

COMMONWEALTH V. AMBROSE, C.P. Franklin County  
Branch, Crim. Action No. 191 of 1989

*Driving under the Influence - Blood Alcohol Test - Out of State Laboratory  
- Consent to Sample*

1. The absence of actual consent will not invalidate the administration of a blood test since consent will be implied upon a finding of reasonable grounds.
2. Reasonable grounds for implied consent exists where one believes defendant was involved in an accident resulting in injuries or death.
3. Blood alcohol tests performed in an out-of-state laboratory which is not licensed and approved by the Pennsylvania Department of Health are not admissible in evidence.

*David W. Rabauser, Assistant District Attorney, Attorney for the Commonwealth*

*Blake E. Martin, Esquire, Counsel for the Defendant*

#### OPINION AN VERDICT

Keller, P.J., March 6, 1990:

Trooper Stewart of the Pennsylvania State Police filed a criminal complaint on October 27, 1988 charging the defendant, Robert A. Ambrose, with Count 1, driving under the influence; Count 2, homicide by vehicle while driving under the influence; Count 3, homicide by vehicle. The defendant was also charged with summary offenses of reckless driving, driving on roadway lined for traffic, and operating privileges being suspended.

Preliminary hearing before District Justice David Hawbaker was waived March 2, 1989. On April 19, 1989 defendant appeared and waived arraignment and entered pleas of not guilty to all charges. On September 11, 1989 the defendant appeared before the Honorable John R. Walker and waived jury trial. On December 19, 1989 trial was held. Briefs were submitted on January 5, 1990.

#### FINDINGS OF FACT

1. A three-car automobile accident occurred on Route 16, about 1½ miles east of Mercersburg on the night of October 1, 1988.

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**LEGAL NOTICES, cont.**

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on October 22, 1990, an application for a certificate for the conducting of a business under the assumed or fictitious name of DAEDALUS PRESS, with its principal place of business at P.O. Box 375, Chambersburg, PA 17201. The name and address of the person owning or interested in said business is Elizabeth Gottschalk, 11855 Lower Horse Valley Road, Upper Strasburg, PA 17265.  
11/16/90

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2. Trooper Stewart received a report of an automobile accident at approximately 2:30 a.m. He responded to the call and arrived at the scene at 2:45 a.m.

3. Trooper Stewart was able to conclude the following from his investigation and the physical evidence at the accident scene,

(a) Robert A. Ambrose, defendant, was traveling east on Route 16.

(b) Wilson French, decedent, was traveling west on Route 16, driving a 1979 Dodge Omni sedan.

(c) John Taylor was also traveling east on Route 16, driving a 1984 Ford Ranger pickup.

4. Defendant came up on a vehicle going east and passed him on the left; he then saw another vehicle in front of him and swerved into the westbound lane and struck the oncoming French vehicle.

5. French's vehicle went off the right side of the road and hit a telephone pole.

6. Defendant continued east and hit the Taylor vehicle.

7. When defendant's vehicle stopped, it was facing west.

8. Wilson French was taken to Hershey Medical Center where he died as a result of the accident.

9. The weather was very foggy, with visibility limited to no more than a car length ahead.

10. The road surface was moist from the fog.

11. A. Wayne Young has been a volunteer with the Greencastle Fire Department for 13 years, and on October 1, 1988 he was the fire chief and a certified Emergency Medical Technician.

12. Young responded to the call and went to the accident scene.

13. The weather was so foggy they blew the siren and the air horn the whole way to the scene.

14. When Young arrived at defendant's vehicle, he was still in the driver's seat and a collar was placed around his neck.

15. They had to use hydraulic equipment to get defendant out of his vehicle. His one foot was trapped around the pedals and a knee lodged under the dash.

16. Young supervised defendant's extrication from his vehicle.

17. Defendant was semi-conscious and in a lot of pain.

18. He was fairly unresponsive.

19 Trooper Stewart detected a strong odor of intoxicating beverage coming from defendant's vehicle when he approached it.

