Rachel Barton v. Chicago & Northwestern: Who Should Face the Music?

Molly DiRago

How much would you expect to be compensated if you lost a leg due to someone else's negligence? What if your leg was literally ripped off your body in a violent accident? Can you put a price on a limb? Now what if you were partially at fault; you could have prevented the injury but you failed to do so? What if your career opportunities actually improved s a result of the injury? Answering these questions is not easy; yet, as vividly demonstrated by the Rachel Barton story, juries all over the country regularly have to decide issues just like these.

A Child Prodigy: defined by an instrument

Rachel Barton, born October 11, 1974, in Chicago, Illinois, began playing the violin when she was just three and a half years old. By age five she knew she had found her calling, as she had already begun to "define [herself] by [her] instrument."[1] She began performing publicly by the time she was seven years old and by the time she was eleven, she was practicing eight hours daily.[2] Rachel had also joined the Civic Orchestra in Chicago, which is the prestigious training orchestra of the Chicago Symphony Orchestra. The self-touted goal of the Civic Orchestra is to "recruit nationally a diverse group of gifted pre-professional musicians, train them at the highest level as orchestra players, and further develop skills of advocacy and mentoring, essential to the role of

[1] Rachel Barton's personal web page, http://www.rachelbarton.com/aboutrachel2.htm
[2] *Barton v. Chicago and Northwestern Transportation Co.* , 757 N.E.2d 533 (2001).

orchestral musicians in communities, now and in the future."[3] Raised in a family of little economic means, by age fourteen, Rachel was literally her household's primary breadwinner.[4]

Since then, Rachel has appeared as a soloist with many of the world's leading ensembles, including the Chicago, Atlanta, Baltimore, Montreal, Vienna, New Zealand, Iceland, and Budapest Symphonies.[5] She has worked closely with renowned conductors and holds prizes from several of the world's leading competitions.[6] In fact, in 1992, she was the youngest performer and first American to win the gold medal at the 1992 Quadrennial J.S. Bach International Violin Competition in Leipzig, Germany.[7]

In June 1996, Rachel was one of the torchbearers in the Olympic torch relay.[8] She has performed her own virtuoso solo arrangement of the national anthem at the Chicago Bulls playoff games in 1995 and 1996 and the 1996 Democratic National Convention in Chicago.[9] Also in 1996, *Chicago Magazine* selected her as a "Chicagoan of the year" and *Today's Chicago Woman Magazine* named her a "Woman of the Year." She was featured on "CBS Sunday Morning" and has twice appeared on the "Today" show.[10] She has been profiled in *People Magazine*, and in the Arts & Leisure section of *The New York Times* and was officially congratulated by the State of Illinois' 90th General Assembly.[11] In February of 2003, Rachel was named "Classical Entertainer of

[3] Civic Orchestra of Chicago Fact Sheet, http://www.icsom.org/news97/news1197/120597civicfaq.html.
[4] Rachel Barton's personal web page, http://www.rachelbarton.com/aboutrachel2.htm
[5] Rachel Barton on Cedille Records bio, www.cedillerecords.org/barton.html
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] State of Illinois 90th General Assembly Legislation.

the Year" at the 22nd Annual Chicago Music Awards.[12] *Rolling Stone* calls her "one of the world's most acclaimed classical musicians."[13]

The Accident

On January 16, 1995, at around 10:30 a.m., Rachel boarded the last car of a northbound Metropolitan Rail (Metra) train, No. 317, at the Ravenswood stop in Chicago.[14] The train was being operated by Chicago & Northwestern Transportation Company (C&NW)[15] under an agreement with Metra. Rachel was headed to Winnetka, a northern suburb of Chicago, to teach violin lessons at the Music Center of the North Shore.[16]

Rachel was wearing "jeans, a T-shirt, possibly a flannel shirt, a bulky sweater with shoulder pads, a puffy down coat with fashion shoulder pads, gym shoes, earmuffs and thin leather gloves."[17] She was carrying a book bag, her purse and a food bag in addition to a violin in a soft, insulating case. The violin, almost 400 years old, had been loaned to Rachel by her patron and insured for the amount of $500,000.[18] The violin was handmade in Italy by the Brothers Amati, who are the sons of Andrea Amati, known as the "Father of the Modern Violin,"[19] and who some think invented the violin in the late 1500's.[20] [21]

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[12] Id.
[13] www.rollingston.com
[14] *Barton v. Chicago & Northwestern Transp. Co.*, 757 N.E.2d 533, 539 (Ill.App. 2001).
[15] The Northwestern railroad is the oldest railroad in the west, founded in 1848 by William Ogden. It began its commuter services in 1880, when Chicago was a "small town on the lake" and inhabited by only a few thousand people. Defense Opening Statement 7.
[16] *Barton*
[17] Id.
[18] Id.
[19] www.paultupper.com/violinfacts.htm
[20] *Barton*, supra 14 at FN4

All of these items were being carried on her shoulder, but would not slip down her arm due to the puffiness of the winter coat she was donning. She routinely carried these items in the following order: purse, violin, book bag, food bag.[22]

When Rachel noticed the Winnetka stop was coming up, she began to gather her belongings and otherwise prepare to exit the train. By the time she got to the vestibule of the train, the train had already stopped to let out passengers.[23] Dr. Caroline Clements, who was riding in the same car as Rachel, heard Rachel ask whether this stop was Winnetka and remembers that she thought Rachel would not be able to exit the train in time.[24]

As Rachel began to descend the stairs of the train car, she still had her purse, violin (in its case), briefcase and food bag on her left shoulder.[25] Unfortunately, and critically, Rachel's violin case got stuck on one or two of the handrails in the train vestibule. Rachel tried to keep the many belongings at her side, but apparently had to take a step back to unhook the violin and reorganize her belongings. She then descended the stairs and stepped off the train.

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[21] Interestingly, this case is not the only legal dispute in which this violin sits, and in fact, it is a mystery as to how it ended up in the United States at all. During WWII, Nazis raided the Lobkowicz family's 16th century castle, situated on top of a hill 40 miles outside Prague, in the Czech Republic. The castle contained some of the foremost treasures of European culture, including rare musical instruments and historic scores in Beethoven's hand writing. Although the collection was returned after WWII, many pieces are still missing, one of which is this violin, which Rachel played for over a decade. The Lobkowicz family believes it is theirs and should be returned immediately, yet the several Chicago violin dealers who have sold and resold the violin over the years say they had it in their possession legally because Maximillion Lobkowicz sold it in the United States in the late 1940's. It is now on loan from the Stradivari Society to Daniel Roehn, a 21 year old German violinist living in Munich and who considers the Amati "the best instrument he ever has played." (Chicago Tribune, 8/19/01, 2001 WL 4105790)
[22] *Id*. 1011
[23] *Barton* 1011
[24] *Id*. 1012
[25] *Id*. 1012

As Rachel stepped off the train platform, she could hear 'ambient train noise.'[26] Rachel did not see or hear the train doors close, but felt and heard a bump.[27] There was no warning that the doors were closing, and no one announced that the doors were closing.[28] As Rachel attempted to take another step, she was unable to go any further and testified that it was as if her left shoulder was pinned to the train.[29] Rachel turned as much as she could to the left (she could not turn right since her left shoulder was "pinned" to the train) and since she could not see her violin, she figured it was stuck in the train doors because the strap was taught. No part of her body or clothing was stuck in the train doors.

Rachel explained, "I mean, my shoulder was pinned against the door, and the strap of the violin case was tight. It was like a little - like a noose. Just like pulling me against the door. I was stuck."[30] Indeed, Rachel's violin was inside the car, while the strap to the case was still on her shoulder – outside the car. At this point in time Rachel did not think she was in danger – she figured she could spring the doors open.[31] She also thought the conductor would look out of the train and see that her violin was stuck in the doors and that she too was stuck. Surely the train would not move with her still pinned to it.[32]

But Rachel could not open the door herself, so she yelled to try to get someone's attention. She said, "Hey, wait. Hey, open up the doors."[33] Theresa Croghan, a 39 year old former Cook County prosecutor, was jogging on the opposite side of the train at the

[26] *Id.*
[27] *Id.*
[28] Plaintiff's brief, 2000 WL 34202137, at 4
[29] *Barton*, 1012.
[30] Plaintiff's brief at 5.
[31] *Id.*
[32] *Id.* at 6.
[33] *Barton*, 1012.

time and heard a "very annoyed voice say, 'Wait. Wait. Wait a minute. Wait a minute.'"[34] Still, Rachel did not believe she was in harm's way at this time.[35]

But then, with Rachel's violin still stuck in the doors and Rachel's shoulder still pinned to the side, the train began to move. Suddenly. And without warning. According to Rachel, she immediately stumbled and fell, being pulled northward by the train.[36] Croghan, the jogger on a path just three feet below, heard Rachel say, "No. Stop. No. Stop. No," in a very "intense" voice.[37]

Defense's ergonomics expert, Jerry Purswell, deduced from the police report and medical evidence that once the train began to move, Rachel, fully realizing she was in physical danger, nevertheless *elected* to run alongside the train rather than pull her arm out of the straps pinning her to the train.[38] He believed Rachel was so intent not to abandon her violin that she deliberately would not release herself from the strap. After all, if she was pinned to the train by the strap on her left shoulder, would it not take a simple turn to the left to give some slack to the strap, allowing Rachel to essentially back out of it?

