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REPORTING IMPORTANT OPINIONS OF THE COURT OF APPEALS
AND IN SPECIAL SITUATIONS OF OTHER COURTS

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"SERIOUS INJURY" CATEGORY UNDER NO-FAULT LAW
Court Examines Steps to Be Used to Determine Whether "Limitation" on Bodily Function Qualifies as "Serious Injury"

One of the showings that will take a case out from under the restrictions of the no-fault law (Insurance Law § 5101 et seq.) and let it proceed as an ordinary, jury-triable, automobile personal injury case – with the usual, and often highly assessed, pain and suffering (non-economic damages) element included – is a showing that the plaintiff suffered a "serious injury". Else the case goes to arbitration and only economic damages are awarded. The lure of the courtroom, and a jury, and a full gamut of damages, has produced a vast number of fraudulent presentations in the no-fault realm.

The Court of Appeals addressed these in its 2005 *Pommells* decision, on which we did a note in Digest 547. We captioned it "Citing Fraudulent Claims, Court Addresses Proof Needed to Establish 'Serious Injury' to Support Court Action". By changing only the word "Addresses" to "Elaborates", we might use the same headline to describe the more recent – and yet another potentially leading – decision in the frequently controversial no-fault realm. This latest decision is *Perl v. Meher*, 18 N.Y.3d 208, 936 N.Y.S.2d 655 (Nov. 22, 2011).

Perl is actually one of three cases in which a unanimous Court, in an opinion by Judge Smith, laments that "[n]o-fault abuse still abounds today" and even cites the grim statistic that no-fault cases constitute "53% of all fraud reports received by the Insurance Department". Their major context, the Court notes, is the soft-tissue injury. (Broken bones and the like are more readily negotiated.) The Court endeavors to set forth some guidelines for the kind of proof needed in such cases before they're permitted to escape no-fault treatment. It introduces the discourse by noting the "skepticism" the *Pommells* case said the courts must show in approaching these soft-tissue cases, and endorses this skeptical approach heartily.

The appellate division had dismissed in all three cases, and from the opening tenor of the Court of Appeals opinion one might have expected all three dismissals to be affirmed by the Court. But even given the appropriate dose of skepticism required, the Court finds that in two of the cases the plaintiffs did show enough to create an issue of fact about whether the injury sustained was "serious" under the statute. In two of the cases the Court was therefore constrained to order a remand.

Among the categories of "serious injury" recognized by the statute, three are involved in the *Perl* trio but the Court concentrates its main attention on only two of them. One is a showing that the plaintiff suffered a "permanent consequential limitation of use of a body organ or member". The second is a showing of "significant limitation of use of a body function or system". The plaintiffs in the two cases offered proof that could satisfy these provisions, at least to the extent of requiring a trial. The Court separately considers the facts in each of the two cases and finds itself unable to dispose of either as a matter of law.

Citing another of its earlier no-fault treatments – the 2002 *Toure* decision on which we did a lead note in Digest 512 – the Court says that in such soft-tissue cases "subjective" complaints by the plaintiff do not alone suffice; there must be "objective" proof, such as by the submissions of physicians, including submissions by the claimants' own treating physicians. Here there were such submissions and they succeeded in convincing the Court that there were issues of fact material enough to try whether the injuries were "serious" enough to satisfy the statutory definition.

In each case the treating physician examined the plaintiff shortly after the accident and then again a considerable time after that. On the latter examination the physician actually used instruments to measure the range of motion and reported on the reduced range found.

These "quantitative" measurements sufficed, held the Court, "to create an issue of fact as to the seriousness" of the injuries suffered.

The defendants argued that the findings made in the later examination were made "too long after" the accidents; that plaintiffs have to show restricted range of motion based on findings "contemporaneous to the accident" as well as on the later findings. The Court rejects the argument. A contemporaneous report may be important to prove causation, but where "causation is proved, it is not unreasonable to measure the severity of the injuries at a later time".