20. Young also noticed an odor of some type of alcohol when he was extricating defendant from his vehicle. He was unable to testify if the odor was coming directly from the defendant.

21. The defendant was removed from his vehicle, stabilized and transported to Washington County Hospital, Hagerstown, Maryland.

22. Trooper Stewart took measurements at the scene of the accident, and pictures were taken by Ken Peiffer.

23. The defendant's operating privileges were suspended at the time of the accident.

24. Dr. John Gregory Newby is Director of the Pathology Department of Washington County Hospital and has been Director since May 1, 1988.

25. Maryland requires a locked facility for forensic testing. Therefore, Washington County is not licensed due to lack of security.

26. The laboratory does blood alcohol testing for medical reasons, but not for forensic purposes.

27. In trauma cases blood is withdrawn and a blood alcohol test is performed.

28. The blood specimen is never unattended because they need to find the blood alcohol contents and report immediately to the treating physician.

29. The type of equipment used by Washington County Hospital to make the blood alcohol test is a ACA-4 made by DuPont.

30. Washington County Hospital has a certificate of exemption from the State of Maryland. It is authorized to receive specimens in Interstate Commerce and run tests. It is licensed by the State of Maryland in various areas, including blood alcohol testing.

31. Defendant arrived at Washington County Hospital as a trauma patient.

32. Kathy Jones, a medical technologist, employed by the Washington County Hospital for 13½ years testified:

(a) She attended Shippensburg University for four years and received a B.A. degree.

(b) She did an internship for 1 year as a medical technologist at

Martinsburg V.A Center.

(c) She has been a member of the American Society of Clinical Medical Technologists for 13 years.

33. In the early hours of October 1, 1988, she was on duty and drew defendant's blood when he arrived as a trauma patient.

34. She took the sample to the laboratory where she had an I.D. created through the computer and then labeled the sample with the number.

35. A quality control test was run during her shift.

36. Kathy Jones had the blood specimen at all times until the result of the blood alcohol test was received.

37. No one else had access to the blood.

38. It took 25 minutes from the time she withdrew the blood until the time the results were finished.

39. The defendant never gave his consent to the taking of his blood.

40. The alcohol test result given by the machine was 159 mil. per deciliter.

41. Sharon Van Ornum is employed by Washington County Hospital as a Medical Lab Technician. She is supervised by a medical technologist.

42. Sharon Van Ornum testified:

(a) She has a 2 year degree.

(b) She has worked at Washington County for 2 years.

(c) She worked at Indiana Hospital for 17 years, and 2 years at Sharon, Pennsylvania.

(d) She was accredited in 1970.

(e) She belongs to the American Society of Clinical Pathologists, and is accredited by the hospital.

43. Sharon Van Ornum was on duty October 1, 1988, and she entered the number and information on the defendant/patient into the computer to create an I.D. for the patient.

44. Trooper Stewart interviewed defendant at his home in the presence of his mother, Elaine Ambrose.

45. The interview took place on October 26, 1988. The trooper advised defendant of his Miranda rights at 11:25 a.m. and defendant signed the waiver after he read it to him.

46. Defendant stated that he had been at Buchanan Inn on October 1, 1988, and left after 2:00 a.m.

47. Defendant stated he had 4 or 5 Budweiser draft beers.

48. Trooper Stewart filed charges on October 27, 1988.

49. Counsel for the defendant objected to consideration of the blood test results as provided by the DuPont ACA-4 on the grounds that the Commonwealth had not established that the Washington County Hospital Laboratory was an approved laboratory to conduct blood alcohol tests and that the ACA-4 was not established to have been an approved testing device for blood alcohol.

50. The blood alcohol test result 159 mil. per deciliter is the equivalent of 0.159% of alcohol by weight in the blood of the defenant.

#### DISCUSSION

Homicide by motor vehicle is:

Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic except Section 3731 (relating to driving under influence of alcohol or controlled substance) is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death.

