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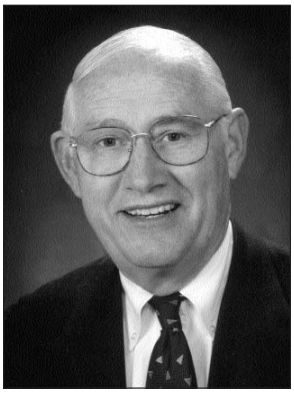
Trial Lawyers Section Digest

A publication of the Trial Lawyers Section
of the New York State Bar Association

A Message from the Chair



This is my first message. I just authored some thoughts for the next edition of the *State Bar News*. I don't intend to burden you again. A few thoughts:

A large thank-you to Judge Seymour Boyers who preceded me as Chair of this Section. What a splendid gentleman! All the downstate lawyers regret his absence from the bench. I never had the pleasure of knowing him as a judge, but I can sense why he is so respected for his past and his lawyering today.

Tort reform is all around us. No one knows exactly what the Legislature and Governor will pass most immediately. Caps on damages—probably not. Changes in vicarious liability—probably yes. Changes in the Labor Law—who knows? Increases in filing fees, index number fees and now motion fees—yes.

We all must stay alert to the debate. Our civil trial system and even jury trials are at risk. I do both plaintiff and defendant trials. I have lost more cases than most lawyers. I have never seen an outrageous verdict, much less ever heard of one surviving a post-trial motion and/or appellate review. Why do we allow this falsity to exist?

Included in this *Digest*, at the request of Sy Boyers, are excerpts of attorney Henry G. Miller's remarks at a recent dinner of the Queens County Bar Association. Mr. Miller's excellence is well known. This Section extends its heartiest congratulations to him and to Dawn Baker, Esq., of the New York City Corporation Counsel's Office, who were married on June 1st by Judge Albert M. Rosenblatt of the Court of Appeals.

Special thanks of the Section are extended to Steve Prystowsky, Esq., of the Lester Schwab Katz & Dwyer firm, in the preparation of the "Important 2002 Decisions" found in this edition, and for all of his other scholarly work over the years.

Of special note is the acclaim that was received at the Annual Meeting of the NYSBA on January 23, 2003, when Dick O'Keeffe and Gunther Kilsch put on the "Masters in Trial" program of the American Board of Trial Advocates. Word has it that James M. Hartman, Esq., of Rochester (former Section Chair) was selected best speaker of the Trial Giants that day.

I would be remiss if I didn't include in this message some of the paragraphs from Supreme Court Justice Joseph D. Mintz's letter published in "Everybody's Column" in the *Buffalo News* on May 11, 2003. His letter is as follows:

Inside

Frivolous Malpractice Suits Are Rare

As the 8th Judicial District Supreme Court Justice who presides over the majority of the medical malpractice trials in Erie County, I must take issue with some of the assumptions and conclusions in the April 28 *News* editorial, "Malpractice Misery," and subsequent editorials. I can assure you that in Erie County, there are very few frivolous malpractice suits.

First, the cost of prosecuting a malpractice case on behalf of a plaintiff is often as high as $40,000 to $50,000. While the plaintiff is responsible for these costs, even if not successful, the lawyer representing the plaintiff usually will advance the costs. If the case is not successful, the lawyer rarely is able to recover the costs. As a result, lawyers cannot afford to prosecute frivolous cases.

Second, in order to commence a medical malpractice action in New York, the lawyer must file a certification that the case has been reviewed medically and that there is a reasonable basis for the action. For these reasons, the malpractice actions brought in Erie County are not frivolous, and no legislation to prevent frivolous actions is necessary. Few medical malpractice actions result in a verdict in favor of the plaintiff, but this is not due to the frivolity of the actions brought. In New York, nearly 90 percent of the cases tried end in a defense verdict. The reasons for such a high defense success rate are due in part to the phenomenon that defendants offer significant settlements in the best of the plaintiffs' cases.

The law that forms the basis of the instructions a judge gives to the jury strongly favors the medical providers. Furthermore, plaintiffs are required to present expert proof by medical witnesses to sustain their initial burden in medical malpractice cases. The number of physicians willing to testify against other physicians, even where the errors are blatant, is very small, and their testimony does not come cheaply.

Does the system need improvement? Perhaps. But it is not fair to hold the lawyers or the plaintiffs solely responsible or to ask them to bear the burden. When medical providers deliver inferior services, the public must be informed and protected.

Joseph D. Mintz
Supreme Court Justice

We are all so indebted to Professor Travis H.D. Lewin of Syracuse Law School, Judge Thomas P. Franczyk of the City Court of Buffalo and to our own Steve O'Leary for the Regional and National Law School Mock Team Competition. UB Law School beat St. John's in the Regional Competition, but St. John's won nationally in Houston in March.

Please join us at the Summer Meeting at Niagara-on-the-Lake, Ontario, on August 13 through August 15, 2003. It's twenty minutes from the Falls and, as Carl Thompson, Esq. of Binghamton has said, "the most civilized place in North America."

Edward C. Cosgrove

Did You Know?

Back issues of the*Trial Lawyers Section Digest* (2000-2003) are available on the New York State Bar Association Web site.

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Henry Miller on Tort Reform

By Sy Boyers
Past Chair
Trial Lawyers Section

The present administration in Washington in conjunction with the insurance industry and some large corporate entities has contributed to a massive assault on the integrity of trial lawyers as well as on our traditional concepts of due process.

In view of the foregoing, I asked Henry Miller, the former President of our New York State Bar Association, if he would consent to have excerpts from his timely speech given before the Annual Dinner of the Queens County Bar Association on Thursday, June 15, 2003, published in the *Trial Lawyers Section Digest*. Henry graciously gave his consent. The text of his talk is as follows:

"Never in my lifetime have I witnessed such an attack not only on lawyers but more importantly on traditional legal remedies as there is today by those who promote corporate dominance. And I truly believe that lawyers have a special role to play. Let me explain.

"Here's the attack as I understand it. Let me start with the kind of cases we everyday lawyers representing ordinary people understand.

"Our enemies demonize all lawyers as greedy, and all lawsuits as frivolous. They hire the slickest public relations manipulators and repeat ad nauseam every horror story of a large verdict of dubious merit, be it burns from coffee or misused lawn mowers. They invite the doctors to strike and claim doctors are being driven from practice by high insurance because of runaway verdicts. They claim that lessors of automobiles will no longer survive due to vicarious liability. They charge that buildings will not be built if strict liability continues to allow workers to sue those in charge of construction.

"But they never mention that lawsuits have leveled off and there is no significant increase. And they never discuss that insurance reform, not caps on recoveries, in California brought down doctors' malpractice premiums. Nor do they suggest that the CEOs of the companies in the health and insurance fields who are making 5, 10 even 20 million dollars for just one year ever take a cap of $250,000 a year, which they would impose on the paraplegics and brain-damaged whose cases are meritorious. Nor do they mention that innocent victims will go uncompensated if lessors who profit from leases have no duty to pay when their negligent motorists can't. Nor do they mention that the workers who benefit from strict liability engage in the most hazardous activity while those who would take away their rights sit comfortably in high offices with lovely views built by those very workers. As Clarence Darrow described the workers of a hundred years ago, they are 'the men who risk their lives and whose mangled remains are often found on the earth below. These are the men who built the civilization we enjoy.' But their families' claims were defeated by the defense of assumption of risk for being so stupid as to work high up in those buildings in the first place. Wouldn't today's tort reformers love to get back to those good old days?