The opinion of the plaintiffs' physician – the same person was the examining physician in both cases – is that "it is the better practice to defer a precise quantitative assessment of an injury" because measuring range of motion, such as of a joint, "when it's acutely injured, [is] not reliable. It doesn't present correct numbers". Noting that the defendants did not challenge that assessment, the Court explains that

> [a] case should not be lost [merely] because the doctor who cared for the patient initially was primarily, or only, concerned with treating the injuries. We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery.

With the *Perl* decision now on the books, the *Toure* and *Pummels* duet now become what we might call a major Court of Appeals trio on the application of the no-fault law.

OTHER DECISIONS

UNINSURED MOTORIST COVERAGE

Employee Driving Employer's Car Can Turn to Employer's Car Policy for Uninsured Motorist Coverage – and to Employer Itself When It Has Elected to Be Self- Insured

That was the situation in *Elrac, Inc. v. Exum,* 18 N.Y.3d 325, ... N.Y.S.2d .... (Dec. 13, 2011). The car of the employer, R, was being driven by one of its employees, E, when it was involved in an accident with another car and E was injured. The other car had no liability insurance, the circumstance that entitles E to turn for uninsured motorist coverage to the insurance policy of the car he was in. In this instance, that was of course his employer's car, but because the accident arose in the course of his employment, E was entitled to – and indeed put in for and got – workers' compensation.

When E now sought uninsured motorist benefits from the self-insured R, R promptly cited the well known §11 of the Workers' Compensation Law, which makes workers' compensation the employee's exclusive remedy against the employer. The statute clearly so provides. It says the compensation is "exclusive and in place of any other liability whatsoever".

The Court holds that this seemingly absolute language "cannot be taken literally", citing several of its earlier cases in point. These cases hold, for example, that "the statute cannot be read to bar all suits to enforce contractual liabilities", using the example of where the employer agrees to provide life or medical insurance for the employee: the breach of such an agreement would be actionable despite the purported exclusivity of the compensation statute.

In an opinion by Judge Smith, the Court also considers this self-insurance undertaking to be an "essentially contractual" claim against the employer. It's the same as if the employer had written an insurance policy to itself and explicitly included the uninsured motorist provision in it, as all auto policies are required to include by Ins.L. § 3420(f)(1).

The procedure for seeking an uninsured motorist recovery is by arbitration, which E duly sought. R's attempt to stop it with a stay fails and the arbitration is left to proceed.

<u>CHURCH AND STATE</u>

Parishioners of Roman Catholic Church Incorporated as Religious Corporation Can't Challenge Trustees' Decision to Abolish Church

Section 5 of the Religious Corporations Law gives custody and control of an incorporated church's property, "real and personal", to the trustees of the church. In this case, involving a Roman Catholic church established for the Lithuanian community, the trustees decided to demolish the church after finding diminished attendance and significant reductions in baptisms, weddings, funerals, and other such activities made it uneconomical to keep the church running.

Some parishioners of the church brought an injunction action against the archbishop and other church personnel to try to stop the demolition, but the suit fails as the Court of Appeals holds that they have no authority to make such a challenge. *Blaudziunas v. Egan,* 18 N.Y.3d 275, ... N.Y.S.2d .... (Dec. 13, 2011).

For the legislature and the courts, addressing issues like this is like walking on eggs, so gingerly do they have to negotiate the division between church and state. And when one does see the courts undertaking to resolve a dispute like the one at bar, it's because they are able to do so through the application of strictly "neutral" standards of law that govern one and all without getting the courts into internal church governance.

A major case on the subject, and among those relied on in the *Blaudziunas* case, is the Court's 1984 *First Presbyterian* decision (Digest 295), which applied a "neutral principles of law" analysis in a dispute between a local church and its parent. The neutral principles led in that case to the Court's holding in favor of the local church.

In *Blaudziunas*, they lead to the Court's deference to the archbishop, who is found under the law, and under the by-laws adopted by the small church itself, to have been given the final say in "the governance of the church corporation and the rights and duties of the trustees". This admits of no power in individual practitioners to challenge the diocesan decision to demolish the church, the Court says.