However, Rachel's lawyers told the jury to be skeptical of Purswell and his testimony. In plaintiff's rebuttal argument, Rachel's attorney called Purswell a "brain hogger." He sarcastically told the jury that "[Purswell] ha[d] a supernatural ability to get into someone else's mind for a price."[39]

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[34] *Barton*, 1012.
[35] Plaintiff's brief at 6.
[36] *Barton* 1012.
[37] *Barton* 1012.
[38] Plaintiff's Brief fn 2 at. 7.
[39] Plaintiff's Rebuttal Argument at 68.

Plus, Rachel claimed she never walked or ran with the train or made any conscious decision to put her life in jeopardy to save her violin.[40] She testified, "I wouldn't even use the word 'decision' because I was not exactly weighing different options: should I do this? Should I do that? I did what came to me naturally, like, my natural reaction, you know. I knew I was not in danger, so I was like getting the doors open, get someone's attention, pound on the door, whatever."[41]

Whoever is right as to this point in the story – whether Rachel ran with the train purposely, refusing to leave behind her violin, or if she was helplessly pulled by the train – the events that followed are undisputed.

Theresa Croghan did not see Rachel pinned to the train, but she did see Rachel's brown coat flash underneath the wheels and then disappear, together with "the most blood curdling sound she had every heard."[42] This was *not*, as Croghan originally thought, a commuter who had simply missed the train and wanted to get on.[43] Croghan, in a frenzy, began running and screaming to nearby people to stop the train and call 9-1-1.[44] Croghan was the first person to see Rachel after the train stopped and Croghan understandably testified that it was "traumatizing to see."[45]

At this time, a ticket agent, James Kaiser, who had come down as he regularly did, to collect the mail from the train when it pulled into the Winnetka stop, was walking up the stairs from the platform to get to his office in the train station. He heard screaming

[40] *Id*.
[41] Plaintiff's Brief at 7.
[42] Plaintiff's Brief at 6.
[43] *Barton*, 1013.
[44] *Id.*
[45] Chi. Sun Times, 1999 WL 6524942.

and turned to his right and briefly saw a "fraction" of her being pulled by the train.[46] Kaiser ran up the stairs and called 9-1-1.

Rachel testified that she was dragged by the strap on her violin case - which was still on her arm, and also still in the train doors - in a "half-sitting position," screaming at the top of her lungs, bumping along the gravel road near the wheels.[47] She was "screaming at the top of [her] lungs."[48] Rachel quickly realized that if the train continued accelerating and she did nothing to free herself, she would almost certainly die before the train reached the next station. "I knew the train was going to be going much faster and I was already bumping around pretty violently and I knew my tailbone would be severed off and I'd die."[49] If she were to pull herself free of the straps from her violin case, which were still holding her to the train, she feared she would flip under the wheels and also be killed. Nonetheless, Rachel tried to get free of the violin case straps.[50]

However, according to Rachel, at that point it was difficult to free herself because her hands were gloved and the train was creating a force on her and her belongings.[51] She also had several other straps on her shoulder that she had to remove if she was to get free. Somehow Rachel managed to get her hand under the straps of the purse, bags, and violin case, and with a forceful tug, she pushed them off her arm and flipped away from the train.[52] When Rachel pulled free from the straps, she landed face-up in the gravel rail bed, 366 feet from where she had first tried to exit the train.[53] She kept screaming, hoping someone, anyone, would hear her as she lay in the gravel, overcome by horrific

[46] Trial Transcript 2/11/99
[47] *Barton*, 1013.
[48] *Id.*
[49] Chi. Tribune 1, 1999 WL 2845506
[50] Plaintiff's Brief at 7.
[51] *Barton*, 1013
[52] *Barton* 1013.
[53] Plaintiff's Brief at 7.

pain. She later testified she "did not know so much pain could exist."[54] Rachel also checked herself to see what damage had occurred, but all she could see was blood and that her lower left leg was gone – probably the train had run over it. She felt cold. She wanted to just lie down and close her eyes, but she feared that if she did, she would never awake. She decided to try to distract herself from her legs.

As this was happening, Brian McCarthy, a 47 year old heroic passenger, who had been walking towards the train vestibule to get off at the next stop when he heard Rachel's hair-raising screams, rushed to press the emergency stop button and bring the train to a halt.[55] "I must have pushed it 48 times," he later told the media. [56] He saw the violin at an angle, inside the car, and near the bottom of the steps, the straps hanging out the door. McCarthy had to use a pen to trigger the doors to open, which he had seen conductors do on previous train rides.[57] The door opened and the violin fell out onto the railroad ties.

McCarthy was the first person to reach Rachel as she lay in the gravel bed. He could see part of her left leg was gone and the right leg was badly mutilated, "spurting blood with every heartbeat."[58] McCarthy removed his belt and applied it as a tourniquet to try to stop the bleeding on what remained of her left leg. Jim Tuck, McCarthy's neighbor and friend, who was also on the train, came over at this point to help. Tuck also took off his belt and applied it to Rachel's other leg, and the two men held the belts there until the paramedics came. McCarthy told the *Chicago Tribune*, "We sat there, Mr. Tuck

[54] *Barton*, 1012.
[55] Plaintiff's Brief at 8; *Barton*, 103.
[56] Chi. Tribune 1, 1995 WL 6171156
[57] *Barton*, 1013 – 1014.
[58] *Barton*, 1014.

and myself, holding tourniquets for what seemed like half our lives … just praying that what we were doing was right."[59]

According to Brian McCarthy, Rachel was calm and alert and repeatedly asked him about her violin. She wanted to know what he was carrying when he walked over to her because she thought it might be her violin.[60] He told her it was close by. She also asked him to call her mother and tried to remember her phone number. She kept repeating these sorts of statements, and testified that if she didn't keep talking, she would have been "freaking out again."[61]

When the paramedics arrived, they placed Rachel on a stretcher and picked up her leg and put it next to her.[62] Rachel recalled this and testified that it was like a "jigsaw puzzle," or a "broken Barbie doll."[63]

Once Rachel reached Evanston hospital, a medical team, including Dr. Glen Reinhart, a board-certified orthopedic surgeon, spent the next eight hours saving her life and carrying out basic surgical procedures.[64] The doctors cleanly removed Rachel's left leg from below the knee, saving some of the skin and bone to use as grafts on her right leg. On the right leg, Rachel had extensive injuries from her mid-thigh down to her mid-calf, which was "degloved," meaning most of the skin and soft tissues on the her leg were missing. There was also a large gap in the bone just below her right knee, the skin over the front half of her right foot had been torn away, and the bones were exposed on the top of her toes. The lower half of the right knee was smashed into many small pieces

[59] Chi. Tribune 2, 1995 WL 6171555
[60] *Barton*, 1014.
[61] *Barton*, 1014.
[62] Plaintiff's Brief at 8.
[63] *Barton*, 1014.
[64] Plaintiff's brief at 8.

and the upper knee was terribly cracked. The doctors could close only the skin over Rachel's thigh because the skin from her shin was completely missing. They had to remove the toes from her right foot. The surgeons then attempted to cover the remaining bones with skin borrowed from Rachel's severed left leg.[65]

Dr. Reinhart testified that he knew he would have to remove unhealthy or contaminated skin every 24 to 48 hours for the next 10 days to keep Rachel's right leg from infecting.[66] On January 23, exactly a week later, Rachel's left leg was medically amputated above the knee. Later in January, a different doctor removed muscle from Rachel's stomach and transplanted it to her right leg. She also had skin grafts taken from her thigh to cover the exposed muscle. She had to wear a brace on her right leg for 1 ½ years to support it and in May 1995, more skin grafts were to be added. At this time, however, it was found that Rachel's bone on her right leg was seriously infected and there was a chance this leg, too, would have to be amputated. Luckily, Rachel's second leg never had to be amputated. However, she still had a great deal of trouble with it, including pain, infection, and open sores.

Rachel testified that during the period of 1995-98, she had 25 surgeries, 223 medical appointments, 122 prosthetics appointments and 170 physical rehabilitation sessions. Her medical bills totaled $672,570.97.[67] According to Dr. Reinhart, Rachel would always need the assistance of crutches or a walker to walk. Although Rachel may be able to eat and dress by herself, she cannot climb or descend stairs or do anything involving a lot of movement or lifting or carrying without the help of other people. Dr.

[65] Plaintiff's brief at 8.
[66] Barton, 1015.
[67] *Id*. at 1016.

Reinhart also stated that as Rachel matures, she will have even less mobility and at some point, she will be in a wheelchair most of the time.

Another doctor, Dr. Stulberg, testified that Rachel would have to think about stump care issues on a daily basis, as her removable prosthesis depended on her skin for suction and various factors can cause her skin to change or break down. Indeed, Rachel was already was having problems with skin breakdown, which Rachel said was very painful. A photograph of skin breakdown taken the day of Rachel's testimony was shown to the jury and Rachel described it as "one of those embarrassing ones [with] the raw open stuff right in the bikini area."[68] Rachel was also experiencing "phantom pain" consisting of "anything from the feeling of an electrical shock, to itching, to the feeling that part of the limb is being slowly sliced or pierced by a million needles" in the limb that had been amputated.[69]

Rachel would very likely eventually need a knee replacement, both to regain substantial motion and to address pain likely to be associated with Rachel's progressive arthritis. Dr. Stulberg further opined that Rachel would probably require further surgery on the stump of her right foot and possibly her right ankle. Dr. Stulberg finally testified that Rachel would need supervised physical therapy four days a week, along with a daily program, for the rest of her life.[70]

[68] *Barton*, 1017.
[69] *Id*. at 1018.
[70] *Id*. at 1017.