"But we should not take a narrow, selfish view and only concern ourselves with the everyday cases our clients bring to us. The attack is part of a much larger pattern.

"In the aftermath of 9/11, the cry for security was understandable. Even civil libertarians understood the need for balance in insuring national safety.

"However, in this atmosphere of permanent war and endless terror alerts, will the Bill of Rights become a quaint antique?

"We should not forget the excesses of the past during wartime. Now we look back uneasily on the internment of American citizens of Japanese descent. Yes, there's a need for balance, but belief in due process for all is one reason we cherish and fight for the America we love.

"When it comes to upholding the laws protecting the environment, we see a wholesale departure from the spirit of conservation pioneered by the likes of Theodore Roosevelt. Now, we are told that the law mandating wilderness reviews expired years ago. Really. Endangered species better watch out. Conservationists will appeal while oil, timber and mining interests cheer.

"And what about the judiciary? Evidently, the role of the ABA has been ended. That role was the ABA's screening of potential nominees by a committee which has always been composed of the best and fairest lawyers in America. Instead, we now find that names of the undistinguished are submitted who never voted for a consumer in their judicial life and who will be with us for many a year.

"And whatever happened to the legal requirements for open bidding for reconstruction contracts in war-torn areas? Are lucrative assignments to be given to those whose only distinction is the size of their campaign contributions or whose former executives now serve in high office or who hire the most former generals?

"Doesn't anybody remember Dwight Eisenhower's brilliant foresight in warning us to beware of the power of the 'military-industrial complex'?

"What can we do about it, you say? Much, I believe. Lawyers have voices. We should speak out. Many of you are community leaders. We all have clients and, I hope, client lists. We should tell them of our concerns. I have. There should be a great national debate on all these issues. The media may be getting a little too corporate to sound the alarm. We'd better do it. There is no shame in failing to prevail. There is only shame in silence. You know the old quip which many before me have said frequently and better: If I am silent when they come for others, when it comes my turn, who will speak for me?

"Our clients, ordinary citizens, can't turn to their lobbyists to fight the corporate powers who already have all the best lobbyists. But they can turn to their neighborhood lawyer. And that's you. It was lawyers and lawsuits that uncovered the horror of asbestos, as well as tires and cars that explode. You are the private attorney generals who can correct abuse.

"But for our voices to sound convincingly, we best be worthy of our trust. We must not tolerate those whose greed besmirches us all. Those who cheat and lie their way to false rewards deserve their punishment. They make our work harder. They diminish the claims of the honest and give ammunition to those who would bring us all down. They are not to be tolerated.

"We have a special role to play. And you have a good cause. You have a unique voice. Use it. Loud enough for all to hear. There is a triumphal selfishness afoot among the privileged who seek to take away the hard-won rights of those ordinary citizens who, but for you, lack the voice to be heard."

Important 2002 Decisions

By Steven B. Prystowsky

APPEAL AND ERROR—HARMLESS—CURATIVE INSTRUCTIONS

Admitting nurse's testimony that plaintiff stated that he fell on a porch instead of on a pathway on defendant's property, as plaintiff testified in court, and then striking it because the nurse was unable to identify the third-party who translated the statements of the plaintiff, who spoke only Russian, was harmless error:

> Contrary to the plaintiffs' contention, any prejudice due to the erroneous admission and subsequent withdrawal of evidence concerning the hospital record was harmless error in light of the curative instructions given to the jury. Moreover, since the plaintiffs' testimony and other evidence was contradictory, the jury was entitled to discredit it.

Alperovich v. London Cottages, Ltd., 292 A.D.2d 477, 739 N.Y.S.2d 726 (2d Dep't 2002).

AUTOMOBILES—DOUBLE-PARKED CARS—PROXIMATE CAUSE

Defendant, whose armored vehicle was allegedly illegally double-parked (*see* 34 RCNY 4-08[f]), is not entitled to summary judgment since violation of the double-park statute is some evidence of negligence which should go to the jury:

> In this matter, "but for" defendants' allegedly illegally parked truck, plaintiff would not have had to make the lane change which purportedly precipitated the accident. Accordingly, summary judgment is not warranted herein.

Murray-Davis v. Rapid Armored Corporation, 300 A.D.2d 96, 752 N.Y.S.2d 37 (1st Dep't 2002).

COURTS—LAW OF THE CASE—CASE MANAGEMENT DECISIONS

IAS Court is not bound by earlier conditional order precluding third-party defendant (Hatch) from testifying if its representative fails to appear for a deposition and may, if warranted, grant third-party plaintiff's motion for an order striking Hatch's answer and awarding a default judgment:

> The doctrine of law of the case may be applied "[w]here a court directly passes upon an issue which is necessarily involved in the final determination on the merits." However, "[i]ts application is exclusively to questions of law," and the doctrine does not apply to rulings, such as case management decisions, which are based on the discretion of the court. Under CPLR 3126, the trial court may make such orders "as are just," and it has the discretion to decide the type and degree of sanction. Thus, law of the case is inapplicable to the prior discretionary, conditional preclusion order.

Brothers v. Bunkoff General Contractors, 296 A.D.2d 764, 745 N.Y.S.2d 284 (3d Dep't 2002).

[EDITOR'S NOTE: Although the Appellate Division concluded that the trial court was not bound by "law of the case doctrine," it nevertheless found that striking Hatch's answer under the circumstances was error:

> Based on Hatch's repeated disregard of notices from counsel and discovery orders, as well as evidence that Hatch intentionally evaded being located, we have no quarrel with Supreme Court's determination that Hatch's deliberate conduct was worthy of sanction . . . Here, the prior preclusion order anticipated Hatch's misconduct and established a specific penalty therefor, thereby forming a justifiable basis for Hatch's reliance. In our view, as no subsequent preclusion order was issued indicating that the passage of time had increased the potential sanction, under the particular facts herein presented, preclusion of Hatch's testimony at trial is the more appropriate sanction.]

DAMAGES—BILATERAL LEG AMPUTATIONS AT MID-THIGH—90-YEAR-OLD—$11 MILLION

Award of $11,000,000 to 90-year-old plaintiff who sustained bilateral leg amputations at mid-thigh when she was struck by a New York City Transit Authority bus whose right wheels ran over her legs was not excessive:

> The damages awarded plaintiff, as reduced, did not materially deviate from what is reasonable compensation under the circumstances. The award, although sizable, is in accord with the evidence showing that despite her advanced age, plaintiff led an active and vibrant life prior to the accident, and that in the accident's aftermath, following the amputation of both of her legs at the groin, plaintiff is confined to a wheelchair and will require 24-hour care for the remainder of her life.

Hersh v. New York City Transit Authority, 297 A.D.2d 556, 747 N.Y.S.2d 153 (1st Dep't 2002).

[EDITOR'S NOTE: The $11,000,000 award was reduced to $3,600,000 because plaintiff was found 67 percent negligent. At trial, she was awarded $3,000,000 for past pain and suffering, $5,000,000 for future pain and suffering (10 years), $184,000 for past medical expenses and $2,800,000 for future medical expenses (10 years). (*See* 2001 WL 1519197)].