The challengers argued that they qualify as "members" of the church corporation under the cited § 5, but – again applying the "neutral principles" doctrine – the Court, in an opinion by Judge Jones, observes that the statute addresses members of "the corporation", and while under the by-laws the parishioners may be members of the "ecclesiastical body", they are not, under § 5, members of the "corporation".

After also considering §§ 91 and 92 of the law, which govern Roman Catholic churches specifically, the Court finds nothing in either to alter these conclusions.

SHALLOW-DIVING RISK

State Not Liable to Claimant Seriously Injured After Diving into Lake He Knew Could Be Too Shallow

The lake had been formed by the building of a dam with spillways over which water flowed into the lake. The lake had irregular levels and depths, affected also by snowmelt and rain. The claimant – this was a court of claims action – knew the lake well. He and his family used it for recreation and he'd been to the lake and dove into it many times. On this occasion he made his dive – headfirst – near one of the spillways without ascertaining the depth of the water at that point. He struck his head on the bottom and was rendered a quadriplegic.

He is unable to sustain a claim against the state; the Court of Appeals finds the sole cause of the accident to be the claimant's own reckless conduct. He knew, or – in view of his extensive personal experience with the lake – should have known that the maximum depth at the point involved was just four feet or so even when the lake was "brimming with water", and it was not brimming at the time of the accident, as the claimant saw. He even admitted that the water was dark at the point of his dive and that he couldn't see the bottom.

The state may not be faulted for this accident, holds the Court in *Tkeshelashvili v. State*, 18 N.Y.3d 199, 936 N.Y.S.2d 645 (Nov. 22, 2011).

The lake was known to leak, prompting the claimant to add the charge that the state was under a duty to warn about it. No, responds the Court in an opinion by Judge Read. There was no evidence to support claimant's "speculation" that the lake was "leakier" at the time in question than it had been on the earlier occasions of the claimant's visits and divings. Thus

> [a]ny warning would have only alerted him to what he already knew about the approximate water level in the vicinity of the spillway as a result of his familiarity with the depth of the lake's water and the height of the spillway above the lake bed.

Finding the claimant's own reckless conduct to be the sole cause of this accident, the Court does not even deem it necessary to consider the assumption of risk doctrine.

The Court finds very much in point two of its prior cases on diving into shallow water: *Howard v. Poseidon Pools, Inc.*, 72 N.Y.2d 972, 534 N.Y.S.2d 360 (1988), and *Olsen v. Town of Richfield*, 81 N.Y.2d 1024, 599 N.Y.S.2d 912 (1993). In both, the divers were denied recoveries because their own conduct was found to be the sole cause of their injuries. It's noteworthy that the point apparently seemed plain enough in both cases to dispense with a signed opinion: each case therefore came off in a mere memorandum. The more complicated factors involving the lake here in the *Tkeshelashvili* case apparently account for its earning the more thorough analysis of a signed opinion.

<u>LABOR LAW §§ 240, 241</u>

Trench in Basement Being Concreted Did Not Require Protective Cover Because It Was "Very Goal" of the Work to Spread the Concrete Throughout

Hence a majority of the Court of Appeals holds that neither of the statutes relied on by the plaintiff workman here required a protective cover over the trench that he fell into while spreading ("raking") the concrete being poured onto a basement floor. *Salazar v. Novalex Contracting Corp.*, 18 N.Y.3d 134, 936 N.Y.S.2d 624 (Nov. 21, 2011; 4-3 decision).

The plaintiff was backing up while doing the raking, a common step in the task, and stepped into a trench into which concrete was poured, or into which it "leaked", and was injured. There was no protective device of any kind covering or otherwise guarding the area. The issue was whether under either of the statutes the plaintiff relied on here – Labor Law § 240(1), the "scaffold" law, and § 241(6) – there had to be. A majority of the Court, in an opinion by Judge Pigott, holds as a matter of law that under the circumstances of this case there did not have to be.

