

New Law Protects Frivolous Actions

There was a time when the practice of law was so exacting and precise as to be akin to the religious rituals of pre-Christian Rome - where a single mistake could mean having to start a day-long sacrament over again.

Thus, Sir Edward Coke, the great 16th to 17th century jurist, had his first success as a young lawyer when, representing the defendant in a civil litigation, he noticed that the plaintiff had relied upon a faulty translation of a Latin statute (the mistake amounted to the mistranslation of a single word) in asserting his causes of action. Coke successfully moved to dismiss the case on this basis.

The law is more forgiving now than in Coke's time. For example, under Rule 8 of the Federal Rules of Civil Procedure, a complaint, the document initiating a civil suit, is sufficient to set a case in motion if it provides "a short and plain statement of the claim showing that the pleader is entitled to relief" that gives "the defendant fair notice of what the claim is and the grounds upon which it rests." Complaints that fail this elemental test are subject to dismissal at the very outset of the case.

But what exactly constitutes "a short and plain statement of the claim showing the pleader is entitled to relief" under Rule 8? For one thing, the plaintiff must satisfy each element of a cause of action. For example, the cause of action for negligence consists of the following elements: that defendant owed plaintiff a duty to use due care; defendant breached that duty; and the breach caused plaintiff damages. A complaint that fails to satisfy these elements will be subject to dismissal. However, pursuant to the federal "short and plain statement" requirement, can a plaintiff simply get by reciting the above formulaic elements of a cause of action, and nothing more? Is a complaint sufficient to allow a case to proceed to discovery if it is devoid of specific facts to show the case has some basis?

The answer recently provided in two U.S. Supreme Court cases - *Bell Atlantic Corporation v. Twombly* (2007) and *Ashcroft v. Iqbal* (2008) - is an emphatic "no." In those cases, the Supreme Court held that a complaint is subject to dismissal if it consists of nothing more than "naked assertions devoid of further factual enhancement." As *Twombly* observed, federal precedent has long provided that a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" under Rule 8 requires "more than labels and conclusions," more than a "formulaic recitation of the elements of a cause of action." Thus, *Twombly* and *Iqbal* concluded, to survive a motion to dismiss, "a complaint must contain sufficient factual matter" to "state a claim for relief that is plausible on its face." The facts alleged (which the trial court must assume to be true) must allow the court to "draw a reasonable inference that the defendant is liable for the misconduct alleged." Complaints that fail to satisfy this requirement will be subject to dismissal.

In so ruling, the *Twombly* and *Iqbal* courts specifically rejected an oft-quoted statement in a 1956 Supreme Court case, *Conley v. Gibson*, that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." As Justice David H. Souter, writing for the majority in *Twombly*, reasoned, there is an insoluble tension between the *Conley* pronouncement and the long-standing principle that a complaint must provide the grounds upon which its claims rest. Further, the *Conley* rule, while often quoted, has rarely been applied literally, the Court explained. After puzzling the legal profession for so long, the majority wryly concluded, *Conley's* "famous observation" had now earned its retirement.

But like the bogeyman in a horror movie, *Conley* may be returning



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just when everyone thought it was dead, and in its reanimation will be more powerful than ever. Thus, last year, Democratic legislators in the House of Representatives introduced the "Open Access to Courts Act of 2009," H.R. 4115. The effect of this act would be to overrule *Twombly* and *Iqbal* while reviving *Conley*. Under H.R. 4115, a federal court would be prohibited from dismissing a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief" - i.e., the "famous observation" of *Conley*. Likewise, a court would be prohibited from dismissing a complaint based on the judge's determination that "the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged."

By this law, *Conley's* statement, which *Twombly* tells us, has rarely if ever been followed literally, would be applied in its strictest sense. As with most legislation, the exact consequences of such a law are not perfectly clear. For example, under H.R. 4115, would a plaintiff truly be permitted to assert a complaint simply by checking boxes on a form? (i.e., "defendant owed me a duty [check]; defendant breached said duty [check]; defendant's breached caused my damages [check].") Would a

judge be prohibited from dismissing such an action because some set of facts could conceivably be found to support such a claim? Will a plaintiff attorney be able to make his complaint bullet-proof simply by declining to allege any facts at all? After all, in that case, it will be impossible to say that "no set of facts" could support the claim. This would seem to be fundamentally inconsistent with the basic function of Rule 8 - i.e., to give the defendant sufficient notice of what it is accused of and the grounds of his claim. But there can be no doubt that plaintiff's attorneys, armed with this new law, will try to argue that this is exactly its effect. Whether district judges will agree to this interpretation is another matter.