DAMAGES—BRAIN-DAMAGED INFANT—$50 MILLION

Jury's awarding plaintiff damages in the principal amount of $50,123,293, before structuring, including $1,500,000 for past pain and suffering and $3,000,000 for future pain and suffering over 55 years, was not excessive:

> The awards for past and future pain and suffering, as reduced by the trial court, do not deviate from what is reasonable compensation for the severe brain damage sustained by plaintiff when he was four years, taking into account his preexisting impairments since birth. In addition, as the trial court indicated, defendant's evidence that the care plaintiff needs can be provided by licensed practical nurses is not so weighty as to warrant judicial "usurpation" of the jury's finding that plaintiff requires permanent, around-the-clock care by registered nurses.

Desiderio v. Ochs, et al., 294 A.D.2d 241, 741 N.Y.S.2d 865 (1st Dep't 2002), *aff'd*, __ N.Y.2d __, __ N.Y.S.2d __ 2003 WL 1818120 (2003).

[EDITOR'S NOTE: Initially, the jury awarded plaintiff $79,873,293 before structuring, including $2,000,000 for past pain and suffering, $30,000,000 for future pain and suffering and $40,000,000 for future care and nursing.

The total present value of the reduced amount was $28,873,490 before interest. The court held that the methodology used to structure the judgment followed CPLR 5031(e) and *Bryant v. New York City Health & Hosps. Corp.*, 93 N.Y.2d 592, 695 N.Y.S.2d 39 (1999), and should not be disturbed.]

DAMAGES—DOUBLE AMPUTEE—$30 MILLION—EXCESSIVENESS

Award of $30,000,000 ($20,000,000 for past pain and suffering and $10,000,000 for future pain and suffering) awarded to plaintiff whose left leg was amputated above the knee and right leg below the knee was excessive. The Appellate Division modified the award to $3,000,000 for past pain and suffering and $5,000,000 for future pain and suffering if plaintiff stipulated:

> The damages award deviated materially from what is reasonable compensation under these circumstances. Rather, the amounts stated above would provide a more appropriate level of compensation.

Mundy v. New York City Transit Authority, 299 A.D.2d 243, 749 N.Y.S.2d 710 (1st Dep't 2002).

DAMAGES—49-YEAR-OLD WITH MODERATE BRAIN DAMAGE, HEMIPLEGIA—$7 MILLION

Trial court's reduction of a $15,000,000 award [$2,000,000 (past) and $13,000,000 (future) for pain and suffering] to $7,000,000, which plaintiff accepted, was not error since plaintiff, a 49-year-old male, suffered moderate brain damage, hemiplegia and visual impairment after a neurosurgeon struck his artery in an attempt to remove a moderately-sized benign temporal lobe tumor:

> Given the severity and permanence of the neurological injuries resulting from defendants' malpractice, the verdict, as reduced pursuant to plaintiff's stipulation following the partial grant of defendants' post-trial motion to set aside the verdict, awarding plaintiff $7 million dollars for past and future pain and suffering, does not deviate materially from what is reasonable compensation under the circumstances (see, CPLR 5501[c]).

Vigo v. The New York Hospital, 294 A.D.2d 226, 741 N.Y.S.2d 859 (1st Dep't 2002).

[EDITOR'S NOTE: See 2000 WL 1266626 concerning plaintiff's injuries].

DAMAGES—FRACTURED TIBIA/FIBULA—FUTURE PAIN AND SUFFERING—$950,000—NOT EXCESSIVE

The IAS Court erred in reducing plaintiff's future pain and suffering award from $950,000 to $550,000:

> The jury's award of $950,000 for future pain and suffering over 39.6 years (*i.e. $23,989.89 per year*) should not have been reduced. Plaintiff sustained a fracture of the tibia and fibula and a tear of the interosseous membrane, requiring open reduction and internal fixation with a metal rod and screws. He will need a future operation to replace the rod and screws. The injury has resulted in atrophy and a limitation of plaintiff's physical activities, and plaintiff suffers ongoing pain. The weakness and pain in plaintiff's leg will be permanent. Under these circumstances, the jury's award cannot be said to have deviated materially from what is reasonable compensation (see CPLR 5501[c]).

Vasquez v. City of New York, 298 A.D.2d 187, 748 N.Y.S.2d 140 (1st Dep't 2002).

[EDITOR'S NOTE: Plaintiff also received $250,000 for past pain and suffering].

DAMAGES—INADEQUACY—PAST AND FUTURE PAIN AND SUFFERING (4-YEAR-OLD)

Damages of $10,000 awarded to a 4-year-old infant for past pain and suffering, who was dragged face down 50 to 60 feet across an asphalt road when the mule-driven buckboard wagon in which he was seated overturned, was inadequate. The Appellate Division, Third Department, affirmed the trial court's conditional increase of money damages for plaintiff's past pain and suffering from $10,000 to $50,000 and for future pain and suffering from $0 to $35,000:

> The uncontradicted medical evidence indicates that the infant sustained fractured ribs, a pulmonary contusion, bleeding into his pulmonary cavity, a collapsed lung and respiratory distress. He also sustained partial thickness abrasions on his face, chest and upper abdomen where the epidermis and a portion of the dermis were removed. Gravel, rocks and asphalt were ground into the remaining dermis. To treat these injuries, it was necessary to heavily sedate him, insert a chest tube to re-expand the lung, intubate him, place him on a mechanical ventilator and scrape all of the foreign bodies and tar out of the abrasions which affected 11% to 12% of his body surface. The infant was in the hospital for five days and his plastic surgeon opined that the injuries were extremely painful. There was also evidence that the infant suffered nightmares related to the accident.

Plante v. Hinton, 294 A.D.2d 679, 742 N.Y.S.2d 159 (3d Dep't 2002).

DAMAGES—LEAD PAINT POISONING—$2 MILLION—NOT EXCESSIVE

Infant plaintiff's award of $2,019,911.15 for poisoning by lead paint she ingested while she was a tenant in premises defendants owned was not excessive:

> We find that the damage awards for pain and suffering are not inconsistent with a fair interpretation of the evidence.

Seay v. Greenidge, 292 A.D.2d 173, 738 N.Y.S.2d 199 (1st Dep't 2002).

DAMAGES—PAST PAIN AND SUFFERING—EIGHT-MONTH HOSPITALIZATION—$1,300,000 NOT EXCESSIVE

An award for past pain and suffering of $1,300,000 to plaintiff's decedent for eight months hospitalization, which included persistent abdominal infection, numerous surgeries, a permanent colostomy and a bed sore, was reasonable:

> From the time of the initial surgery until his death, Jump [plaintiff's decedent] remained hospitalized. He continued to suffer from abdominal infections, mental confusion, and hallucinations. In addition, he lost the ability to walk, and it was painful for him to sit upright in a chair. He underwent eight major surgeries in total, including the insertion of a permanent colostomy. He developed a bedsore on his lower back that did not heal, and had to be scraped and cleaned repeatedly, which eventually infected his spine. According to Mr. Jump's wife, the colostomy bag would sometimes open, and Mr. Jump's room always smelled like feces.