The plaintiff, apparently employed by a subcontractor on the job, brought this personal injury suit against the general contractor, among others. Its predicate was this commonly invoked Labor Law twosome that we've written about so often in the Digest – as recently as last November's Digest 623 in which the Court's 2011 *Wilinski* case was the lead note.

Both majority and dissent here in Salazar review *Wilinski* but reach different conclusions. The dissent, in an opinion by Chief Judge Lippman, finds it in point and would hold it dispositive, at least to the extent of denying the summary judgment of dismissal the majority orders here. The majority obviously sees nothing in *Wilinski* that would preclude summary judgment for the defendants here in *Salazar*. It stresses that "common sense" in this case suggests that it would be

> illogical to require an owner or general contractor to place a protective cover over, or otherwise barricade, a three- or four-foot- deep hole when the very goal of the work is to fill that hole with concrete.

After listing specific protective devices for the elevation-related conditions it addresses, Labor Law § 240(1) adds the catch-all phrase "other devices" (with similar missions). Even assuming that the kinds of protections plaintiff says were required here fall within the § 240(1) "other" category, mandating it on the present facts would still be "contrary to the objectives of the work plan" involved.

The dissent takes exception to the grant of summary judgment to the defendant. A motion for summary judgment requires that all assumptions of fact must be resolved in favor of the opposing party – here the plaintiff – while the effect of the Court's holding is to resolve them in favor of the moving party.

The dissent sees several key factual issues requiring resolution before summary judgment might be warranted, including whether the trench was being filled at the time of the accident, and if it wasn't, whether it could have been temporarily covered while the raking was going on. It says the majority here "sidesteps" those issues, which need resolution by a jury.

(The two sides also disagree about whether the hole constituted a "hazardous opening" under a regulation invited onto the scene by § 241 [6]. The dissent here sees an issue of fact precluding summary judgment on that point, too.)

CHALLENGE TO STATE EXPENDITURES

Divided Court Says Constitution Does Not Bar State from Funding Public Benefit Corporations Like UDC and ESDC Even Though Private Companies Incidentally Benefit

One would think that the headline is nothing more than a declaration of long established New York law. Indeed, the view of the Court of Appeals as set forth in a majority opinion by Judge Jones in *Bordeleau v. State*, 18 N.Y.3d 305, ... N.Y.S.2d .... (Nov. 21, 2011; 5-2 decision), phrases this challenge by some 50 taxpayers in even broader terms; it sees this declaratory action as a challenge to the constitutionality of "the State's practice of designating state funds for the purpose of economic development".

The state can't use its money – the money of its taxpayers – to advance economic development in the state? An extraordinary proposition at this stage in New York's economic history, to say the least. And yet the decision – indeed, the very proposition – generates two dissents.

The dispute centers on Article VII, § 8(1), of the state constitution, which says that

> the money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned

> to or in aid of any individual, or public or private corporation or association, or private undertaking.

The money at issue here was paid by the state to entities like the Urban Development Corporation (UDC) and the Empire State Development Corporation (ESDC) for what the Court describes as “public development purposes”, including in this instance the expansion of semiconductor manufacturing facilities at a private company and the promotion of New York agricultural products.

In an extensive trip through the background from which the prohibitions of Article VII, § 8(1) emerge, the Court finds them to be originally a reaction to credit the state gave the railroads, which resulted in the state being saddled with a great financial burden when in a mid-19th century fiscal crisis the railroads failed and the state was obliged to pay their debts. Whether involving the giving of money or the lending of credit, the Court finds through an evolution of constitutional amendments (and its prior caselaw) that “an appropriation is valid where it has a predominant public purpose and any private benefit is merely incidental”.

Stressing the “incidental”, the state argued that that was in essence the situation here in *Bordeleau*. The majority agrees with it.

Judge Pigott in dissent cites among other things a proposed 1967 constitutional amendment that would have allowed what he describes as “the distribution of funds to private businesses for the purpose of economic development in the same manner as the ESDC is distributing funds now”. That amendment was rejected, however, and to Judge Pigott its rejection is further argument against “the State’s current practice of distributing taxpayer funds to foster the growth of private industry”. He labels as “specious” the state’s arguments that the funds here are not gifts merely because they are “first funneled through public corporations”.

