BECOMING "KEENELY" AWARE OF THE CONSEQUEUNCES

THE RISK MAY NO LONGER BE WORTH THE BENEFIT

Case: Keene v. Brigham and Women's Hospital, Inc. 56 Mass. App. Ct. 10 (2002)

Issues:

1. Charitable immunity;
2. Sanctions relating to discovery; abrogation of $20,000 damage cap;
3. Discovery-motion practice;
4. Spoliation of evidence;
5. Implications for other charitable and nonprofit institutions;
6. Law in other states;
7. Public policy issues;
8. Further SJC review;
9. What is to be done in light of Appeals Court decision: case law, legislative action, increasing the cap or abrogating the cap as in Rhode Island?
10. Appeals court may be signaling it is timely to consider abrogation of charitable immunity doctrine on a case by case basis unless the Legislature enacts a more equitable statutory scheme that reflects the economic power and resources of many "charitable institutions"; also see the inequity of sexual abuse cases and affirmative defense of charitable immunity by the Catholic church to prevent just economic compensation to victims –many of whom were young boys and teenagers when they were harmed by those in positions of trust and authority over them;
11. Charities and nonprofit foundations are increasingly wealthy institutions. They are more and more frequently a means of sheltering the taxable estates of the wealthy from the reaches of the IRS. They are a wealth preserving and wealth transferring device that only indirectly has a "charitable' purpose. They are estates planning schemes that belie the scope and purpose of the original charitable immunity statutes.
12. Loss of enjoyment of life: requirement of conscious pain and suffering;
13. Due process-right to a jury trial; it is a formidable hurdle to get discovery abuse enforcement with teeth. **From the transgressors point of view the risk may be worth the benefit.**
14. Discovery motion practice-delay, delay and more delay. The economic costs of obfuscation by a financially powerful opponent are formidable. These powerful institutions are in the position of routinely prevailing in discovery disputes. Judges become tired and impatient with the parties' inability to resolve their differences amicably or collegially. Obfuscators know the courts' attitude and manipulate it to their advantage. Delay costs money, but for deep pocket defendants it is a cost-effective device. See Woburn, Federal Appeals Court.