Jump v. Facelle, 292 A.D.2d 501, 739 N.Y.S.2d 730 (2d Dep't 2002), *lv. to appeal denied*, 98 N.Y.2d 612, 749 N.Y.S.2d 3 (2002).

DAMAGES—PROPERTY—COLLATERAL SOURCE OFFSET—CPLR 4545(C)

Where the jury found that the reasonable cost of repairs to plaintiffs' house that defendant contractors negligently destroyed was $1,333,000 and the diminution in market value of their property was $480,000, plaintiffs were not entitled to recover anything against the defendants since plaintiffs' receipt of $1,050,000 in insurance proceeds corresponded to the damages defendants were obligated to pay plaintiffs.

The Court rejected the homeowners' (Fishers) argument that for the purposes of CPLR 4545(c) offset, the cost of restoration and diminution in market value represent two different categories of loss, and replacement cost insurance proceeds correspond only to the first:

> As recognized in our case law, however, replacement cost and diminution in market value are simply two sides of the same coin. Each is a proper way to measure lost property value, the lower of the two figures affording full compensation to the owner. In this case, the collateral source payment—the Fishers' replacement insurance proceeds—thus *corresponds* to their property loss, and was properly offset against the damages award.
>
> A contrary rule would enable the Fishers to recover greater compensation from defendants and their insurer than they would be entitled to in the absence of insurance—precisely the double recovery CPLR 4545(c) was designed to eliminate. We note that, contrary to the Fishers' argument, this conclusion does not create a windfall for negligent defendants by allowing them to escape liability where a homeowner has insured against the loss of real property. Rather, a defendant still may be held responsible in subrogation to the homeowner's insurer, as apparently was the case here.

Fisher v. Qualico Contracting Corp., 98 N.Y.2d 534, 749 N.Y.S.2d 467 (2002).

DAMAGES—WRONGFUL DEATH—CONSCIOUS PAIN AND SUFFERING—40 MINUTES

Award of $4,000,000 to 47-year-old female public health consultant for 40 minutes of conscious pain and suffering was excessive to the extent it exceeded $1,000,000:

> The award for conscious pain and suffering deviates materially from what would be considered reasonable compensation and is excessive to the extent indicated in light of the relatively short duration that the decedent was in pain.

McAndrews v. City of New York, 299 A.D.2d 462, 749 N.Y.S.2d 896 (2d Dep't 2002).

[EDITOR'S NOTE: The Second Department's decision did not disclose that plaintiff sustained 40 minutes of conscious pain and suffering. This information is found in 12 J.R.D. 161. See also 2001 WL 34001263 for further information about the case.]

EVIDENCE—EXPERT OPINION—SECONDARY SOURCE

Permitting plaintiff's chiropractor to testify that there were "central herniations at L4-L5 and L5-S1," based on the "results of the MRI" as set forth in a report which was not admitted into evidence, was prejudicial error requiring the court to reverse the judgment in plaintiff's favor and grant a new trial:

> Plainly, it is reversible error to permit an expert witness to offer testimony interpreting diagnostic films such as X-rays, CAT scans, PET scans, or MRIs, without the production and receipt in evidence of the original films thereof or properly authenticated counterparts. Without receipt in evidence of the original films, a party against whom expert opinion testimony is offered is deprived of the opportunity to cross-examine the expert witness concerning the basis for the opinion, offer opposing evidence to clear misimpressions, or offer a contrary opinion controverting the interpretation of the films, through his or her own expert witness.
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> * * *
>
> Additionally, the receipt in evidence of the contents of a non-testifying health-care professional's written report, interpreting a film produced as the result of a medical test, violates the best evi-

dence rule. The best evidence rule is intended to eliminate or reduce the spectre of deceit or perjury, potential inaccuracies attendant to human recall, or errors in crafting or recording a writing. The rule clearly bars a healthcare provider's written report which interprets the results of a medical test from receipt in evidence.

* * *

In the case at bar, there was no proof presented to establish that the written MRI report contained reliable data. It is significant that the plaintiff's treating chiropractor never saw the actual MRI films. There was simply no evidence regarding the healthcare professional who prepared the MRI report, or when and under what circumstances it was prepared. Additionally, there was no evidence that the written MRI report offered a detailed interpretation of the several images displayed in the MRI films, or whether the report merely stated a conclusion as to the condition or conditions purportedly revealed by the films. Furthermore, the treating chiropractor's testimony was equivocal as to whether he used the written MRI report merely to confirm an already established diagnosis or whether he relied upon it to form his diagnosis. Accordingly, this particular written MRI report was not shown to be sufficiently reliable to permit the witness to rely upon it as out-of-court material "of a kind accepted in the profession as reliable in forming a professional opinion."

Wagman v. Bradshaw, 292 A.D.2d 84, 739 N.Y.S.2d 421 (2d Dep't 2002).

[EDITOR'S NOTE: Justice Luciano, writing for a unanimous court, noted that two earlier cases in the Second Department upholding admitting into evidence MRI reports when the doctor who prepared the report did not testify were harmless were incorrect: *Torregrossa v. Weinstein*, 278 A.D.2d 487, 718 N.Y.S.2d 78 (2d Dep't 2000) and *Pegg v. Shahin*, 237 A.D.2d 271, 654 N.Y.S.2d 395 (2d Dep't 1997). Justice Luciano stated:

> To the extent that *Pegg*, *supra*, applied the "professional reliability" exception to allow testimony as to the results of the written reports, for the truth of the matters asserted in the written reports, without requiring the proponent of the evidence to establish the reliability of the written reports, it should no longer be followed.]

INDEMNIFICATION—INDEMNITEE'S NEGLIGENCE—UNMISTAKABLE INTENT

Hertz, whose negligent maintenance of its vehicle may have contributed to the accident causing plaintiff's injuries, is not entitled to contractual indemnification because the rental agreement did not clearly and unequivocally express an intent to indemnify Hertz against its own negligence:

> It is settled that "the law frowns upon contracts intended to exculpate a party from the consequences of his own negligence and . . . such agreements are subject to close judicial scrutiny." "[U]nless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts."

Sweeney v. The Hertz Corporation, 292 A.D.2d 286, 740 N.Y.S.2d 19 (1st Dep't 2002).

[EDITOR'S NOTE: The rental agreement contained the following hold harmless language:

> You and all operators will indemnify and hold Hertz, its agents and employees, harmless from and against any loss, liability and expense in excess of the limits stated herein or beyond the scope of the protection provided for above, if any, arising from the use or possession of the car by you or any operators with your, his or her permission.]

INDEMNITY—CONTRACTUAL INDEMNITY—WRITTEN AGREEMENT—EXECUTION/AFTER ACCIDENT

Written agreement, including hold harmless clause between lessee of commercial property (Viener) and contractor, that was formally executed on May 10, 1996—eight months after plaintiff's accident—was enforceable since the agreement was made as of August 1, 1995:

> In support of his motion for conditional summary judgment on the issue of contractual indemnification, Viener submitted evidence which established, as a matter of law, that the agreement per-

taining to the renovation project was made "as of" August 1, 1995, and that the parties intended that it apply as of that date.