Judge Smith concurs “heartily” in that view and, noting the number of New York jobs claimed to be created by these allotments, shows that – in light of the sums involved – the state ends up paying anywhere between $60,000 and $400,000 for each expected new job.

The majority responds that this all relates to the “wisdom” of the legislation, which is not for the courts to decide. Judge Smith rejoins that while he will usually defend the legislature’s right to commit folly, he can’t do that when the folly supports a provision the constitution specifically bars.

<u>*CLAIM OF FEDERAL PREEMPTION FAILS*</u>

Federal Law Regulating Appraisal Practices Does Not Preempt State Law from Some Incidental Regulation, Too

Even of a federal savings and loan association, holds the Court of Appeals.

As part of the fallout from the national mortgage foreclosure crisis come governmental probes into appraisal practices pursued by banks. Among the probers are the states, including New York, where an action by the attorney general generated the recent Court of Appeals decision in

People ex rel Cuomo v. First American Corp., 18 N.Y.3d 173, ... N.Y.S.2d .... (Nov. 22, 2011; 6-1 decision).

The crisis resulted from banks and other lenders, in what might be termed a feeding frenzy to put their money to work overtime, departed from sound banking tradition and lent their money out on insufficient security. In the real estate market, this meant offering the borrower a mortgage that exceeded the value of the parcel being mortgaged, and with repayment obligations that the borrower would likely be unable to meet in the event of a default and foreclosure, in which the borrower would of course lose the property. When the property was the family home, this meant dispossession and all of the unhappy consequences that attend it. That's what this crisis produced in what appear to be millions of cases.

A key part of the lending practices that led to the problem concerns the steps followed by the lender in having the property appraised – as required by law – before deciding the amount of the loan. In sound banking practice, not only would the loan not exceed the appraised value of the property; it would be for only a fraction of it. This would assure the bank that if the borrower defaulted and foreclosure ensued, the foreclosure sale would be likely if not certain to bring in more than enough to cover the loan. If it failed to, the balance of the loan not covered by the proceeds of the foreclosure sale would become a personal debt of the borrower, and that, of course, is also what happened in this economic disaster.

The precaution of demanding sufficient security before lending seems to have disappeared during the economic revelries of only a few years ago, when presumably responsible lending institutions began lending promiscuously with only the thought of mounting profits in mind – and when the regulatory agencies supposed to be looking after things failed to. These practices could be pursued, however, only if there were no limits on the amount a lender could lend on the strength of the given parcel. There's where the appraisal factor – the subject of the *First American* case – comes in: the lender has to be sure that the appraisal is high enough to permit the given loan. This of course makes the appraiser a key figure. The case is perhaps typical of the pressure-the-appraiser practice that also came to be part of the lenders' misconduct.

The state claimed the defendant appraisal company and others violated their obligation of independent judgment and gave in to pressure from their lender/customers to make higher appraisals than independent judgment would tolerate. And part of the charge, of course, is that that these ostensibly independent appraisers profited from so doing. The suit by the state seeks injunctive and monetary relief against them.

The defendants tried to stymie the action at the threshold by arguing that the subject of regulating appraisers is governed entirely by federal law and that this preempts state law entirely.

Not entirely, holds the Court of Appeals in an opinion by Judge Ciparick.

In an extensive treatment of the federal statutes and regulations in point, the Court finds room for state regulation at least to the extent that the state has undertaken it here in *First American*. The Court observes, for example, that one of the federal regulations in point, in listing things that do preempt state law, does not mention real estate appraisals. This, the Court says, shows some room for the state to act.

> [T]he attorney general's challenge to defendants' alleged misconduct under state law does not correspond with any of the categories of law preempted by [the federal regulation].

The state statutes invoked here, including General Business Law § 349 aiming at fraudulent practices, are not preempted, especially because they at most would only "incidentally affect the lending operations of a federal savings association".

The dissent, by Judge Read, reaches an opposite conclusion, largely in reliance on some lower court federal court decisions.