Plaintiff's Trial Lawyer: "A regular guy"

Robert Clifford grew up on Chicago's far south side, in a middle class neighborhood.[71] His father was a carpenter and Clifford was the only one of his childhood friends to go to college. Friends say, of Clifford, that he is a "regular guy." A regular guy who regularly wins million dollar settlements and verdicts, that is. And a regular guy who was selected as one of the Top Ten Litigators in Illinois in 1999, a Top Ten Litigator in the Nation in 1993,[72] as well as one of the Best Lawyers in America by the *National Law Journal*.[73]

A graduate of DePaul Law School, Clifford was sworn in to become a lawyer October 5, 1976.[74] He was actually sworn in by his then-client, former Illinois Supreme Court Justice Thomas Kluczynski. The former justice had been "bumped" off a Delta flight and was suing the airline – and Delta did *not* get away with it. This was the first of many high-profile cases that Clifford has won for his clients. Since then, he has racked up million-dollar after million-dollar verdicts stemming from plane, auto and train accidents, to name a few.[75]

Even Clifford's opponents have nice things to say about him. Former United States Attorney, Anton Valukas, who went head to head with Clifford over an American Airlines crash in Indiana in which all 68 on board were killed, said Robert Clifford is "… creative. He forces you to rise to the occasion. He works hard, and he's enormously well-

[71] Chi. Daily Herald, 1999 WL 14178920.
[72] 6/10/02 Nat'l L.J. D4, (Col. 1)
[73] Leading Lawyers Network, attorney's profiles, www.leadinglawyers.com
[74] Chi. Daily Herald, 1999 WL 14178920
[75] *Id*.

prepared."[76] American Airlines ended up settling with the families represented by Clifford, for $110 million.

Another former U.S. Attorney, Thomas Foran, who has known Clifford for years said, "I don't know if there is anyone who prepares a case better…. He's a real technician."[77] Foran represented McDonell Douglas Corporation in litigation resulting from the 1989 United Airlines DC-10 crash near Sioux City, Iowa. Clifford represented a survivor of the crash who was ultimately awarded $28.2 million.[78] Of the *Barton* trial, Foran says, of Clifford's skill, "[h]e found those 15 people who made complaints to Metra …. Metra couldn't even find them."[79]

Clifford is also credited for the rise of many women in the personal injury field, a field which is still dominated by men.[80] Clifford believes that men have had an easier road ahead of them in part because women often have to take on a disproportionate amount of family responsibility. Clifford served as a mentor to one of the most prominent female personal injury attorneys in the Chicago area, Kathleen Zellner.[81] Zellner said in an interview, "[h]e was just so helpful to me and so encouraging to me…. He was telling me that attorneys settle their best cases and try their worst cases … that was a big insight for me."[82]

For Rachel's case, Clifford put in many 18-hour days, preparing for the trial.[83] He, with the help of his staff, assembled over 100 depositions, thousands of documents, and more than 50 witnesses to take to trial in an effort to win against Metra and Chicago

[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] Chi. Daily L. Bull.23, vol. 146, No. 80
[81] Chi. Daily L. Bull.23, vol. 146, No. 80
[82] *Id.*
[83] Chi. Daily Herald 6, 1999 WL 13248116

& North Western Railroad.[84] The firm spent about $1 million in costs, a large portion going to a train model, computer simulation, and medical illustrations that were prepared for his use in explaining the case to jurors.[85]

Clifford believes that his flexibility in the use of visual aids was important to the result of the *Barton* trial.[86] In the end, Clifford actually decided *not* to use a video reenactment of a cartoon woman getting dragged underneath the train in the same way he believes Rachel was dragged. He feared that this evidence would not be allowed because he could not prove that the cartoon's body movements were the actual body movements of Rachel at the time of the accident. For the same reason, Clifford believes that Metra also withheld its video reenactment. However, Clifford did use a "day-in-the-life" documentary of Rachel to show how difficult her life became after having her leg amputated.[87] [88] He also used still-frame clips of the video during closing arguments, which was the first time he had ever used a visual aid in that way. "[T]rials are increasingly becoming visual demonstrations that are coupled with the art of persuasion."[89] To convince a jury, "you need to become a student of psychology," Clifford said.[90] "Because, if you do not know how [jurors] *think*, how do you expect to make them listen?"[91]

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[84] *Id.*
[85] *Id.*
[86] Chi. Daily Law Bulletin, Vol. 145 No. 69
[87] *Id.*
[88] Studies have shown that jurors exposed to visual presentations retain 100 percent more information than those who receive only oral presentations. 432 PLI/Lit 143, Practising Law Institute, DEFENDING AGAINST DAY IN THE LIFE VIDEO, March-April, 1992
[89] Chi. Daily L. Bull., vol. 145 no. 69
[90] *Id.*
[91] *Id.*

After the trial, Clifford turned down interview requests from, among others, *"Today," "20/20,""Inside Edition,"* and *"Dateline."*[92]

The Defense Trial Lawyer: "You put on a defense; cover all the bases; make all appropriate arguments; and if the jury still comes out against you, that happens."

C. Barry Montgomery, 66, is a partner at Williams, Montgomery & John and has been a defense attorney for forty years. He attended University of Michigan Law School and graduated in 1962.[93] In 1991 he was named one of America's Best Lawyers, in 1996, he was selected as one of the nation's Top Ten Litigators by the *National Law Journal*,[94] and in 2003, he was named one of the Top 20 Defense Tort Defense Lawyers by *Chicago Lawyer*.[95] He received nominations from more than 20 legal professionals for this award, the most of any candidate.[96] His nominations contained statements from other professionals calling Montgomery "a highly skilled trial lawyer, well- prepared, articulate and a gentleman."[97]

Philip Corboy of Corboy & Demetrio, the (possibly most) successful and well-known plaintiff's personal injury firm in Chicago[98], said Montgomery is "the lawyer you would want to defend you because each trial is his 'one and only' and his best."

Montgomery says he has a simple recipe for being a successful tort defense attorney: try cases like a plaintiff's attorney, give the jury a damage estimate and buy

[92] Chi. Tribune 2, 1999 WL 2849056
[93] 1/03 Chicago Lawyer 8
[94] 6/10/02 Nat'l L.J. D4, (Col. 1)
[95] *Id*.
[96] 1/03 Chicago Lawyer 16, Volume 26, Number 1
[97] 1/03 Chicago Lawyer 8
[98] This is also where Robert Clifford got his start as a law clerk, after sitting in Mr. Corboy's office all day every day for 5 days straight until he was offered a job.

suits without pockets.[99] That's right, no pockets. The Williams, Montgomery & John partner wears custom-made, pocketless suit pants. "A lot of people unconsciously stick their hands in their pockets when they're talking to juries," Montgomery told a *Chicago Lawyer* reporter after being chosen as a Top 20 Tort Defense Lawyer.[100] "A jury trial is a show, and I've always been a great believer that how you look and act in a courtroom is every bit as important as what you say in a courtroom."[101] His other mantra: "To win, you have to believe you can win. To believe you can win, you have to believe you're the best. To believe you're the best, you have to be prepared to give it your best shot."[102] Apparently, he has successfully built his career around this philosophy.[103]

Montgomery's father was a minister, as was a long line of other family members, which most likely gave Montgomery his ability to "perform" in front of a jury. "Being a trial lawyer isn't much different than being a minister: You're just preaching to a different congregation," he told the *Chicago Lawyer*. "Trial lawyers are a lot like an evangelist minister. They're animated. Typically, plaintiff lawyers are more animated; and defense lawyers are more stoic. Maybe I have more of the evangelistic side." Montgomery also said defense lawyers often make the mistake of believing that jurors put the burden of proof entirely on the plaintiff. "You can't think defense. Rather than disproving the plaintiff's case, you have to prove your own case. … They expect the defense to prove their case."[104]

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[99] 1/03 Chicago Lawyer 16, Volume 26, Number 1
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*

Although Montgomery has won many cases, he knows it's just life to win some and lose some. He admits, "[y]ou put on a defense; cover all the bases; make all appropriate arguments; and if the jury still comes out against you, that happens."[105]

Robert Clifford, Rachel's attorney, said (years after the *Barton* trial was over) that "Barry is as smooth as silk and as bright as they come….. He must be a great chess player because he is always, always thinking three, four, five steps down the line."[106]

Montgomery said the *Barton* case was one of his most memorable because of the publicity the case received. "If it's a highly publicized, civil damages trial, jurors think they have to do something extraordinary," he said. "It was a difficult case from Metra's standpoint. And [Rachel] was a very sympathetic plaintiff."[107] It may also be a memorable case to Montgomery because the roughly $30 million award was, as of 2003, his biggest loss.[108]

The Trial: "This case is about fault."[109]

Opening Statements began February 4th, 1999. The trial was presided over by Judge Allen A. Freeman, who was then 82 years old and had been a judge for the Circuit Court for over 20 years.[110] Close to 50 witnesses testified.[111]

The Defendants and their Defense

After Montgomery thanked the jury in his opening statement, and wished Rachel well, he told the jury that this case was "… about something different. This case is about

[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] Defense Opening Statement 3.
[110] Chi. Daily L. Bull. 3, 4/26/00
[111] Defense Closing Argument 21.

fault. This case is about money."[112] He further stated that Metra and C&NW "had a good system."