* * *

Workers' Compensation Law § 11 does not prohibit Viener from enforcing the indemnification agreement, which the parties agreed to make retroactive to a date prior to plaintiff's accident.

Stabile v. Viener, 291 A.D.2d 395, 737 N.Y.S.2d 381 (2d Dep't 2002), *motion for lv. dismissed*, 98 N.Y.2d 727, 749 N.Y.S.2d 477 (2002).

INSURANCE—CRIMINAL ACTIVITY EXCLUSION—NON-CRIMINAL ACTS OF NEGLIGENCE

Criminal activity exclusion in homeowner's general liability policy precluded coverage for homeowner who (a) injured his guest after discharging his gun and (b) pleaded guilty to felony assault:

> The criminal activity exclusion, on its face, does apply, as France's [homeowner] liability arose directly from an act for which he stands convicted.
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> * * *
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> The exclusion now under review . . . results in the drafter's evident attempt to find enforceable policy language that removes coverage from criminal conduct such as France's. Absent evidence of a strong public policy requiring such coverage we are reluctant—especially on the facts before us—to send the drafters of insurance policy forms back to the drawing board.
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> * * *
>
> The "public policy of this state when the legislature acts is what the legislature says that it shall be." Conversely, when statutes and Insurance Department regulations are silent, we are reluctant to inhibit freedom of contract by finding insurance policy clauses violative of public policy.

Slayko v. Security Mutual Insurance Company, 98 N.Y.2d 289, 746 N.Y.S.2d 444 (2002).

[EDITOR'S NOTE: The insurance provision states:

> This policy does not apply to liability arising directly or indirectly out of instances, occurrences or allegations of *criminal activity* by the insured or by employees of the insured named in this policy. (Emphasis in original).

The court, however, held that the policy's intentional act exclusions did not preclude coverage:

> France's conduct, though reckless, was not inherently harmful for the purpose of the intentional act exclusion. The general rule remains that "more than a causal connection between the intentional act and the resultant harm is required to prove that the harm was intended." Under this standard, as the Appellate Division correctly held, the exclusion does not apply.]

JUDGMENT—SUMMARY JUDGMENT—LIABILITY ONLY—NO FAULT—SERIOUS INJURY

Although plaintiff's motion for summary judgment in an automobile accident case was unopposed and granted, he must nonetheless establish a "serious injury" since the granting of summary judgment on liability does not include a favorable determination whether a "serious injury" under No-Fault has been established:

> The Appellate Division, First Department, has addressed this issue squarely and has come to the conclusion that, even though the issue was never raised in the motion papers, the granting of summary judgment on liability "necessarily" includes a finding that the plaintiff sustained serious injuries. [Fourth Department also treats the issue of serious injury as part of liability.] We disagree and hold that such a ruling is inconsistent with the intent of the No-Fault Law, as well as basic summary judgment principles, and has the practical effect of increasing motion practice.
>
> By holding that the issue of serious injury is "necessarily" resolved in favor of the plaintiff even when no evidence of such injury is presented, the courts may be authorizing recovery for minor injuries, which is contrary to the purpose of the No-Fault Law as set forth above. It is the plaintiff's burden to establish that he or she has sustained a serious injury within the definition of Insurance Law § 5102(d). Further, the court is charged with the duty of determining, as a threshold matter, whether

> the plaintiff has presented proof of such an injury. Accordingly, the court would be abdicating its duty by allowing a plaintiff to recover for minor injuries, merely because the defendant failed to, or chose not to, respond to a motion for summary judgment on liability. Lack of opposition to a motion for summary judgment on the issue of liability, be it negligent or purposeful, is not justification to relieve the plaintiff of his or her burden to submit adequate evidence of his or her injury.

Zecca v. Riccardelli, 293 A.D.2d 31, 742 N.Y.S.2d 76 (2d Dep't 2002).

MOTIONS—CROSS-MOTIONS—SUMMARY JUDGMENT/120-DAY RULE

The motion court should have considered defendant's cross-motion for summary judgment even though it was served more than 120 days after the filing of the note of issue, since the court was considering a timely and pending motion for summary judgment by another defendant:

> Although Jamie Towers' cross-motion was served more than 120 days after the filing of the note of issue, the court should have considered the cross motion on its merits along with the timely and still-pending motion by [co-defendant] Lance to which it responded.

James v. Jamie Towers Housing Co., Inc., 294 A.D.2d 268, 743 N.Y.S.2d 85 (1st Dep't 2002), *aff'd on other grounds*, 99 N.Y.2d 639, __ N.Y.S.2d __, 2003 WL 1754781 (2003).

MOTIONS—GRAVE INJURY—BURDEN OF PROOF

To sustain a third-party complaint for contribution based on plaintiff having sustained a "grave injury," third-party plaintiff need only raise an issue of fact and does not have to establish as a matter of law that plaintiff sustained a "grave injury":

> Contrary to the court's determination, Murphy [third-party plaintiff] was not required to establish as a matter of law that plaintiff sustained a grave injury in order to avoid dismissal of the third-party complaint; that burden exists only when an owner moves for summary judgment on its third-party complaint seeking indemnification from the plaintiff's employer. Rather, Murphy was required only to raise an issue of fact in order to defeat the motion of D.R. Casey [third-party defendant] seeking summary judgment dismissing the third-party complaint. We therefore modify the order by denying the motion of D.R. Casey in part and reinstating the third-party complaint insofar as it alleges that plaintiff sustained a grave injury based on an acquired brain injury resulting in permanent total disability.

Sergeant v. Murphy Family Trust, 292 A.D.2d 761, 739 N.Y.S.2d 790 (4th Dep't 2002).

MOTIONS—SUMMARY JUDGMENT—EXPERT'S AFFIDAVIT

Plaintiff, who was sexually assaulted by employee of hospital's independent contractor during a transvaginal sonogram, did not establish her cause of action for negligent supervision by her expert's reliance on two professional organizations' guidelines recommending having a female staff member present during the procedure:

> Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment.
>
> * * *
>
> The guidelines of both professional organizations merely recommend the presence of female staff members for vaginal sonogram procedures; in fact, the materials from the American College of Radiology clearly state that its guidelines "are not rules."
>
> Moreover, plaintiff's expert failed to provide any factual basis for her conclusion that the guidelines establish or are reflective of a generally accepted standard or practice in hospital settings. Dr. Berkowitz [plaintiff's expert] made no reference either to her own personal knowledge acquired through any professional experience or to evidence that any hospitals have implemented such a standard. Thus, the expert's affirmation lacked probative force and was insufficient as a matter of law to overcome the hospital's motion

> for summary judgment on plaintiff's negligent supervision claim.

Diaz v. New York Downtown Hospital, 99 N.Y.2d 542, 754 N.Y.S.2d 195 (2002).

MOTION—SUMMARY JUDGMENT—HEARSAY

Affidavit based upon hearsay is without evidentiary value and insufficient to support a motion for summary judgment:

> By submitting the one-page affidavit from the risk control manager of the entity that operated and maintained Great Northern Mall for defendants, along with the pleadings, defendants failed to meet their burden of establishing their entitlement to judgment as a matter of law. The affidavit is based upon hearsay rather than personal knowledge, and thus it is "without evidentiary value" . . . Absent proof in admissible form establishing that defendants lacked constructive notice of that condition, the burden never shifted to plaintiff to raise a triable issue of fact.