75 Pa.C.S. §3732.

The Commonwealth must establish (1) that the defendant had deviated from the standard of care established by the underlying traffic regulation which had allegedly been violated, and (2) that the defendant's violation of the regulation caused the victim's death. *In Re Hyduke*, 371 Pa. Super. 368, 538 A.2d 66 (1988).

Ordinary negligence will not sustain a conviction for the offense of homicide by vehicle. Therefore, in order to convict of vehicular homicide, the Commonwealth must prove that the defendant acted in a criminally negligent fashion. As defined in 18 Pa.C.S.A. §302(B)(4), which provides:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

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## LEGAL NOTICES, cont.

Notice is hereby given that Articles of Incorporation have been filed with the Corporation Bureau of the Department of State, Commonwealth of Pennsylvania, Harrisburg, Pennsylvania, for the purpose of obtaining a Certificate of Incorporation.

The name of the proposed corporation is **FIRST TEE GOLF SHOPPES, INC.**

The corporation has been incorporated under the provisions of the Business Corporation Law of 1988.

William R. Davis, Jr.  
Suite 410  
Chambersburg Trust Company Building  
Chambersburg, PA 17201  
Attorney

11/23/90

### LEGAL NOTICE

NOTICE is here given that the Mayor and Town Council of the Borough of Chambersburg adopted, on September 12, 1990, an ordinance authorizing the creation of a municipal authority to be known as the Chambersburg Transit Authority, pursuant to the Municipality Authorities Act of 1945, as amended. The purpose of the authority is to provide municipal transportation services in the Borough of Chambersburg including the leasing and/or purchasing of real and/or personal property necessary for the rendering of said services, the employment of such persons as necessary for the rendering of such services and to do and perform all acts necessary for the rendering of said services.

On December 1, 1990 the articles of incorporation of the Chambersburg Transit Authority will be filed with the Secretary of the Commonwealth of Pennsylvania.

Tanya Mickey, Borough Secretary  
11/23/90

### FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN that an application for registration of a fictitious name **HAROLD M ZIMMERMAN & SON FUNERAL HOME** for the conduct of business in Franklin County, Pennsylvania, with the principal place of business being 45 South Carlisle Street, Greencastle, PA 17225, was made to the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on the 6th day of

## LEGAL NOTICES, cont.

September, 1990, pursuant to the Act of Assembly of December 16, 1982, Act 295. The name and address of the only person or persons owning or interested in the said business are: H. Martin Zimmerman, Jr., 45 South Carlisle Street, Greencastle, PA 17225.

McNees, Wallace & Nurick  
Attorneys at Law  
100 Pine Street  
Harrisburg, PA 17108

11/23/90

NOTICE IS HEREBY GIVEN pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing with the Department of State of the Commonwealth of Pennsylvania, on October 30, 1990, an application for a certificate for the conducting of a business under the assumed or fictitious name of **FRANKLIN COUNTY GLASS**, with its principal place of business at 25 Spring Street, Chambersburg, Pennsylvania 17201. The name and address of the person owning or interested in said business is William O. Johnson, of 1630 Liberty Drive, Chambersburg, Pennsylvania 17201.

Timothy S. Sponseller, Attorney  
215 Chambersburg Trust Building  
Chambersburg, PA 17201

11/23/90

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing with the Department of State of the Commonwealth of Pennsylvania on October 16, 1990 an application for a certificate for the conducting of a business under the assumed or fictitious name of **TERRIFIC TOYS**, with its principal place of business at 985 Wayne Avenue #3, Chambersburg, Pennsylvania 17201. The name and the address of the person owning or interested in said business is Pamela E. Grove, 899 Stock Drive, Chambersburg, Pennsylvania 17201

Robert C. Schollaert, Esq.  
209 Lincoln Way East  
Chambersburg, PA 17201

11/23/90

*See Commonwealth vs. Heck*, 517 Pa. 192, 200-201, 535 A.2d 575, 579-580, *In Re Hydeke*. 371 Pa. Super. 386-387.