By way of background, Metra is a commuter transportation system that owned 12 different commuter lines at the time of trial.[113] C&NW was an operating company that operated three of Metra's lines under a purchase of service agreement that stated:

> "1. *SAFETY*
>
> The Contract Services shall be operated or provided by [C&NW] in accordance with the applicable standards of safety established by any agency of the Federal Government or the State of Illinois…. [C&NW] shall maintain its existing practices and procedures… for the safety of its passengers, employees and property used in providing Contract Services."[114]

To put it simply, Metra owned the equipment and C&NW supplied the crews.

Metra's and C&NW's defense was based on two ideas. First, the alleged that Rachel was over 50% at fault, barring her, under Illinois statute, from any recovery at all.[115] They said she was at fault first, because she tried to get off the train too late and "beat the doors" – the conductors testified that they did not see anyone getting on or off the train when they closed the doors,[116] and second, because she deliberately failed to let go of her violin when the doors shut on it. In addition, the defendants denied that they were at fault, taking the position that their doors and their conductors were operating exactly as they should have that day.[117]

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[112] Defense Opening Statement 3.
[113] Defense opening Statement 5.
[114] *Barton*, 1010.
[115] Chi. Tribune 1, 1999 WL 2847096.
[116] Chi. Sun Times 2/1799 24
[117] Defense Opening Statement at 19.

The No. 317 train was equipped with an event-recorder and therefore we know that the train stopped at the Winnetka train stop for a total of 27-29 seconds, 10 seconds of which the doors were closed, before the train began slowly pulling out of the station.[118] Thus, Metra says, Rachel had a full 17-19 seconds to detrain, but detrained after the doors had already been open approximately 17 seconds.[119] They say she necessarily forced her way through the doors, otherwise the doors would not have closed right behind her, on her violin strap.

Metra also said Rachel was careless and that she should have, and definitely could have, wiggled out of the straps on her left shoulder in the 10 seconds she was stuck before the train began moving and the additional 5 seconds when the train was moving very slowly. Even if she thought the conductors would look out of the train and see that she was stuck, it was quite foolish to stand there for 10-15 seconds, pinned to an operational train and do nothing. Moreover, because the straps were 45 ½ inches long, she definitely could physically have removed herself from them. Metra further argued that Rachel was just trying to save her violin and foolishly would not let go of it, even to save herself.[120] Metra even included an alleged recreation of the accident in the courtroom, using a model of similar stature, wearing similar clothing and bags on her shoulder, who repeatedly removed herself from mock train doors towering over the courtroom.[121] Jerry Purswell, a safety and ergonomics expert from the University of

[118] Plaintiff's brief at 24.
[119] *Id.*
[120] Chi. Tribune 1, 1999 WL 2847096
[121] Rachel said later, to news reporters that she wants the doors to be donated to a children's museum to help teach children about train safety.

Oklahoma, concluded that it would have taken Rachel 1.5 – 3 seconds to free herself from the train. The model demonstrated this with the train door replicas.[122]

Dr. Carl Boyar, the physician who treated Rachel in the Evanston, Illinois emergency room, said Rachel was "wide awake from the moment she arrived."[123] Dr. Boyar also testified that Rachel told him she "went back" to get her violin.[124] However, what that meant, the doctor did not know.

The Train

The train on which Rachel was riding was equipped with a "fail-safe" door light system – an electronic "state of the art innovation that greatly improved the 'second-look' system that was in effect previously."[125] The electronic system is basically a sensor in the train doors that illuminates when a connection between the doors is made. This lets the conductor know if the doors are fully closed. Each door is lined with two inches of rubber, leaving a four inch gap between the doors, so that if they close on someone she could free herself.[126]

When using this system, the conductors normally stand on the platform throughout boarding and deboarding to observe and assist passengers.[127] When all of the passengers appear to be done boarding and deboarding, the lead conductor gives what is called the "high ball" or the "high sign" to tell the other conductors to board the train. After a final look for passengers, the lead conductor closes the doors. At this point, the

[122] In rebuttal argument, plaintiff's attorney would later say of this simulation, "It was phony. It was rehearsed. It was not real. Rachel didn't get a practice run."
[123] Chi. Sun Times, 1999 WL 6526958
[124] *Id.*
[125] Chi. Tribune 1, 1999 WL 2847096
[126] *Id*. at 18.
[127] Defense Opening Statement 20.

engineer in the front car is watching the door-light and when it illuminates, signaling all of the doors have closed, he or she puts the throttle on forward and starts the train.[128] The engineer in front is not responsible for watching the passengers get on or off the train, only for making sure that the sensor system shows that it is safe to proceed forward.

The older "second-look" system, that used to be employed before the electronic "fail-safe" system was developed, is comprised of exactly what it sounds like. After the passenger doors have been closed, the lead conductor once more steps off the train and makes one final visual check for passengers.[129] The new system "improved" the second-look system because under a "second-look" system, a conductor would not know if someone opened a door once the train started moving. Moreover, there are many low-visibility situations where the electronic system is far superior to the second-look system (e.g. inclement weather or a bend in the tracks causing the train to curve - a train may have up to 11 cars, each of which is 85 feet long).

Even though the railroad industry is one of the most heavily regulated industries in the country,[130] no federal or state rules require any specific door-operation system. Many commuter trains use slightly different systems, although nearly all are variations of either the electronic door-light system or the second-look system. Metra, the company that owned the train on which Rachel was riding, used the second-look system on the trains it operated itself, but did not require its contractor-operators (such as C&NW) to use it. So C&NW, and thus the train Rachel was on that fated January morning, used only the electronic "fail-safe" system door sensors and no second-look took place after the doors closed on Rachel's violin strap.

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[128] *Id.*
[129] 17 No. 12 Prod. Liab. L. & Strategy 1. (1999).
[130] Defense Opening Statement at 9.

Clifford and his experts argued that the "second-look" safety procedure, used on trains across the country, could have easily and cheaply been utilized *in conjunction* with the electronic "fail-safe" system and that the two together would most-likely have saved Rachel her dreadful injuries.[131] "If I had looked the second time after I closed the doors, I would have seen her," testified Shawn White, the lead conductor who shut the doors on Rachel's violin case.[132] Perhaps the higher-ups in Metra agreed because just weeks after the accident, the "second-look" procedure became protocol on this line.[133] (This was not allowed into evidence during trial under the remedial measures doctrine).

Had This Happened Before?

Another major point of contention in the trial, as one would imagine, was whether Metra or C&NW had previously had any similar complaints from commuters of doors closing on them or trains dragging them. Vice President of C&NW, Greg Larson, testified that before Rachel's accident, he had never known of anyone being dragged by one of his trains.[134] If he had, he said, he would have re-examined the door-closing policy.[135] (However, he also said that an examination of those events would not necessarily have caused a change in the door-closing policy.)[136]

Yet three commuters testified that in the five years preceding the accident, they, too, were caught and dragged in C&NW train doors and they had all filed complaints with the company.[137] Josephine Rose's coat became stuck in the doors in May 1990, and

[131] Chi. Tribune 1, 1999 WL 2846756
[132] Chi. Sun Times 1, 1999 WL 6525926
[133] 17 No. 12 Prod.Liab. L. & Strategy 1 (1999).
[134] Chi. Sun Times, 1999 WL 6524384
[135] *Id.*
[136] *Id.*
[137] *Id.*

was dragged as a result.[138] In February 1992, Ted Mizuno's right arm was trapped up to the shoulder in train doors and he had to run along with the train for approximately 30-40 feet to free it.[139] In July 1993, Anna Mae Gibson stepped up onto the train's steps with her left foot, but the train began to move.[140] Her friend, who had already boarded the train, grabbed onto Anna Mae's hand and held her as the train rumbled down the tracks. Anna Mae was soon being dragged on her back, between the platform and the wheels of the train. Anna Mae testified that she kept thinking, "Oh, please God, don't let her let go of my arm." Finally, after being pulled 100 feet, some passengers helped her onto the train. When the train stopped, she asked the conductors if they could retrieve her shoes.

Eleven others were caught in doors without being dragged,[141] one of whom was a child who became separated from his mother.[142] Yet the Vice President of C&NW said he had no knowledge of any of these incidents and the train crew members were not advised of them either.[143] In closing argument, Clifford rhetorically asked the jury, "[i]s this the three monkey trial: hear no evil, speak no evil, see no evil?"[144] Clifford's partner, Durkin, in rebuttal, also said, "[p]eople were speaking [to the railroads] and no one was listening." Durkin also asked a Metra representative to produce "one piece of paper that tells [the jury] that anyone outside of the claims department ever analyzed these occurrences."[145] Juror Lisa Dixon would later tell reporters that she did not

[138] *Barton*, 1020
[139] *Id.*
[140] *Id.*
[141] Chi. Sun Times, 1999 WL 6527912
[142] *Barton*, 1020
[143] Plaintiff Closing Argument at 42.
[144] Plaintiff Closing Argument at 33.
[145] Plaintiff Rebuttal Argument at 67.

believe Larson's testimony that no one in higher-management knew about the incidents.[146]

Even so, Metra argued, the fourteen substantially similar occurrences were statistically insignificant, considering there were approximately 224 million ingresses and egresses during just those five years.[147] Montgomery even asked, albeit rhetorically, in his closing argument, "[f]ourteen out of 225 million is a trend?"[148] Moreover, Montgomery argued, Rachel's case was the first to result in "serious physical injury." One of Defendant's experts, Gary Wolf, explained that the pre-Barton occurrences had not raised a "red flag" because they had not involved "catastrophic injuries" of a magnitude to say "we got a real problem here," such as "an amputation of a limb."[149] Quite simply, they believed there was no problem with Metra, C&NW, or their policies. It was Rachel's irrational behavior that caused her accident.