Bielak v. Plainville Farms, Inc., 299 A.D.2d 900, 750 N.Y.S.2d 729 (4th Dep't 2002).

> [EDITOR'S NOTE: Hearsay, however, may be sufficient to defeat a motion for summary judgment. In *Gizzi v. Hall*, 300 A.D.2d 879, 754 N.Y.S.2d 373 (3d Dep't 2002), the court accepted hearsay statements because plaintiff provided an acceptable excuse for failing to tender evidence in admissible form and they properly "identif[ied] the witnesses, the substance of their testimony, how it is known what that testimony would be and how the witnesses acquired their knowledge."

See also Phillips v. Joseph Kantor & Company, 31 N.Y.2d 307, 338 N.Y.S.2d 882 (1972)].

NEGLIGENCE—ASSUMPTION OF RISK—PARALLEL BARS

Detainee at a City detention facility, who lost his grip on metal/parallel exercise bars while swinging himself back and forth and fell, striking his head on the cement floor beneath the bars, assumed the risk and does not have a cause of action against the City of New York for his becoming a quadriplegic:

> Plaintiff assumed the risk of injury when he swung on, and subsequently fell off, an exercise apparatus constructed over a concrete floor.

Marcano v. City of New York, 99 N.Y.2d 548, 754 N.Y.S.2d 200 (2002), *rv'g*, 296 A.D.2d 43, 743 N.Y.S.2d 456 (1st Dep't 2002).

[EDITOR'S NOTE: In the Appellate Division, Justice Buckley, writing for the majority, held that there was a question of fact whether plaintiff assumed the risk of his injury. Plaintiff had presented evidence from a Professor of Biomechanics that two defects "unreasonably increased the risk of injury." These defects were: (1) the squareness of the metal bars making them difficult to grip, a design defect; and (2) the eight-inch grip circumference of the dip bars is larger than the industry standard which ranges from 3-7/8 inches to 7-1/8 inches with the usual between 4-6 inches in circumference.

Plaintiff's expert also stated in his affidavit that the City of New York created a uniquely dangerous condition by placing the bars over concrete rather than absorbent material and by failing to either warn, instruct or supervise plaintiff in the use and danger of the exercise bars. The City did not submit an expert's affidavit to refute the opinions of plaintiff's expert.

In finding a question of fact, the court reasoned:

> A review of exercise and sport cases demonstrates that the boundary between assumed risks and non-assumed enhanced risks is clear and that plaintiff in this case may well have confronted enhanced risks which he had not assumed.
>
> * * *
>
> In the instant case, however, a question of fact exists as to whether the specially constructed parallel-dip bars were "unique," exposing plaintiff to "unreasonably increased risks" not open and obvious to plaintiff, taking into consideration his level of experience and expertise.

Two judges dissented. Justice Friedman wrote the dissenting opinion in which Justice Andrias joined.

Justice Friedman maintained that plaintiff did not incur any risks that were not perfectly open and obvious:

> A defendant providing a place for recreation or athletics is obligated only "to make the conditions as safe as they appear to be. If the risks of the activity

> are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty." . . .
>
> First, plaintiff could not reasonably have believed that the bars were intended for the gymnastic use he made of them. Plaintiff's rapid swinging back and forth, in which his feet rose to a level above his head, plainly posed a serious danger that he would lose his grip on the bars, regardless of how broad or narrow the bars were. This danger was inherent in the activity in which plaintiff was engaged, and plainly falls within the category of dangers of which any reasonable person, regardless of prior experience with the particular type of equipment involved, would have been "fully aware . . . through general knowledge, observation or common sense."
>
> * * *
>
> It bears emphasis that what is dispositive here is not that dipping was the actual intended use of the bars, but that the activity plaintiff was performing obviously was not the intended use. Again, given that the bars were situated over an unpadded cement floor, no reasonable person could have believed that they were intended for the sort of amateur "gymnastics" in which plaintiff chose to engage.]

NEGLIGENCE—CONTRACTOR DEFENSE

Installer of roofing materials, Allweather, was not liable to repairman of roof air conditioner, who slipped and fell on roof, since Allweather followed the plans and specifications of the roof architect and the defect in the plans and specifications were not obvious to place Allweather on notice:

> Generally, a contractor is entitled to rely on plans and specifications that he has agreed to follow unless they are so patently defective as to place a contractor of ordinary prudence on notice that the project, if completed according to the plans and specifications, is potentially dangerous. Allweather met its initial burden by establishing that it had agreed to follow the plans and specifications of defendant Duchscherer Oberst Design, P.C., the architectural firm that prepared the plans for the roof, and SarnaFil, Incorporated, the manufacturer of the roofing material, and that those plans and specifications were not "so patently defective" as to place Allweather on notice that the project was potentially dangerous if completed according to the plans and specifications.

Rechlin v. Allweather Contractors, 298 A.D.2d 907, 747 N.Y.S.2d 844 (4th Dep't 2002).

NEGLIGENCE—DUTY/CARE—NON-CONTRACTING THIRD PARTIES

A subcontractor, San Juan Construction and Sales Corp., which contracted with the New York State Thruway Authority's general contractor, Callanan Industries, Inc., to complete "a full 312.5 feet of new guiderailing" but only completed 212 feet, leaving 100 feet lacking a guiderail, is not liable to plaintiff whose vehicle veered off the southbound traffic portion of the Thruway, careened down a non-traversible embankment and crashed in a V-shaped ditch at the bottom.

The Court found there was no "cognizable duty [by San Juan] to plaintiff to complete its contractual obligation" and therefore it cannot be cast in damages. The Court did not find that this case presented the three exceptions to the general rule that there is no duty of care owed to non-contracting third parties arising out of a contractual obligation or its performance. The three exceptions:

1. Where the promisor while engaged affirmatively in discharging a contractual obligation creates an unreasonable risk of harm to others or increases that risk;
2. Where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continued performance of a contractual obligation; and
3. Where the contracting party has entirely displaced the other party's duty to maintain the premises safely:

> Plaintiff fails to qualify under any of the foregoing exceptions. There is no evidence in the record that San Juan's incomplete performance of its contractual duty to install 312.5 feet of guiderailing falls within the first exception—i.e., that it created or increased the risk of the Jetta's divergence from the roadway beyond the risk which

existed even before San Juan entered into any contractual undertaking . . . San Juan's failure to install the additional length of guiderail did nothing more than neglect to make the highway at Thruway mile post marker 132.7 *safer*—as opposed to less safe—than it was before the re-paving and safety improvement project began.

Likewise, this case does not fall within the second exception. It is not (and cannot be) contended here that the tragic loss of control of the Jetta occurred because the driver "detrimentally relie[d] on the continued performance of [San Juan's contractual] duties" when she failed to remain awake and alert at the wheel.

Nor can San Juan's liability be sustained under an assumption of the Thruway Authority's safety duty theory under *Palka* [*v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 611 N.Y.S.2d 817 (1994)] or *Espinal* [*v. Melville Snow Contrs., Inc.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002)].