The defendant swerved into the oncoming traffic lane while passing a vehicle. The weather was extremely foggy, so visibility was limited to one car length. The defendant's vehicle struck the vehicle of Wilson French, the deceased. The French vehicle went off the right side of the road and hit a telephone pole. French died as a result of the accident.

We conclude that the defendant while in dense fog recklessly proceeded in the opposite lane of traffic, struck the vehicle operated by the deceased causing it to swerve off the highway and strike the telephone pole. We, therefore, find that under the then existing weather condition and the extremely limited visibility that defendant's conduct was a gross deviation from the standard of care that a reasonable person would observe in the defendant's situation.

We find the defendant guilty of the summary charges of reckless driving, driving during suspension, and driving on roadways laned for traffic. The defendant's violation of the traffic regulations other than driving during suspension caused the victim's death.

This court finds that the defendant knew or should have known that his actions posed a significant threat of death or serious bodily injury to others. His conduct clearly justifies a finding of criminal negligence, if not recklessness, as required by *Heck, supra*. We therefore find the defendant guilty of homicide by vehicle.

Defendant is also charged with driving under the influence, and homicide by vehicle while driving under the influence. Defendant argues that the Commonwealth's evidence does not prove beyond a reasonable doubt that the defendant was operating his vehicle under the influence of alcohol to a degree which renders the person incapable of safe driving. Therefore, defendant cannot be found guilty of homicide by vehicle while driving under the influence because it is wholly dependent upon proof that he was driving while under the influence.

The primary issue in this case is the sufficiency and admissibility of the blood alcohol test on defendant's blood performed at the Washington County Hospital. We have found no other legally sufficient evidence of driving under the influence. No one testified

that defendant smelled of alcohol on his breath or person; only that when they approached his vehicle they smelled alcohol. We do not find this to be adequate evidence of ingestion of alcohol. There is no evidence of defendant's conduct, the way he walked or spoke or as to his appearance. The only other evidence offered by the Commonwealth is defendant's statement that he had 4 or 5 "Bud drafts". There is no evidence of the time the beer was consumed, the size of the drafts, whether defendant ate, or his condition when he left the Inn. We therefore find that the Commonwealth's evidence absent the blood alcohol test is insufficient to sustain a finding of guilt of driving while under the influence and homicide by vehicle while under the influence.

We must therefore determine if the result of the blood alcohol test performed at the Washington County Hospital is admissible. The defendant's first argument is that he did not consent to the testing of the blood sample. The absence of actual consent will not invalidate the administration of a blood test since consent will be implied upon a finding of reasonable grounds. Reasonable grounds exist where one believes that defendant was involved in an accident resulting in injuries or death. See 75 Pa.C.S. §3755. *Commonwealth v. Pelkey*, 349 Pa. Super. 373, 503 A.2d 414 (1988). In trauma cases blood is withdrawn and a blood alcohol test is performed. We find that under normal hospital procedures defendant's blood was withdrawn and a blood alcohol test performed. The blood test was properly administered; probable cause existed for one to believe that defendant was driving while under the influence of alcohol. We conclude therefore that the absence of actual consent is irrelevant.

75 Pa.C.S.A. §1547 states:

(c) Test results admissible in evidence. - In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3731 or any other violation of this title arising out of the same action, the amount of alcohol or controlled substance in the defendant's blood, as shown by chemical testing of the person's breath, blood or urine, which tests were conducted by qualified persons using approved equipment, shall be admissible in evidence.

(2) Chemical tests of blood or urine shall be performed by a *clinical laboratory licensed and approved by the Department of Health* for this purpose using procedures and equipment prescribed by the Department of Health. For purposes of blood and urine testing, qualified person means an individual who is authorized to perform those chemical tests under the Act of September 26, 1951 (P.L. 1531,

No. 389), known as 'the Clinical Laboratory Act' (Emphasis ours)

The Pennsylvania Superior Court approved the admission of blood alcohol tests which established the alcohol per volume rather than simply by weight. *Commonwealth vs. Karch*, 349 Pa. Super. 227, 502 A.2d 1359 (1986).

