett in Dallas. McVey argued that the defendants had failed to make their products safer and failed to warn workers such as Garvin about the dangers of the asbestos in those products, even though they had long been aware that the products were hazardous.

"There was testimony that these companies knew about the dangers of asbestos in the 1930s, and to this day they maintain that the gaskets and packing material can't hurt people, and you could work with them today, all

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A corroded gasket (at left), similar to ones Mr. Garvin, the plaintiff in this case, worked on throughout his career.

These gaskets were made up of 75 to 85 percent asbestos materials, which flaked into cancer-causing dust particles that could be inhaled.

The View from Here

Getting the tone right

By John Kassel

As a trial lawyer, I am interested in what persuades people. What are the components of a compelling argument? How can you structure a presentation to get the listeners to agree with you? These are of course, ageless questions. Much has been written about the art of persuasion. Let me make a small contribution to the cause.

It almost goes without saying that a persuasive case needs to be built upon a strong foundation of substance. That is, the advocate must have fundamental facts organized in a coherent way that supports his or her position. If I am prosecuting a medical malpractice case, I

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Surgeon faulted in total knee replacement

Kassel McVey won a \$1.9 million jury verdict in early October on behalf of a man who underwent total knee replacement surgery and ended up with a deep bone infection known as osteomyelitis.

The patient alleged that the orthopaedic surgeon who performed the procedure violated the medical standard of care by placing the implant incision too close to a previous incision scar on the patient's knee. The resulting infection required that the knee implant be removed twice and placed the patient at a life-time risk of recurrence of the infection and likely amputation of his leg.

The plaintiff had previously had surgery and trauma to his knee and had a long, pre-existing scar running longitudinally on the inside (medial) of the knee. In undertaking the orthopaedic implants, the surgeon made a standard incision, which was only 1.5 cm from the old pre-existing incision at the closest point. The isolated skin between the two incisions broke down within 20 days of the surgery, leading to the infection.

At trial, Kassel McVey presented evidence from expert witnesses that the surgeon violated the standard of care – conduct required of a reasonable and prudent surgeon under the same or similar circumstances. The experts opined that the surgeon should have incorporated or used the old pre-existing incision in placing the knee joint. Doing so would have eliminated the narrow skin bridge which broke down and led to the catastrophic results.

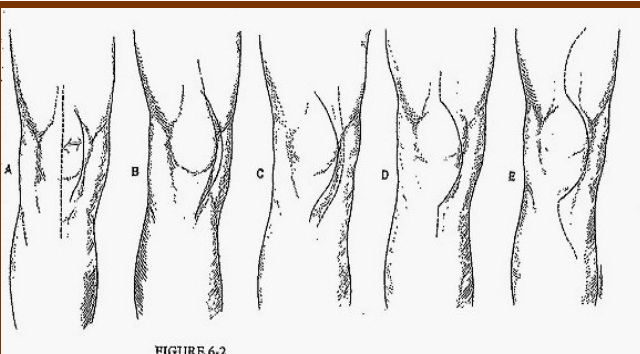


FIGURE 6-2
Total knee replacement involves making a "parapatellar" incision in the knee joint and replacing the knee with metal implants.

Knee replacement surgery is considered the

gold standard when more conservative treatments fail. There are potential dangers in the process, however. According to the leading medical text on total knee replacement, "The Techniques of Total Knee Surgery," by Ken Krackow (1990):

The greatest danger arises with placement of essentially parallel incisions and the creation of areas of 'isolated' skin. This kind of occurrence is potentiated by previous relatively long incisions.

The Krackow text provides a depiction of knees with previous incisions (see figure above). The diagram notes that the placements of total knee-replacement incisions in the three knee depictions from left (labeled A, B, and C) would be "unsafe." The defense presented Dr. Krackow as one of their experts. Dr. Krackow tried to distinguish our client's knee from those in his diagram. Ultimately, he was unsuccessful.

The View from Here

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have to be correct on the medicine. If I claim a physician did wrong, there must be clear factual evidence of the wrongful actions. Generally accepted medical authority must weigh in that the physician's actions failed to comply with the standard of care required under the circumstances. But substance is not enough.