C&NW had an agent meeting every month in downtown Chicago to discuss relevant issues and problems the conductors may have with their jobs. But C&NW never told their train crew members or their ticket agents of the previous incidents and thus they had no reason to look out for this type of accident. They could have had "walkie-talkies," "they could have devised a system, where [a crewmember] [has] a red flag in his hand or something, if he sees somebody in that zone of danger."[150]

Unfortunately for Metra and C&NW, the existence of these substantially similar occurrences not only allowed the jury to find the railroads were at fault, but also allowed them to award Rachel punitive damages, because, in the jury's view, the fact that no one

[146] Chi. Sun Times, 1999 WL 6527973
[147] *Barton*, 1032.
[148] Defendant's Closing Argument
[149] Plaintiff's Brief, at 19
[150] Plaintiff's Closing Argument at 43.

in management followed up on the previous occurrences meant that Metra and C&NW showed "conscious disregard for safety of others."[151]

A Better or Worse Career?

An additional "hot-point" at trial, going more to damages, was that of Rachel's career. Plaintiff's counsel spent a lot of time emphasizing the difficulties Rachel would now face in her professional life as a result of her injuries. Defense counsel spent equal amounts of time illustrating that Rachel's career would not suffer, and may very well flourish due to her new notoriety.

For example, Clifford brought in Henry Fogel of the Chicago Symphony Orchestra to testify.[152] Fogel said the accident would not result in an improvement to Rachel's career. Although the story was big news in the Chicago area, Fogel said most of the managers and conductors of other orchestras had not heard about it. He added, "[t]he publicity in Chicago, in my view, got Rachel a few things that aren't even career-related, like playing the national anthem before a Bulls' game probably came out of the story and it was a lovely gesture and moment. But you don't build an international violin career over playing the national anthem … at the United Center."[153] Further more, Rachel had lost at least two years of valuable time at a point in her career when she was trying to transition from being a child prodigy to a mature violinist. "…[w]hen the adjective, 'young' starts to get dropped."[154] Fogel also said she would have been "a number of

[151] *See Barton*
[152] Trial Transcripts 2/1/99.
[153] *Id.*
[154] *Id.*

steps further along both in terms of the actual career development … [and] in development of her own music profile."[155]

Montgomery cross examined Fogel and asked, "So it would appear that she did get back to the violin, notwithstanding her severe injuries incurred in this accident, within *months* after the occurrence rather than years?"[156] Fogel answered affirmatively.

Then Clifford called Richard Corrado, Rachel's manager, to testify. Corrado worked for International Creative Management, which is ranked one of the top three management companies in the world for classical musicians.[157] He had been managing musical careers for 32 years and represented the famous violinist Itzhak Perlman, who suffered from polio and was also disabled. Corrado basically said that, in the classical music business, notoriety and a dollar will get you a cup of coffee. He also testified that when he booked a venue for Rachel, he had to keep in mind special concerns based on her physical disabilities, such as getting to and from hotels, alerting the hotel to her disability, making sure the presenting organizations are aware of Rachel's disability, and letting them know what they need to do to prepare. Also, Rachel always has to travel with a companion, so Corrado would often have to ask the presenting organization for an extra coach ticket. All of these concerns, Corrado testified, mean he has to be very careful regarding the proximity of the dates for which he books Rachel. "In Rachel's case," he said, "it's more than difficult and practically impossible to have her play consecutive engagements on successive days not in the same city because of the travel time she needs, et cetera, et cetera."[158] On one occasion Rachel had to forgo an

[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] Trial Transcript 2/11/99

engagement in Europe because of the proximity to another date, already booked, in the U.S. In Corrado's opinion, Rachel's energy level would have been low and "probably both dates on the performance level would have suffered."[159]

Corrado also stated that the age of the venue is always a concern because a lot of the older concert halls are not wheelchair accessible and do not have other amenities which Rachel may need. At times he has asked concert presenters to build a temporary ramp or put planks on the stairs so that Rachel could access it.[160]

When Montgomery cross-examined Corrado, he got Corrado to admit that, in terms of a musician's career, name-recognition was good "- if it's bona fide."[161] Moreover, Corrado answered, Rachel's new notoriety is not a hindrance. Corrado also admitted that Rachel's injuries had not affected her ability to be a disciplined musician. Nor did it affect her talent, musicality or "ability to achieve greatness."[162]

Moreover, even though Corrado had special concerns when booking Rachel's venues, the concert presenters, he testified, were generally accommodating to Rachel. In fact, Rachel had scores of symphony orchestras that she requested Corrado look into so that she may play there – she wanted to *increase* her schedule, not *decrease* it! When coupled with the fact that there was only one incident which Corrado could remember where he had to turn down a concert due to Rachel's disabilities, the jury might well have concluded that Rachel's concert roster was not suffering due to her injuries.[163]

Responsibility – at the Core

[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*

In the end, the trial predictably rested on the determination of whose fault it was that Rachel was dragged by a Metra train. Montgomery, who argued that it was Rachel's fault she was injured, told the jury in his closing argument, "[w]e have become a mean society. If something goes wrong, it is the other fella's fault. If you slip on the rug, it is the homeowner's fault. If you fall on the swing it is the school's fault to the point where in this day and age they are taking the swings away. We no longer have diving boards."[164] He further argued that Rachel "totally disregarded" protection of herself and pointed out that nobody, including Rachel, disagreed with the fact that Rachel physically *could have* removed the strap from her shoulder before the train began to move.[165] Since it was "natural and probable" that the train would soon start, a reasonable person in the same situation would have removed herself from the straps immediately. "Is there such thing anymore as responsibility for one's conduct?" Montgomery asked the men and women of the jury.

"How about corporate responsibility?" Durkin, Clifford's partner, asked in rebuttal. "How about responsibility for the customers who buy tickets from you?"[166] He added, "[n]o matter what the procedure is, it is the railroad's responsibility to not catch you in their doors and drag you. They have to find a way not to do it." Durkin had many other good lines that summed up his rebuttal: "Getting off the train is not supposed to be a game of chance." "They let [Rachel] down that day." And his last few lines: "As she lost her legs and a hope for a normal life ended, she was alone that day. Now here today, four years later, she is alone no longer. She has you. Thank you."[167]

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[164] Defense Closing Argument
[165] *Id.*
[166] Plaintiff's Rebuttal
[167] *Id.*

After a four-week trial, the jury deliberated for more than seventeen hours and ultimately returned a total verdict for Rachel of $29.6 million. While the verdict was being read aloud, Rachel sighed and bowed her head, her injured legs propped up on an ottoman.[168] The verdict consisted of $9 million for disability; $8 million for disfigurement; $8 million for pain and suffering; $3 million for future pain and suffering; $20,250 for lost wages; $104,370 for future lost wages; $672,570.97 for medical expenses; and $1,293,018 for future medical expenses.[169] The jury allocated 62.5% of the fault to CN&W, 33% of the fault to Metra, and 4.5% of the fault to Rachel. After the 4.5% reduction, the total compensatory award was $28,736,149.57. The jury also awarded $900,000 in punitive damages, which was reduced 4.5% to $859,500.

Clifford speculated that the punitive damages may have been comparatively low because Metra had already changed its safety procedure and thus a large punitive award was seen as unnecessary.[170] Although Metra's changed policy was not admitted during the trial, the jurors could have been commuters, themselves, and realized that the change took place. "Or maybe the savvy jurors of today were attempting to protect the award and see to it that it was not subject to remittitur if a larger punitive award were assessed, as had occurred in some high-profile cases around the country" Clifford stated.[171] Actually, juror Ann Veldey told the *Chicago Daily Herald* that "punishment was not a

[168] Chi. Sun Times 1, 1999 WL 6527912
[169] *Id.* at 1024.
[170] Id.
[171] *Id.*

big part of the award" because the jury was just trying to "take care of Rachel."[172] "We weren't trying to punish the railroads. We were trying to right a wrong."[173]

Juror Ed Vanderlee said the hardest part of deliberations was figuring out how much Rachel was at fault.[174] "Every juror had their own opinion on that" he said.[175] The 4.5% was due mostly to the fact that she did not try to break loose of the violin strap before the train began moving.[176] They held her less responsible for this than the defense lawyers proposed because they noted Rachel was not a "physical person."[177] This meant she played the violin all day and did not play sports or participate in many physical activities.[178] The jurors apparently believed it would have been physically difficult for Rachel to remove the violin strap from her arm, even before the train was moving. However, not only did Rachel admit in her testimony that she physically could have removed the strap from her arm at the time the train was not moving, but also, Rachel *did* ultimately remove the strap, and at a time when the train was rushing down the tracks and Rachel was being dragged along the gravel road on her tailbone!