In *Commonwealth vs. O'Hayes*, 345 Pa. Super. 73, 497 A.2d 649 (1985), the Superior Court outlined the requirements for qualifications of laboratory personnel. Under the standard set out in *Commonwealth vs. O'Hayes*, we find that Cathy Jones and Sharon Van 'Orniem met the qualifications of technical personnel. We therefore find Cathy Jones to be a qualified person to conduct the blood alcohol test as set forth in 75 Pa.C.S. 1547(c). Doctor Newby's qualifications and expertise are certainly consistent with that of a director of pathology at a licensed and approved hospital.

The Washington County laboratory used a DuPont ACA-4. In *Commonwealth vs. O'Hayes*, the Superior Court found Reading Hospital used the DuPont ACA in testing for blood alcohol and that use was acceptable and proper.

In *Commonwealth vs. Cook*, 277 Pa. Super. 152, 154, 419 A.2d 707 (1980), the Superior Court found that an ACA machine had been in use in the hospital at least since 1974, and was subsequently approved in accordance with regulations issued in January 1978 by the Department of Health.

We find that the Commonwealth's evidence has established that the DuPont ACA-4 was approved and the persons administering the test were qualified. The final issue to be considered on the question of the admissibility of the blood tests results is whether the Washington County Hospital was licensed and approved by the Pennsylvania Department of Health for forensic testing; or if the hospital is not approved, does that render the blood alcohol test inadmissible?

The Commonwealth does not contend that the Washington County Laboratory was licensed and approved by the Pennsylvania Department of Health; in fact, it concedes it was not approved. After reviewing the current listing in the Pennsylvania Bulletin of approved laboratories, we conclude that the Washington County Laboratory is not licensed and approved by the Pennsylvania Department of Health.

The issue narrows down to whether the laboratory's lack of approval by the Pennsylvania Department of Health renders the blood alcohol test inadmissible evidence.

Neither the Commonwealth nor the defendant have produced any authority on this particular issue. Our independent research on the subject has been equally unproductive. The cases we have found dealt only with the equipment used to test the blood. It appears no Pennsylvania court has dealt with the issue whether a laboratory's lack of approval by the Pennsylvania Department of Health renders a blood alcohol test result inadmissible under the Vehicle Code. It would therefore appear that this is a case of first impression.

20 Pennsylvania Bulletin 306 provides:

Laboratories approved to determine blood alcohol content under the Clinical Laboratory Act and the Vehicle and Boat Codes.

Laboratories located outside the Commonwealth which are approved to provide blood and/or serum alcohol testing service in Pennsylvania *may not* perform analyses for the purposes set forth in the Commonwealth's Vehicle Code and Fish and Boat Code *unless* they are *specifically licensed* by the Department under the *Clinical Laboratory Act*. (emphasis ours)

20 Pa. Bulletin 306 (January 20, 1990). Our analysis of this section of the Pennsylvania Bulletin and the applicable sections of 28 Pa. Code §5.1-§5.104 coupled with the case law dealing with the approval of equipment and qualified lab technicians leads us to conclude that a laboratory must be licensed and approved by the Pennsylvania Department of Health for blood alcohol test results, to be admitted in evidence in a case such as the one before us. We have no hesitation in finding that the Washington County Laboratory's procedures are reliable and consistent with laboratories that are approved by the Department of Health but also find that the overriding theme of the Legislature and case law is that a laboratory must be approved by the Pennsylvania Department of Health as a condition of doing forensic testing under the Vehicle Code. The Washington County laboratory is not licensed and approved by the Pennsylvania Department of Health. Therefore, we must find that the results of the blood alcohol test are inadmissible.

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**LEGAL NOTICES, cont.**

IN THE COURT OF COMMON PLEAS  
OF THE 39th JUDICIAL DISTRICT  
OF PENNSYLVANIA  
FRANKLIN COUNTY BRANCH

In Re: : Civil Action - Law  
Tyler Wayne :  
Gordon :  
: Misc. Docket Vol.  
: Page  
: Change of Name

**NOTICE**

Notice is hereby given that on November 7, 1990, the petition of Susan G. Kimmel for her minor son, Tyler Wayne Gordon, was filed in the above named Court, praying for a Decree to change his name to Tyler Wayne Kimmel.