Tone is important. Tone is how you say something. It encompasses volume, pitch, speed of delivery, and techniques to demonstrate emphasis. The listener may be concentrating more on how you are saying something rather than what you are saying. Even if a listener cannot fully understand the substance of your argument, he or she should always be able to intuitively grasp the persuasive power from your tone.

This technique at work is often evident during closing arguments at a trial. The defense lawyer makes several points. As part of his closing statement, he argues that the plaintiff has not been straightforward and was actually dishonest. At the conclusion, the plaintiff's lawyer must stand up and address the jury in rebuttal.

Deafening tonal silence following a robust defense presentation is a recipe for disaster. On the issue of dishonesty, the tone or voice used to make the response may require the opposite of what was used to deliver the accusation. If the attack on the plaintiff's credibility was delivered in a rapid fire delivery, with exasperation and incredulousness in the tone, the response may have to be slow and emphatic.

The voice is one of confidence. It is matter of fact. There is no sense of defensiveness in the voice. It is all business. Whether the jury understands the factual arguments or not, they understand you vehemently disagree with the defense accusation. And that is what counts.

News & Events

Kassel elected Appleseed chair

John Kassel, an attorney with Kassel McVey, has been elected Board chair of the South Carolina Appleseed Legal Justice Center.

For more than thirty years, Appleseed has been a forceful and respected advocate for low income South Carolinians on issues such as housing, education, hunger, public benefits, domestic violence, immigration, health care and consumer issues.

Kassel will replace Christopher R. Koon, Esq., as chair of the Board of Directors.

McVey appointed to SCAJ positions

Theile McVey, an attorney with Kassel McVey, has been appointed chair of the Discovery Abuse Committee with the South Carolina Association for Justice (SCAJ). She has also been appointed as a member of the Honors and Recognitions Committee for the SCAJ.

The SCAJ was founded over 50 years ago by a small group of trial lawyers. The mission is to uphold and defend the constitutions of South Carolina and the nation; to protect the rights of the individual; to seek justice through open and fair courtrooms; to resist unjust laws; to strengthen the civil justice system through education; and to uphold the highest standards of ethical conduct and integrity in the legal profession.



Award Event — Kassel McVey was a sponsor of the South Carolina Appleseed Advocate of the Year Award presentation by the SC Appleseed Legal Justice Center on October 23 to Inez Moore Tenenbaum (center front), chair of the U.S. Consumer Product Safety Commission and former SC Superintendent of Education. John Kassel of Kassel McVey (at left) has been elected Board chair of the Appleseed Center.

Kassel McVey wins \$38 million verdict in asbestos case

ASBESTOS, Continued from Page 1

day, and everyday and still not get sick," McVey told *Lawyer's Weekly*. "I think the jury wanted to send a message that these products weren't safe."

Garvin and his wife initially sued 13 companies that manufacture asbestos pumps and valves, but eight companies were eventually dismissed as defendants because their products could not be linked to the plants where Garvin worked. Two of the remaining companies entered into confidential settlements with Garvin, who took the other three, Byron Jackson, Crane Co., and Durco, to trial in the Richland County Court of Common Pleas in late August.

On Sept. 11, jurors awarded Garvin \$10 million in actual damages and \$27 million in punitive damages. In addition, the jury awarded Garvin's wife \$1 million for her loss of consortium claim, which was a result of surgery needed by her husband in an attempt to keep the cancer from spreading.

Crane Co. and Durco were each assessed \$11 million punitive damages, and Byron Jackson was assessed with \$5 million in punitive damages. Crane Co. is based in Connecticut, while Durco and Byron Jackson are subsidiaries of Flowserve, which is headquartered in Texas.

Attorneys for the defendant companies indicated they planned to seek to get the verdict overturned either through post-trial motions or through an appeal of the jury award. But McVey, who said her medical experts believed that Garvin's cancer would likely resurface and that he could die within the next year, was confident that the award would stand. "I think the trial court will have to review it," she said, "but I think they'll uphold it."

Both McVey and Dean said both testimony and records in the case dispute the Crane Co.'s contention that Garvin did not work with Crane valves.

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John Kassel and Theile McVey

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