* * *

Undisputably, under the contractual framework, San Juan never assumed the Thruway Authority's common law tort duty to oversee and insure the installation of the adequately safe length of guiderailing in the vicinity of mile post marker 132.7 of the southbound Thruway. Likewise, inspection responsibilities as to the proper length of guiderail were never contractually shifted to San Juan . . . Rather the Thruway Authority (owner) either retained those safety responsibilities or delegated them under contracts with Callanan or Clough Harbour. That being so, San Juan had no reason "to foresee the likelihood of physical harm to third persons as a result of reasonable reliance by [the Thruway Authority] on [it] to discover [the safety shortfall]."

Church v. Callanan Industries Inc., 99 N.Y.2d 104, 752 N.Y.S.2d 254 (2002).

NEGLIGENCE—FORESEEABILITY

Plaintiff, who lost her balance while trying to grab boxes of macaroni that fell when store employee was passing them over the top of nearby metal wagon to her, and struck her head on supermarket's shelving, has no cause of action against the supermarket:

> Plaintiff's accident was not within the reasonable foreseeable risks of the defendant's alleged negligence.

Pinero v. Rite Aid of New York, Inc., 99 N.Y.2d 541, 753 N.Y.S.2d 805 (2002), *aff'g* 294 A.D.2d 251, 743 N.Y.S.2d 21 (1st Dep't 2002).

[EDITOR'S NOTE: The Court of Appeals sided with the majority of the First Department who found that the risk of danger in the assistant manager's passing the macaroni boxes over the half-filled wagon as minimal and unforeseeable as a matter of law:

> The dissent appears to believe that the confluence of the presence of the obvious wagon and the employee's dropping of the boxes—neither of which, the dissent agrees, provides a basis for liability standing alone—combined with the fact that plaintiff was injured provide a sufficient basis to submit the case to the jury. In our view, this reasoning presents the kind of "wisdom born of the event" that the Court of Appeals warned against in *DiPonzio* [*v. Riordan*, 89 N.Y.2d 578, 657 N.Y.S.2d 377 (1997)] and *Greene* [*v. Sibley, Lindsay & Curr Co.*, 257 N.Y. 190, 177 N.E. 416]. Were this the case, every injury would constitute proof its own foreseeability. 294 A.D.2d at 253, 743 N.Y.S.2d at 23.]

NEGLIGENCE—LABOR LAW §§ 202, 240(1)—MUTUAL CO-EXISTENCE—COMPARATIVE NEGLIGENCE

Plaintiff, a window washer, who fell three floors after losing his balance while cleaning exterior windows, may maintain actions under both Labor Law §§ 202 and 240(1):

> This Court has never prohibited assertion of alternative Labor Law claims.
>
> * * *
>
> Labor Law § 202 protects people who clean windows and exterior surfaces of buildings. Among other activities, Labor Law § 240(1) applies to workers engaged in the "cleaning" of a building.

> The requirements of Labor Law § 202 apply to owners, lessees, agents and managers while strict liability under Labor Law § 240(1) flows to owners and contractors only. Labor Law § 202 is inapplicable to multiple dwellings of six stories or less and to nonpublic buildings, while Labor Law § 240(1) is inapplicable to one- and two-family homes. Moreover, although Labor Law § 240(1) covers "cleaning," it does not apply to routine household cleaning. Conversely, Labor Law § 202 necessarily involves the periodic cleaning of windows at residences, albeit not at multiple residences less than six stories in height. Labor Law § 240(1) has no similar requirement.

Bauer v. Female Academy of the Sacred Heart, 97 N.Y.2d 445, 741 N.Y.S.2d 491 (2002).

[EDITOR'S NOTE: The Court also held that comparative negligence principles apply to plaintiff's culpable conduct under Labor Law § 202, since this section is similar to Labor Law § 241(6).]

NEGLIGENCE—LABOR LAW § 240(1)—BUILDING OWNER—NO PERMISSION GRANTED

Labor Law § 240(1) applies to a building owner even if (a) it did not permit or suffer plaintiff to work on its property and (b) Cablevision, who hired plaintiff's employer, subcontractor Mucip, Inc., dealt directly with the tenant:

> While some cases have employed such reasoning [permission to work in the building] to absolve owners from liability under the Labor Law, we hold that the Building is an owner as a matter of law, strictly liable pursuant to Labor Law § 240(1).
>
> The Court of Appeals has unequivocally held that "[l]iability rests upon the fact of ownership and whether [the owner] had contracted for the work or benefitted from it are legally irrelevant." Moreover, "an owner no longer need be the employer of the worker or one directing his labor in order to be subject to liability." The law as determined by the Court of Appeals favors the imposition of liability as against the Building.

Otero v. Cablevision of New York, 297 A.D.2d 632, 747 N.Y.S.2d 46 (2d Dep't 2002).

NEGLIGENCE—LABOR LAW § 240(1)—CITY INSPECTOR—COVERED PERSON

Plaintiff, a superintendent of construction for New York City, who was injured while at work coordinating and monitoring the performance and progress of contractors working pursuant to a contract with the City, is covered under Labor Law § 240(1) for his injuries and is entitled to summary judgment:

> The statute may be applicable "despite the fact that the particular job being performed at the moment plaintiff was injured did not in and of itself constitute construction."
>
> * * *
>
> In affirming *Covey* [*v. Iroquois Gas Transmission Sys.*, 218 A.D.2d 197, 637 N.Y.S.2d 992, *aff'd* 89 N.Y.2d 952, 655 N.Y.S.2d 854 (1997)], the Court of Appeals held that the plaintiff, who was injured while doing maintenance work to keep the heavy equipment being used in a pipeline project operating, "was engaged in an activity protected under Labor Law § 240(1), inasmuch as the work performed by plaintiff was part of the construction of the pipeline."
>
> * * *
>
> While his part in the renovation of the building did not require him to use masons', carpenters', electricians' or plumbers' tools, plaintiff was as much employed "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" within the meaning of the statute as any of the employees whose work he inspected. By virtue of their exposure to the risks inherent in an elevated work site and their involvement in the erection, etc., of a building or structure, inspectors of construction projects are "workers on the job" and, as such, are within the class of persons protected by § 240(1).

Campisi v. EPOS Contracting Corporation, 299 A.D.2d 4, 747 N.Y.S.2d 218 (1st Dep't 2002).

[EDITOR'S NOTE: Two judges dissented, concluding that plaintiff was not a covered person under Labor Law § 240(1):

> At the time of the accident, plaintiff was not a worker "so employed" to

perform any of the enumerated activities covered by the statute, i.e., erecting, repairing or altering the structure. It is undisputed that plaintiff was employed by the City and not the contractors, and that his job was to monitor the construction jobs to ensure contract compliance at several locations. He did this by comparing the specifications in blueprints to the actual work being performed; checking which contractors and employees were working at the job site and what they were doing; and preparing periodic progress reports of the work performed. Plaintiff specifically testified that his responsibilities did not include inspections for safety violations, in which regard he had no authority. He was clear that he was only responsible for ascertaining progress, and was not responsible for any construction work or other aspects of the construction job. He brought no tools to the job site, except perhaps a measuring tape and flashlight. The majority urges that we accept a broad, general rule that all workers employed "on the job" are covered—a generalization that I believe to be flawed in that it is too broad to be useful.]