The Court has fixed December 11, 1990, at 1:30 P.M. as the time and place of the hearing of said petition, when and where all persons interested may appear and show cause, if any they have, why the prayer of the said petition should not be granted.

Lynn Y. MacBride, Attorney  
for Petitioner

11/30/90

**NOTICE**

NOTICE IS HEREBY GIVEN that Articles of Incorporation of a proposed non-profit corporation to be called SPECTRUM GYMNASTICS, INC., were filed on October 16, 1990, in the Office of the Department of State of the Commonwealth of Pennsylvania, Harrisburg, Pennsylvania, under the provisions of the nonprofit corporation law of 1988. The purposes for which the corporation is formed are to engage in and do any lawful act concerning any and all lawful business for which corporations may be incorporated under the Pennsylvania Non-Profit Corporation Law, including but not limited to the organization of competitive gymnastics competition and the providing of gymnastics events and shows for the community's participation and enjoyment.

Martha B. Walker, Esquire  
Martha B. Walker & Associates, P.C.  
249 Lincoln Way East  
Chambersburg, PA 17201

11/30/90

**LEGAL NOTICES, cont.**

**FICTITIOUS NAME NOTICE**

NOTICE IS HEREBY GIVEN, Pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on October 31, 1990, an application for a certificate for the conducting of a business under the assumed or fictitious name of ANTHONY'S FAMILY RESTAURANT, with its principal place of business at 5600 Lincoln Way East, Fayetteville, PA 17222. The name and address of the person owning or interested in said business is Dora K. Gladfelter, 950 Wilson Avenue, Chambersburg, PA 17201.  
11/30/90

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Consequently, we must conclude that the Commonwealth has failed to prove a violation of 75 Pa.C.S.A. 3731 (A) (4), or 3735 by evidence beyond a reasonable doubt. We therefore find the defendant not guilty of the charge of driving while under the influence and homicide by vehicle while under the influence.

The evidence offered by the Commonwealth at the trial of this matter clearly established that the defendant Robert A. Ambrose had a blood alcohol level of .159 when his blood was tested at the laboratory of Washington County Hospital on the morning of October 1, 1988. He had been operating a motor vehicle. This constitutes a violation of 75 Pa.C.S.A. 3731(A) (4). However, under the law of this Commonwealth we are compelled to sustain the defendant's objection to the admissibility of the blood alcohol test result because it was not obtained by a "specifically licensed" out of state laboratory. This necessarily required verdicts of not guilty of driving under the influence and homicide by motor vehicle while driving under the influence.

In jurisdictions like the 39th Judicial District, which border neighboring states the luck of the draw will determine whether an individual involved in an automobile or a boating accident is treated and his blood tested for blood alcohol level in a Pennsylvania hospital or in an out of state facility not "specifically licensed". Trials are a truth seeking process. We suggest that process is not advanced by unnecessarily technical legislation and regulations. We respectfully urge the Legislature of this Commonwealth or the Pennsylvania Department of Health investigate legislation or regulations to resolve the perceived problems in the border counties.

**VERDICT**

NOW, this 6th day of March, 1990, we find the defendant Robert A. Ambrose:

- |  |            |
|--|------------|
| Count 1: Driving under the influence:                                    | Not Guilty |
| Count 2: Homicide by motor vehicle while driving<br>under the influence: | Not Guilty |
| Count 3: Homicide by motor vehicle:                                      | Guilty     |
| Count 4: Reckless driving:   | Guilty     |
| Count 5: Driving on roadway laned for traffic:                           | Guilty     |



Count 6: Driving while operating  
privileges are suspended:

Guilty

The defendant shall appear on the call of the District Attorney to  
be advised of his post verdict rights.