The empirical evidence does not support the need for this new, lax standard. For example, as reported by the Civil Justice Association of California, data recently circulated by the Judicial Conference Advisory Committee on Civil Rules show that in employment civil rights cases, the percentage of motions to dismiss that were granted actually decreased after *Twombly* and *Iqbal* were decided. Likewise, Andrea Kuperman, a law clerk to Judge Lee Rosenthal (U.S. District Court for the Southern District of Texas and Chair of the Judicial Conference Committee on Rules of Practice and Procedure), after conducting an extensive review of recent cases concluded that thus far it appears that, following *Twombly* and *Iqbal*, "most of the case law to date does not indicate a drastic change in pleading standards." In short, consistent with the Supreme Court's indication that it was merely following and clarifying prior law, it does not appear that *Twombly* and *Iqbal* have increased the frequency of cases being dismissed from the federal system.

Furthermore, dismissal does not by any means signal the necessary end of a plaintiff's case. The law provides that trial courts are to liberally grant leave to amend to plaintiffs who are dismissed. Cases that fail to make the grade under *Twombly* or *Iqbal* can simply be rewritten, and expanded, and then filed again with greater success. Meanwhile, the truly frivolous actions, those with no basis, will more likely be weeded out.

Far from it being necessary to increase access to the courts, a strong argument could be made that it should be harder, not easier, to launch litigation. A flood of litigation is already choking the court system. Defendants must expend enormous sums on attorneys even to defend the most frivolous of cases, often settling simply to avoid the hemorrhage of money. In short, excessive litigation drains the wealth from our financial system, and from our economic recovery. H.R. 4115 has the potential to increase this problem, perhaps

dramatically.

We have moved a long way from the legal world inhabited by Sir Edward Coke, where one mistranslated word could mean the dismissal of a complaint. But we are in danger of moving too far to the other extreme. Federal judges should be permitted to dismiss truly frivolous and unsupported claims.



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The Crisis in Family Court

Over the past year, breaking news has continually reported on events stemming high risk conflicts from family court that have erupted into deadly events. Breaking news: Father kills child and then himself in San Bernardino. Grandmother shoots daughter and grandchildren in San Clemente after family law hearing. Thousands Oaks father kills two sons and self at end of weekend visitation. Ex-husband shoots ex-wife in face and flees with son in Foothill Ranch. The stories continue nearly daily with critical failures within the family law court. The reality is "everyone knows someone" who has been affected by the crisis in family court.

After studying the family court system, it does not take long to realize the courts are overburdened with the sheer volume of family law cases filed each year. Many cases have allegations of child abuse, domestic violence, child sexual abuse or parent alienation. The court is faced with making decisions based on declarations and limited information, which is often flawed and misleading. Unfortunately, such a system is failing

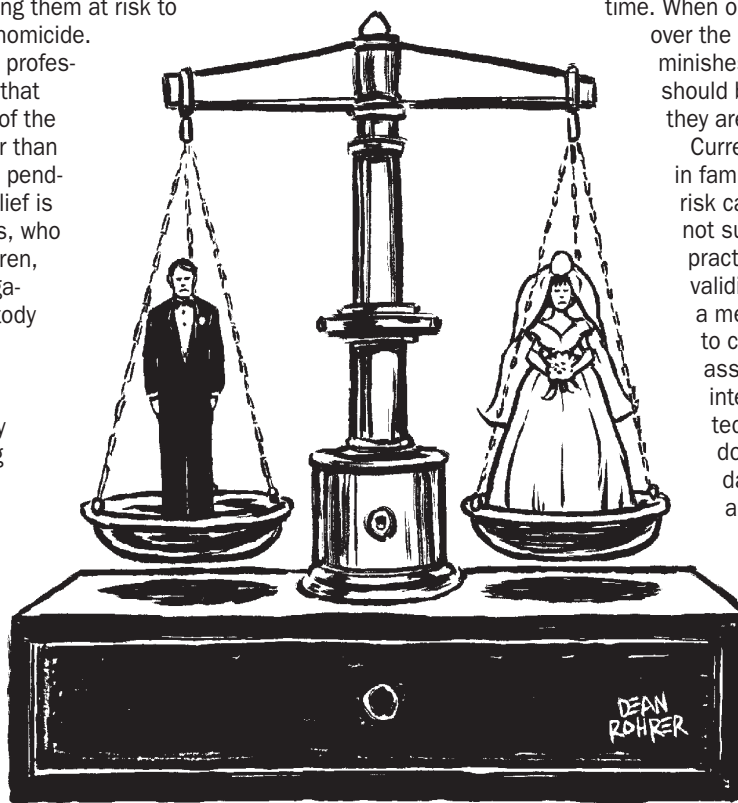
our families and children, often placing them at risk to more abuse and violence, including homicide.