After the verdict, defense attorney Montgomery approached Rachel offering congratulations, but Rachel would not shake his hand. Although Rachel was happy with the award, she felt that the defense lawyers made slanderous remarks about her which were "hurtful and unfair."[179] Montgomery was understandably shocked, and told reporters, "When you extend a hand to somebody and they get this type of award, it's

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[172] Chi. Daily Herald 6, 1999 WL 13248246.
[173] *Id.*
[174] Chi. Sun Times, 1999 WL 6527973.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] Chi. Sun Times, 1999 WL 6527912

hard to imagine."[180] When talking to reporters, Montgomery still held fast to the defense theory that Rachel was at fault and offered his opinion that Rachel "could have avoided the accident 100%" if she had just let go of the violin.[181] "I just wonder whether or not in this day and age there is still such a thing as responsibility for one's self," Montgomery said. "And I wonder whether a corporate defendant can be treated on an equal basis with an individual. …We've reached the stage where I think it's time for society to sit back and take a long hard look at what happens."[182] He added that the size of the award lead him to believe that sympathy played a big role in the verdict.[183]

Perhaps he is right because after Judge Freeman dismissed the jurors, each one embraced Rachel, some with hugs, some with handshakes and, Rachel recalls, "…it was very personal."[184] Rachel said they felt like old friends.[185]

One juror, Lisa Dixon, actually broke down after the verdict was awarded. "I couldn't take it," she said to reporters, and added that she did not think the award was enough.[186] Another juror, Ken Strzelczyk said what touched him was that Rachel was really worried about the way she looked. She testified to them that she felt like "Frankenstein's monster."[187] Strzelczyk also said he felt touched that Rachel exposed intimate details about her sex life and her strained relationship with her mother.[188] Intimate topics like how Rachel uses the toilet (i.e. with the help of her boyfriend or by lifting herself up when there are no bars in a public stall – a feat which could be very

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[180] *Id.*
[181] *Id.*
[182] Chi. Daily Herald 1, 1999 WL 13247999
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] Chi. Sun Times, 1999 WL 6527973
[187] Chi. Sun Times, 1999 WL 6526406
[188] *Id.*

unsanitary) were discussed between Clifford and doctors and between Clifford and Rachel in open court.

Some legal experts concluded that the jurors were influenced by extraneous factors when they decided Rachel's case. For example, Brian Bell, a trial lawyer who defended Chrysler and other corporations in previous personal injury suits, and who followed the *Barton* trial felt that the celebrity status in which the trial put Rachel was largely responsible for the outcome.[189] The media had given the case so much attention that Rachel was a celebrity, for better or worse, in the Chicago area.

The Public Response: "Forget the violin"[190]

Public response to the Rachel Barton case exploded after the jury award was announced on March 1, 1999 (which is not to say public response was subdued before the verdict was announced). The case has been called the most highly publicized trial in Cook County history. The large verdict and Metra's accusations that Rachel was at fault were fodder for radio talk shows, newspapers, and legal debates.[191] This is best exemplified by a passage written by a journalist for the *Chicago Tribune*:

> "As far as we're concerned, it doesn't matter that a court awarded Rachel Barton nearly $30 million for injuries inflicted when she was run over by a Metra train. Fine. Those jurors are entitled to their opinion. But in coffee shops and offices, on the StairMaster and talk radio, we, the juries of ordinary Janes and Joes, are still arguing."[192]

[189] Chi. Sun Times, 1999 WL 6527910
[190] Chi. Tribune, 1999 WL 2849420
[191] Chi. Daily Herald 6, 1999 WL 13248116
[192] Chi. Tribune 1, 1999 WL 2849155.

The following editorial, written to the *Chicago Tribune* by Dennis Sotos, a fellow Chicago commuter, is representative of the feeling many Chicagoans had upon hearing of Rachel's award:

> "I have been a loyal Metra rider for seven years and it sickens me that a jury would award such a settlement. Every day I see people who wait until the last minute to gather their belongings as the train stops at the station. God forbid they stand in the aisle for 30 seconds with the rest of us. What happened to Rachel Barton is a tragedy but at the same time could have been avoided if she hadn't waited until the last minute to grab her backpack, her violin, her purse and coat. Three words: forget the violin."[193]

In a similar vein, Julia Mary Zanoza wrote a letter to the editors of the *Chicago Daily Herald*, stating her opinion that Metra would have been better off not fighting the law suit at all because the jury simply wanted to take from the "haves" and give to the "have-nots."[194] She added, "[t]his verdict put another nail in the coffin of personal responsibility. This is a result of too many lawyers and a public that believes litigation is simply the fulfillment of the American dream."[195]

Some Chicagoans were bitter because they suspected they knew "who really pays for the award," meaning the commuters, whose ticket prices were expected to go up as a result of the verdict.[196] Still, others were frustrated by the dramatically bleak future the

[193] Chi. Tribune, 1999 WL 2849420.
[194] Chi. Daily Herald 10, 1999 WL 14178757.
[195] *Id.*
[196] Chi. Sun Times, 1999 WL 6528493.

public was painting for Rachel. Sue Pavish wrote a letter to the editor of the *Chicago Sun Times* saying she learned to play golf and racquetball after losing her leg at the age of 18. "…three months after my surgery, I was walking on my new prosthetic limb [for miles] … in the dead of winter. Why, after four years, is [Rachel] still walking on crutches?"[197] Incidentally, Sue Pavish believed that Rachel was 50% at fault.

Although Luke Praxmarer declined to say if he thought the almost $30 million award was fair, he did write to the *Chicago Daily Herald* that the "bottom line" is "if you're injured in this country, make sure you get injured by someone who has copious wealth."[198]

Of course, some responded by sticking up for Rachel, or, more accurately, the jury who awarded Rachel almost $30 million. A *Chicago Tribune* journalist, Mary Schmich, advised anyone who disagreed with the jury to take the following "pop quiz":[199]

1. What exactly happened in the accident?
2. How many bags was Rachel Barton carrying?
3. How was her violin positioned when the train door closed?
4. How much was the violin worth?
5. How long between the time the doors closed and the train moved?
6. What kind of system did the train use to determine if it was safe to leave the station?

Schmich then wrote that if you cannot answer all of these questions, "you, like most of us … are not a reliable self-appointed juror."[200] She continued, "[j]uries aren't always

[197]Chi. Sun Times 38, 1999 WL 6528493.
[198]Chi. Daily Herald 15, 1999 WL 14178867.
[199] Chi. Tribune 1, 1999 WL 2849155.
[200] *Id.*

right. But their odds of being right are better than the odds of those of us in the audience. There's a reason court verdicts aren't rendered by opinion polls or surveys on talk radio."[201]

Another journalist, Bob Collins of the *Chicago Daily Herald*, wrote about misplaced anger in the world today and included these words about Rachel: "Lots of people are mad at Rachel Barton. How in the world can that be? .... For you people who are saying that she should have let go of the [violin]: Have you really thought that through? She had roughly 10 seconds to make a rational decision while being dragged along the track. She had to be in shock – panicked, confused, and scared to death – and you want to hold her accountable for making the wrong decision? Hell, I think they should have given her the entire railroad."[202]

Other Chicagoans also spoke up, saying that the award was fair. Arlene Stemerman, when interviewed by *The Chicago Sun Times*, said she did not blame Rachel for hanging onto her violin.[203] "I would question if someone would let go of their [sic] purse if it got stuck, let alone a $600,000 violin."[204] Mindy Reinhardt wrote into the *Chicago Sun Times* that there is no amount of money that will ever replace a person's leg… [the railroads] should have been punished - $29 million is nothing to them."[205]

What is most noteworthy about these reactions is the different conclusions drawn from the common belief that Rachel made a deliberate, conscious decision to hold on to her violin in the face of danger. Some commentators clearly concluded that this meant that Rachel was responsible for her injuries, but others just did not blame her for the

[201] *Id.*
[202] Chi. Daily Herald 11, 1999 WL 13248637.
[203] Chi. Sun Times, 1999 WL 6527980.
[204] *Id.*
[205] *Id.*

decision she made. Richard Roeper, reporter for the *Chicago Sun Times*, admitted that it was very plausible that Rachel was at fault that cold day in January, 1995.[206] However, he wrote that the "dueling quotes" in the media did not bode well for Metra (this was before the verdict was announced).[207] As an example, he quoted Montgomery: "She had every opportunity to free herself. We … cannot be responsible if somebody doesn't want to protect themselves to save a violin."[208] Then he juxtaposed this with a quote from Rachel: "I can't even take care of myself hardly at all, all day long. How am I supposed to take care of a kid? Who's going to want to marry me?"[209] "Which of these lines makes you snarl and which cracks your heart?" he then asked of his readers.[210]

The jurors, too, must have been conflicted, and, after all, they did apportion some of the legal fault to her (albeit a very small share). And while the jurors were undoubtedly influenced by the evidence of the railroads' negligence, it might also have been the case that the jurors responded negatively to Montgomery, the defense attorney, for using the victim-responsibility theme *too* much

It might also be that Metra's defense strategy of minimizing Rachel's injuries struck the jurors a much too harsh. In Montgomery's closing argument, he compared Rachel's disfigured legs to a hypothetical disfigured face, insinuating that a young woman whose face was "smashed in" is comparably worse-off.[211] He added that Rachel was also not in *constant* pain and she did not take prescription medicine. She also enjoys life. "No, she can't fast dance anymore, but she can slow dance. Yes, she can have

[206] Chi. Sun-Times 11, 1999 WL 6527203.
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] Defendant's Closing Argument.

children…. She can read. She can go to the theatre. And she can do the thing that she loves the most, play the violin."[212] Montgomery also reminded the jury that Rachel's talent was "untouched." "Her options," he stated, "how many people have her options?"[213] While all of this may have been true, it is easy to imagine that this sort of stance would infuriate those who were already angry at the defendants for not having a system in place that would have prevented the train from starting while Rachel was caught in the doorway.

