

## **LAW REVIEW 1221**

**February 2012**

### **Why Does a Case Take So Long—Part II**

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9.0--Miscellaneous

#### ***Vernet v. Serrano-Torres*, 566 F.3d 254 (1<sup>st</sup> Cir. 2009).**

What is a Reservist to do when she is injured in an automobile accident while on active duty in a U.S. territory but, for more than a decade, is unable to have her lawsuit heard in the federal courts of the jurisdiction where she was stationed?

The famous “to be or not to be” soliloquy is in Act III, Scene 1 of *Hamlet*, written by William Shakespeare in 1602. While contemplating suicide, Prince Hamlet set forth all that is wrong with the human condition and “the law’s delays” was one item in a very long list. That situation has only gotten worse in the intervening 410 years, but the *Vernet* case is a particularly egregious example.

In 1999, Ruth Vernet (a member of ROA) was on Active Duty for Special Work (ADSW) in Puerto Rico, as a member of the Navy Reserve Judge Advocate General’s Corps. Along with her husband (also a Navy Reserve officer who had been recalled to active duty) and two sons, she lived in the gated community of Palmas del Mar because officer housing at Naval Station Roosevelt Roads was under renovation. On December 17, 1999, she was driving her own vehicle within the gated residential community when a vehicle driven by Jose Serrano Torres (Serrano) illegally crossed the median stripe and collided with Vernet’s vehicle head-on, causing Vernet grievous injuries.

Serrano worked for ICN Pharmaceuticals (ICN) and regularly used his vehicle to perform duties associated with his position at ICN. On the day of the accident that company held a Christmas party inside the gates of the same residential complex where Vernet lived. Serrano and all ICN employees were required to attend the party, which was held during regular working hours and featured an open bar. Just after leaving the party, and while still within the gated complex, Serrano crashed into Vernet. According to the police report prepared at the time of the accident, Serrano’s blood alcohol level greatly exceeded the legal limit.

Vernet was most fortunate to survive the accident –indeed, the Ford Explorer she was driving was totaled—but she suffered critical injuries for which she was medevaced from Puerto Rico to the National Naval Medical Center. She was ultimately “med-boarded” out of the Navy based on the permanent disabilities that she sustained in this vehicle accident. The accident essentially ended both her military and federal civilian careers and has required her to undergo multiple surgeries. The damages in this case (for lost earning capacity, pain and suffering, etc.) likely are in the millions of dollars and are far in excess of the minimum liability policy that Serrano carried on his vehicle, as required by Puerto Rico law.

As between the two drivers, it was never in doubt that this tragic accident was caused by Serrano. Serrano’s insurance company eventually settled with Vernet, paying her the policy limit, but that payment did not come close to compensating Vernet for her tragic losses.

Vernet sued Serrano, his employer (ICN), and several other parties in the United States District Court for the District of Puerto Rico. The federal court had jurisdiction because of diversity of citizenship—Vernet was a citizen of Michigan on temporary military duty in Puerto Rico, and Serrano was a citizen of Puerto Rico, working for ICN located in Puerto Rico, etc. When a federal court adjudicates a civil case under diversity of citizenship, the court is to apply the underlying state law, which in this case is the law of Puerto Rico. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

It is sometimes difficult for a federal court to determine and apply Puerto Rico law. First, the law of Puerto Rico is different from the laws in the 50 states, in that Puerto Rico was a colony of Spain until the Spanish-American War at the end of the 19<sup>th</sup> Century. Moreover, in Puerto Rico's courts (as opposed to federal courts located in Puerto Rico) the proceedings are conducted and the decisions are written in Spanish.

Under the law of Puerto Rico and of every state, an employer is responsible for the negligent act of an employee in the course and scope of the employment of that employee. This is known as the doctrine of *respondeat superior*. The main issue in this case is whether Serrano was in the course and scope of his employment for ICN at the time he negligently crossed the median stripe and collided with the vehicle that Vernet was driving. If Serrano was in the course and scope, ICN is responsible for his tort. If Serrano was not in the course and scope, ICN is not responsible.

Answering the critical course and scope question requires an interpretation of Puerto Rico law, but it also requires a determination of certain factual questions that are not apparent from reading Vernet's complaint and ICN's answer. This is where the right to a jury trial comes in. At trial, the jury will hear the evidence related to the case and render a verdict, in accordance with instructions by the judge as to the law of *respondeat superior* in Puerto Rico.

Although more than 12 years have passed since the tragic accident, Vernet's case has yet to be heard by a jury. Several years into this snail's-paced lawsuit, ICN made and the District Court granted a *motion to dismiss* the entire case under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). Such a motion is usually made by a defendant at the very start of the case, in lieu of filing an answer. The gist of a 12(b)(6) motion is that *even accepting the plaintiff's factual allegations as true*, there is no relief that the court can award.

After the District Court granted ICN's motion to dismiss, Vernet appealed to the United States Court of Appeals for the First Circuit.[\[1\]](#) The First Circuit heard oral argument on December 5, 2008 and rendered its decision on May 21, 2009—not an inordinate interim from argument to decision in our federal appellate courts. The First Circuit reversed the District Court's granting of the motion to dismiss. The appellate court found that it was not possible to conclude, just from the face of Vernet's complaint, that there was no feasible way for her to prevail at trial.

The First Circuit remanded this case to the District Court on May 21, 2009, almost three years ago. There have been more inexplicable delays since the remand. The case is currently scheduled for trial in the fall of 2012, but ICN has filed a motion for yet another delay in this, the oldest pending federal case in the District of Puerto Rico. ROA will file an *amicus curiae* brief in the District Court, opposing any further delays and urging the court to proceed to trial as soon as possible.

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[\[1\]](#) The First Circuit is the federal appellate court that sits in Boston and hears appeals from federal district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.