There is significant belief amongst professionals within the family law system that every allegation of abuse is a result of the conflict created by the divorce, rather than the belief that the abuse caused the pending family law matter. In fact, this belief is so common, child protective services, who are charged with protecting our children, makes a special notation on all allegation cases that come from child custody cases. Child protective services, the courts, attorneys and mental health professionals are pre-disposed to discount all allegations because they are made in the context of a pending divorce.

This line of thinking is flawed at its very core and creates biases in these high risk cases. These cases are often labeled as high conflict rather than high risk. Unfortunately a fair amount of false allegations make it into the family court system on a daily basis. Much like the child who cried wolf too many times, the real cases get lost in the fray. Child abuse and domestic violence laws are in place to protect victims but often get overlooked or misapplied in many cases. So how and why does this happen?

In short, there is a belief amongst mental health evaluators, who are tasked with determining the "best interest of the child" standard that if parents involved in these cases can begin to work a parenting plan, then all the problems will resolve themselves. Well that may be true in many cases; it is not true in family law cases where there are allegations of child abuse, child sexual abuse, domestic violence and parent alienation.

In fact, these abusive behaviors are patterns of behaviors that happen over a period of time and are issues of power and control. Whether it be an abusive spouse or a spouse that takes intentional actions to alienate a child from their other parent, these behaviors happen over a period of



time. When one person exerts power and control over the other, the ability to work together diminishes dramatically. In reality, these actions should be treated as the criminal matters as they are.

Currently the processes or tools being used in family law court to deal with these high risk cases are inadequate and quite frankly not supported by science. Evidence-based practices are not utilized in assessing the validity and accuracy of allegations. Often a mental health evaluator is appointed to conduct a child custody evaluation to assist the court in determining the "best interest of the child." Although, admittedly, most evaluators report that they do not have the ability to get the proper data to make informed decisions and are faced with using mental health testing and self-reported interviews as the source of data relied upon to make these critical decisions. This flawed process fails to prove or disprove allegations in the first place. And when you fail to prove or disprove allegations, how can the best interest of the children be served?

This seems to be the million dollar question circulating in the forensic science world when it

comes to allegations in family law cases. As described above, deadly results are occurring daily based on faulty data and processes relied upon by family law professionals.

A better system and process is available but in reality, if allegations are deemed suspicious because they are made during a divorce proceeding, any process will fail. First and foremost, when allegations are made in the context of a divorce, attorneys, judicial officers and other professionals have to address the important issue of whether or not these allegations are true or not. Since each of these abusive behaviors are patterns of behaviors a detailed risk assessment needs to be conducted from the time the allegations are made. In children who are abused, patterns will exist within their life span. Although you may not be able to answer whether a certain act of abuse actually occurred or not, you can certainly identify the patterns consistent with those who are abusers or those who abuse.

With innovation and technology, it is now possible to map behavior in time line series for analysis allowing for more data to be considered in the context of these cases. Technologies have allowed professionals to better track and predict those cases that are most likely to escalate into future violence. Each case in family court that results in continued abuse or homicide, there are indicators that are present that professionals have missed due to their own biases over believing that all allegations of abuse in the context of family law cases is false.

It is time to open the dialog and look for new solutions and processes to protect those who have been abused by a family member, whether it is a spouse or child.



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