The Legal Response: "…the $30 million Rachel Barton case was certainly one of the sparks that caused the current situation [of very high jury verdicts]"[214]

In response to the verdict, the defense-side lobbying group, Illinois Civil Justice League (ICJL), wrote a letter asking the General Assembly of Illinois to revisit the issue of "tort reform"[215] and noneconomic damage caps.[216] ICJL was formed in 1993 as a lobbying group consisting of Illinois citizens claiming to be working for a "justice system that is fair to all Illinois citizens."[217]

As far as Edward Murnane, president of ICJL, was concerned, the "terribly flawed"[218] *Barton* verdict was a perfect example of why verdict caps are needed.[219] The ICJL estimated Rachel's award would be around $8.8 million, were the caps in place that his group favored. (Clifford estimated that the award would be closer to $2.6 million).[220]

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[212] *Id.*
[213] *Id.*
[214] 6 DePaul J. Health Care L. 249, 256.
[215] Writer is using "tort reform" in quotes because she believes this phrase is a misnomer.
[216] Chi. Daily Herald 6, 1999 WL 13248246
[217] See www.icjl.org
[218] Chi. Daily L. Bull.1, vol. 145, no.41
[219] Chi. Daily Herald 6, 1999 WL 13248246
[220] Chi. Daily Herald 6, 1999 WL 13248246

The $8.8 million figure, they said, was a more reasonable award. Interestingly, the $8.8 million figure was calculated by actually *raising* the amount of punitive damages to the proposed statutory maximum.

Chicago Tribune editors agreed that "tort reform" was needed, contending that jurors were allowed to "shoot for the moon" with respect to damages in the *Barton* case and that $8.8 million would have adequately compensated Rachel.[221] "The problem is that in Illinois, there is no curb on such heart-tugging persuasion. … [t]he jury handed her $29.6 million, based on arbitrary calculations that her pain and suffering was worth $8 million, her disfigurement worth another $8 million and so on."[222]

The ICJL and its supporters were understandably bitter. In January of 1995, *several years before Rachel's trial*, a law that the ICJL helped write, limiting noneconomic damage awards to $500,000, was passed by the Illinois legislature right before Republicans lost control of the Illinois House.[223] The bill was seen as a "taming of the Illinois civil justice system, which had become a virtual money tree for unscrupulous attorneys and plaintiffs and their often frivolous or exaggerated claims" by conservatives and a "purely partisan piece of legislation which [was], in reality, an orchestrated sellout to the powerful medical, drug, business and insurance lobbies and demonstrates an outright disregard for the unfortunate souls who are injured at work or by the conduct of others" by liberals.[224] At any rate, both parties agree it was the most

[221] Chi. Tribune 14, 1999 WL 2849081
[222] *Id.*
[223] Chi. Daily Herald 6, 1999 WL 13248246
[224] 20 S. Ill. U.L.J. 117, at 117.

comprehensive and sweeping tort reform bill ever enacted in Illinois.[225] On March 9, 1995, a Republican governor signed Public Act 89-7 into law.[226]

However, two years later (a mere year and a half before Rachel would get her verdict), the Illinois Supreme Court ruled that the caps were unconstitutional in *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997) and "stunned tort reformer supporters across the nation."[227] The House is now controlled by unsupportive Democrats.[228]

Although the Illinois Supreme Court in *Best* stated categorically that the legislative history of a statute is irrelevant to an analysis of constitutionality, the history is indeed interesting.[229] The legislative synopsis of the bill that was initially introduced claimed the bill was a "technical change."[230] It stated it was merely a suggestion to amend the bill by changing "any" to "a" in the first sentence of the Code of Civil Procedure.[231] This clearly was a placeholder for a totally different measure, and two months later, the bill was released as "amended" and consisted of 67 pages of text. The amended bill was approved as presented by a majority of the House of Representatives. Two weeks later, it went to the Senate Judiciary Committee, where it received a mere two-day hearing, after which it was passed. The circuit court in *Best* found that the "fast track stratagem" employed by the bill's proponents was "designed to curtail deliberation of the bill."[232] Defendants disagreed with this portrayal, but admitted that passage of the

[225] 94 Northwestern U. L. Jo. 227, 227
[226] 20 S. Ill. U.L.J. 915, at, 915.
[227] 94 NWULR 227, 228
[228] Chi. Daily Herald 6, 1999 WL 13248246.
[229] 689 N.E.2d at 1065.
[230] 689 N.E.2d 1057
[231] *Id*. at 1065.
[232] *Id*.

bill was swift and drew significant objections on the grounds that adequate time for debate was lacking.[233]

Supporters of this bill, with the backing of some scholars, argued that Cook County (the county in which Chicago and some of its northern suburbs is situated) was experiencing a crisis in large jury awards that needed to be swiftly addressed.[234] Max Douglas Brown, Vice President and General Counsel to Rush- Presbyterian-St. Luke's Medical Center in Chicago, Illinois believes modern juries are experiencing what he calls, "jury empowerment," which he saw rise to a serious level after the O.J. Simpson trial.[235]

The legislative "purposes" of the bill, as stated by the bill's supporters, may be summarized as follows: to reduce the cost of health care and increase accessibility to health care, promote consistency in jury awards, reestablish the credibility of the civil justice system in the public's eye, establish parameters or guidelines for noneconomic damages, protect the economic health of the state by decreasing systemic costs, and ensure the affordability of insurance.[236] Republican State Senator, Kirk Dillard, who sponsored the bill, argued that "the law placed reasonable limits on torts to prevent the system from becoming a redistribution mechanism.… [T]he debate over tort reform has largely ignored the costs of being a defendant."[237]

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[233] *Id.*
[234] 6 DePaul J. Health Care L. at 255
[235] *Id.* at 255
[236] *Id.*
[237] 94 Northwestern U.L. Jo. 227, 252

Noneconomic damages, often simply called "pain and suffering"[238] have been at the center of many tort reform efforts and are, by their nature, very controversial. As of 2001, 22 states had enacted and upheld some caps on pain and suffering (noneconomic) damages (many of which caps apply only to medical malpractice cases): Alaska, Colorado, California, Florida, Hawaii, Idaho, Kansas, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Montana, Louisiana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, West Virginia and Wisconsin.[239] Indiana and Virginia limit total *compensatory* damages in medical malpractice suits.[240] Colorado, Kansas, California, Florida, Montana and Utah have the lowest caps, all restricting noneconomic damages to $250,000 or less.[241]

Prior to the *Best* case, seven state supreme courts had struck down such caps: Alabama, Florida[242], Ohio, New Hampshire, North Dakota, Texas, and Washington.[243]

Noneconomic damages are often criticized because there are no fixed standards for deciding the amount of the awards, they constitute unwarranted inducements to litigate because they are "cash cows" for lawyers,[244] they are frivolous, they are more

[238] Pain and suffering may be used as a catch-all category for the jury's consideration of all noneconomic losses in a case of nonfatal injury, subsuming other qualitative categories, like mental anguish or humiliation. More commonly, though, other non-economic elements--such as "loss of enjoyment of life"--are accorded independent standing and separate jury instructions. 83 NWULR 908 These are all referred to under the umbrella term, "noneconomic damages"
[239] See American Tort Reform Association, www.atra.org.
[240] *Id*.
[241] *Id*.; Colorado allows noneconomic damages to raise to $500,000 when a court finds clear justification to exceed; California, Florida, Montana, and Utah all limit their caps to medical malpractice claims only.
[242] In 1987 the Florida Supreme Court stated that a $450,000 restriction on damages is not permissible unless one of two exceptions is met: "(1) providing a reasonable alternative remedy or commensurate benefit, or (2) legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such a public necessity." 507 So. 2d 1080 (Fla. 1987).
[243] 94 NWULR 227, 229
[244] 94 NWULR 227, 229

often than not granted for imaginary or exaggerated pain,[245] and, since pain and suffering cannot truly be compensated for by economic means, they operate as a form of covert punishment.[246]

But frivolous or not, covert punishment or not, *Best* concluded that, at least in Illinois, caps on damages are unconstitutional. The *Best* decision was based on several factors, including right to a trial by jury, due process and equal protection. So far, states have struck down over 70 state enacted tort reform bills on state constitutional grounds.[247] However, the Illinois Supreme Court predominantly used "groundbreaking analysis"[248] by being the first state in the nation to utilize the remittitur doctrine and identify the Illinois statute as a "legislative remittitur," and hence a violation of the Separation of Powers Doctrine.

The reasoning went something like this: "Tort reform" is unconstitutional because it violates the separation of powers clause by improperly delegating to the legislature the power of remitting verdicts and judgments, which is a power unique to the judiciary. For over a century it has been a traditional and inherent power of the judicial branch of the government to apply the doctrine of remittitur, in appropriate and limited circumstances, to correct excessive jury verdicts.[249] It thereby invades the traditional province of the judiciary to impose a one-size-fits-all legislative remittitur. Because under the Illinois Constitution, each branch of government has its own unique sphere of authority that cannot be exercised by another branch, caps on damages are unconstitutional.

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[245] 48 Rutgers Law Review, NATIONALIZING TORT LAW: THE REPUBLICAN ATTACK ON WOMEN, BLUE COLLAR WORKERS AND CONSUMERS 673, 706
[246] 87 Columbia Law Review, PUNITIVE LIABILITY: A NEW PARADIGM OF EFFICIENCY IN TORT LAW 1385, 1436
[247] 94 NWULR 227**,** 229
[248] 94 NWULR 227**,** 227
[249] *Best*, 689 N.E.2d 1057 at 1079.

Furthermore, according to the court, any remittitur – legislative or judicial – must be applied on a case-by-case basis, and with an eye to the specific facts of the case because "[t]he very nature of personal injury cases makes it impossible to establish a precise formula for determining that one award is excessive and another is not."[250]

Although the *Best* court was discussing the Illinois Constitution, the remittitur practice exists in almost every jurisdiction nationwide and thus this analysis could be applied in almost every other jurisdiction in America.[251] Ironically, the very idea of judicial remittitur was itself originally adopted as way to limit the jury's power to assess damages. Now in *Best* this doctrine was the very tool that was used to quash further "tort reform."

As a policy matter, opponents of "tort reform" also point to the fact that caps on noneconomic loss chiefly benefit corporate wrongdoers and insurance companies,[252] and that the biggest losers will be women, children, and the elderly – people who will generally have a harder time proving economic damages as stay-at-home mothers, or as otherwise unemployed (children and elderly). Lastly, it will obviously be the people who have suffered the most serious injuries who are affected by caps, because they are the plaintiffs who will likely get a verdict above a codified cap.

Excessive Damages?

Were Rachel's damages excessive? By all accounts, an approximately $30 million verdict is "on the high side." Rachel's verdict was not a record for Illinois, but it

[250] *Ball v. Continental S. Lines, Inc.*, 360 N.E.2d 81, 84 (Ill. App. Ct. 1977).
[251] 94 NWULR 227**,** 228
[252] 87 Columbia Law Review, PUNITIVE LIABILITY: A NEW PARADIGM OF EFFICIENCY IN TORT LAW 1385, at 720

was a runner –up. The only higher award ever given by a jury was to Diane Vasilion, who received $34 million for damages suffered in a 1994 automobile accident. Vasilion now lives in a long-term care facility, as she suffered brain-damage, partial paralysis and loss of body control.

With respect to limb losses in particular, it is worth noting that, in 1996, there were 1,285,000 persons in the U.S. living with the limb loss (excluding fingers and toes)[253] and every year over 156,000 people lose a limb in the United States.[254] As for those who bring lawsuits, the American Law Reports, *Excessiveness or Adequacy of Damages Awarded to Injured Person for Injuries to Arms, Legs, Feet, and Hands* states,

> "Generally, the pertinent factors which must be considered in quantifying damages for a personal injury involving amputation of a limb are: plaintiff's extent of recovery and general physical and mental condition before and after the amputation, including past and future physical pain, suffering and mental anguish (including any future residual psychological or emotional problems having their genesis in or exacerbated by the amputation); the nature of and extent of the amputation, … plaintiff's life expectancy at the time of the amputation; occupational status at the time of the amputation and loss of earnings or profits; impairment of vocational skill or employability; impairment of avocational skills and enjoyment of life; disfigurement resulting from the amputation; past and future medical expenses, including those for future complications; cost of

[253] *See* www.amputee-coalition.org
[254] *See* www.injuryboard.com

prostheses and the expenses for future replacements; and any other losses or special damages flowing from the injury."[255]

Although one must do so with caution, it can also be helpful to compare other Illinois cases where the plaintiff had similar injuries.

For example, in 1889, a six year old child was run over by a train and lost so much of his leg that it was impossible to fashion an artificial leg for him.[256] The jury awarded him $15,000, which is roughly equivalent to $300,000 today. Although the Appellate Court admitted this was "a large sum of money," it also refused to say it was so excessive that it should be lowered.[257]

A few years later, in *Hamilton v. Pitsburgh, Cincinnati, Chicago & St. L. Ry. Co*, a 19 year old boy who lost his leg above knee was awarded only $3000 in damages. Roughly equivalent to $60,000 in today's money, it was held to be adequate and not nominal enough to necessitate a new trial.[258]

In 1943, an Illinois jury awarded $125,000 to a 22 year old man who lost both legs.[259] The trial court remitted this down to $100,000 (equivalent to about $1,000,000 today) and the Appellate Court held that the $100,000 award was not excessive due to the age and life expectancy of the 22 year old.[260]

In more modern times, in 1994 plaintiff Patel lost his leg in a work accident.[261] His total award was $2,020,000 (although he received only $311,080 due to his own negligence).

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[255] *Williams v. U.S.*, 747 F.Supp. 967 (S.D.N.Y. 1990) (taking from 11 A.L.R.3d 9, 43-44, 259-265 (1967))
[256] *The Chicago City Railway Co. v. Wilcox*, 33 Ill.App. 450 (1889).
[257] *Id.*
[258] 104 Ill.App. 207 (1902).
[259] *Avance v. Thompson*, 320 Ill.App. 406 (1943).
[260] *Id.*
[261] *Patel v. Brown Machine Co.*, 637 N.E.2d 491 (Ill. App. 1994)

In 1994, a year before Rachel's accident, a jury returned a verdict for plaintiff Ziarko, who was involved in a train-truck accident, in the amount of approximately $7.1 million after determining he was 3% at fault.[262]

In 1996, when Defendant Driver, Chavez-Pereda, appealed a jury award of $4.5 million because it was "shockingly high," the Illinois Appellate Court again ruled it would not disturb the award.[263] The plaintiff was on a motorcycle when Defendant hit him and Plaintiff's left leg had to be amputated below the knee.[264] Plaintiff received $1,250,000 for disability, $625,000 for disfigurement, $1,750,000 for pain and suffering, $636,720 for lost earnings, and $230,990 for medical expenses.[265] The court stated that, "[a]lthough it is inherently difficult to compare the award for personal injuries in one case with that in another because there are many variables and all the pertinent facts are rarely the same, awards for similar injuries in prior cases are of some comparative value, and at least give some guidance regarding the range of lower and upper figures."[266]

When comparing these broadly similar cases to Rachel's case, it becomes evident that no plaintiff in Illinois, who has suffered a loss of a leg, has ever received anything coming close to what Rachel received. To be sure, the more recent verdicts suggest that jurors today are valuing limbs more than in the past (even adjusting for the value of money). Perhaps the amount of damages is higher for loss of limbs because the American judicial system, in general, is more accepting of the emotional factors that contribute to one's pain and suffering – emotional factors that must be extremely debilitating when one loses a limb.

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[262] *Ziarko v. Soo Line R. Co.*, 641 N.E.2d 402 (Ill. App. 1994.)
[263] *Antol v. Chavez-Pereda*, 672 N.E.2d 320 (Ill. App. 1996)
[264] *Id.*
[265] *Id.*
[266] *Id.* at 1011.

A special irony here is that Illinois allows juries to award sums separately for disfigurement, for disability, and for pain and suffering. In most states, by contrast, juries simply award one amount for all noneconomic losses combined. The Illinois scheme seems to have been promoted by defense side advocates seeking greater precision in jury awards. But the outcome may well be an increase in the overall award, as juries are encouraged to assign large sums to each of the headings. Recall that Rachel's jury awarded $8 or $9 million for each of those three separate losses. Elsewhere, surely $10 million for her injuries beyond medical expenses and wage losses would have seemed an enormously generous sum.

The Aftermath

Rachel is now able to play the violin with a technique that is "every bit as good as before the accident."[267] Still, Rachel lost two years at a critical time in her career, just as she was attempting to move beyond her reputation as a child prodigy to become known as a talented, mature soloist. Rachel still does not have the balance needed to stand while playing the violin and she must use a special performance chair, which means Rachel cannot play the violin with the same sort of physicality typical of other violinists, who can play with their entire body. This also impacts the types of venues at which she is able to play - she has turned down or cancelled a number of out-of-town engagements because of her limitations. Further, because of her condition, the most Rachel can practice is three hours a day. Rachel also realizes that she cannot maintain any regular orchestra position, whether as a concert master or as a section performer, because of the

[267] Plaintiff's Brief at 25.

strain it would cause her. Rachel no longer has the stamina to maintain the same professional pace as her peers.

Rachel, who has plans to marry her fiancé in June 2004,[268] said after her trial, "[t]hrough all of this, my goal remains what it has been all of my life – to live my life to the best of my ability, focus on my music, and bring music to as many people as I can, as well as enjoy my time with my family and friends as a person."[269]

On May 11, 2004, it was announced that Metra would win its 7th E.H. Harriman Memorial Gold medal for employee safety.[270] The award is given to the top three railroads with the fewest Federal Railroad Administration reportable injuries in its class. In 2003, Metra recorded 1.83 accidents for every 200,000 hours worked with only 49 reportable injuries. "Safety is and always will be our number one priority," said Metra executive director Phil Pagano. "We encourage every Metra employee to work with a safety commitment in mind and to continue to aim to be the safest railroad in the country."[271]

(As for the final financial outcome of her case, rumor has it that, while the defendants were pursuing the usual appeal, on the ground that the trial judge made reversible errors, the parties reached a settlement in the neighborhood of $25 million. If so, then Rachel likely received a net of around $15 million after payment of her legal fees and expenses. That would leave here with a very substantial sum for noneconomic loss, even if her medical and related expenses plus her income losses turn out to be double the approximately $2 million awarded by the jury. On these assumptions, her lawyers would

[268] Chi. Sun Times, 2003 WL 9579257
[269] Chi. Daily Herald 7, 1999 WL 13249316
[270] Metra's website, www.metrarail.com
[271] *Id.*

have earned a small fortune from the case. But, after all, they convinced the jury to bring in an award that was wildly more than most lawyers could have dreamed of winning.)