NEGLIGENCE—LABOR LAW § 240(1)—FALL/EXCAVATED TRENCH

Plaintiff, who was injured when he fell while attempting to descend into an excavating trench to tie together rebar rod, which held in place PVC pipes at a construction project, is entitled to partial summary judgment:

> Contrary to defendant's contentions, plaintiff's fall into the excavated trench is "the type of elevation-related risk for which Labor Law § 240(1) provides protection," and the absence of any safety device to protect plaintiff from the risk of injury when accessing the work area in the trench was the proximate cause of plaintiff's injuries. Furthermore, whether the work area at the location where plaintiff fell was 30 inches below grade, as described by the defendant, or 10 feet below grade, as described by plaintiff, is not dispositive here; the extent of the elevation differential or the distance that a worker falls does not necessarily determine the applicability of Labor Law § 240(1).

Congi v. Niagara Frontier Transportation Authority, 294 A.D.2d 830, 741 N.Y.S.2d 629 (4th Dep't 2002).

NEGLIGENCE—LABOR LAW § 240(1)—FALL FROM SLIDING LADDER—JNOV

The IAS Court erred in not granting plaintiff JNOV after the ladder he was standing on "slid away from [him] and [he] went down." The A-frame ladder, which was equipped with rubber feet, did not fall over or break. There was, however, evidence that the floor was oily and that plaintiff had oil on his shoes. In reversing the jury verdict in favor of the defendant, the court reasoned:

> It is clear from their record that plaintiff, engaged in a protected activity while subject to an elevation risk, was injured as a result of falling from an unsecured ladder that failed to support him safely . . . The A-frame ladder was not secured to something stable; nor was it chocked or wedged in place. No other safety devices were provided to prevent the fall. Nor does the evidence suggest that plaintiff's own actions were the sole proximate cause of his injury. Thus, plaintiff, as a matter of law, was entitled to recover on his Labor Law § 240(1) claim. Plaintiff was under no obligation to show that the ladder was defective in some manner or to prove that the floor was slippery to make out a Labor Law § 240(1) violation. It was sufficient to show the absence of adequate safety devices to prevent the ladder from sliding or to protect plaintiff from falling.

Bonanno v. Port Authority of NY and NJ, 298 A.D.2d 269, 750 N.Y.S.2d 7 (1st Dep't 2002)

NEGLIGENCE—LABOR LAW § 240(1)—STAGEHAND—ACTIVITY/"NECESSARY & INTEGRAL" ANALYSIS

Plaintiff, a stagehand, who was focusing overhead lights above a temporary stage while preparing for a performance, is not protected by Labor Law § 240(1) when the "man lift" on which she was standing fell over:

> It is undisputed that, at the time of this accident, the lights plaintiff was focusing were already fully installed, and that all other construction work on the stage had been completed. As a matter of law, plaintiff's activity at the time of

her injury did not constitute "erection" or "altering" of a structure within the meaning of Labor Law §240(1), since it involved no "significant physical change to the configuration or composition of the structure."

Plaintiff's work cannot be brought within the scope of the statute by deeming it "integral," necessary" or "incidental" to the erection of the stage. The Court of Appeals, in holding that "the task in which an injured employee was engaged must have been performed during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" in order to fall within the statute, has expressly rejected an "integral and necessary" test as "improperly enlarg[ing] the reach of the statute beyond its clear terms." Thus . . . we should not use such an analysis to bring within the statute non-construction activity incidental to construction work.

Adair v. Bestek Lighting and Staging Corp., 298 A.D.2d 153, 748 N.Y.S.2d 362 (1st Dep't 2002).

[EDITOR'S NOTE: Two judges dissented, contending that the job of focusing the lights was a required step in constructing the temporary stage:

The work performed by plaintiff falls directly under the language of the statute. Erection of a temporary stage, an enumerated activity (see Labor Law § 240[1]), was underway at the time plaintiff was injured, the task had not been completed, and plaintiff's work, completing the installation of the lighting system, is within the contemplated ambit of Labor Law § 240(1).]

NEGLIGENCE—LABOR LAW § 241(6)—MAINTENANCE/CONSTRUCTION CONTEXT

Plaintiff, who slipped on oil while standing on top of an elevator performing a two-year safety inspection, is not covered under Labor Law § 241(6):

Nagel's work of performing a two-year elevator test constituted maintenance work that was not connected to construction, demolition or excavation of a building or structure and is therefore not within the statute.

Nagel v. D & R Realty Corp., 99 N.Y.2d 98, 752 N.Y.S.2d 581 (2002).

NEGLIGENCE—MENTAL ANGUISH—ZONE OF DANGER

Plaintiff, elevator passenger, who witnessed an elevator malfunction resulting in the decapitation of an unknown person outside the elevator and who was not physically harmed, cannot recover for her mental trauma even though she was treated for shock and continues to suffer from psychological symptoms as a result of her experience:

A plaintiff may state a cause of action for mental trauma sustained as a result of negligence, even without physical impact. However, where the recovery sought by an uninjured third-party is predicated on witnessing injury sustained by another person, three criteria must be established: first, the defendant's conduct must be a substantial factor in causing serious injury or death to the third-party; second, the plaintiff must be within the zone of danger; and, third, the injured person must be an immediate family member of the plaintiff.

Pizarro v. 421 Port Associates, 292 A.D.2d 259, 739 N.Y.S.2d 152 (1st Dep't 2002).

NEGLIGENCE—NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS—MEDICAL TREATMENT OR PSYCHOLOGICAL COUNSELING

Plaintiff has a viable cause of action for negligent infliction of emotional distress based upon negligent handling by the funeral home and casket manufacturer of his father's corpse. It was discovered that a noxious odor came from the mausoleum where plaintiff's father's body was interred because the casket was cracked and its contents leaking. Plaintiff has a viable cause of action even though he had not sought any medical treatment or psychological counseling:

The fact that Anthony J. Massaro has not sought any medical treatment or psychological counseling for his alleged injuries, while relevant to the issue of damages, does not necessarily preclude his recovery. In a case such as this, "there exists 'an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious.'"

Massaro v. Charles J. O'Shea Funeral Home, Inc., 292 A.D.2d 349, 738 N.Y.S.2d 384 (2d Dep't 2002).

NEGLIGENCE—PREMISES—SHOOTING—NOTICE OF CRIMINAL ACTIVITY

Landlord of apartment complex where plaintiff's husband was shot in the parking lot is not liable for his death since it had no notice of prior criminal activity to make the shooting of the tenant foreseeable:

> The defendants . . . moved for summary judgment . . . on the grounds that the plaintiff failed to establish that they had notice of any criminal activity at the apartment complex, or that their alleged breach of duty proximately caused the decedent's death. The plaintiff opposed the motion by submitting . . . records of crimes reported to the Nassau County Police Department. While none of those incidents occurred at the apartment complex, a majority of them occurred at the Green Acres Shopping Center [which was located directly across the street]. The Supreme Court granted the defendants' motion. We affirm.
>
> * * *
>
> The plaintiff's submissions in opposition to the defendants' prima facie establishment of its entitlement to summary judgment failed to raise an issue of fact as to whether the defendants had notice of prior criminal activity to make the shooting of the decedent foreseeable.

Erlich v. Greenacre Associates, 295 A.D.2d 558, 744 N.Y.S.2d 190 (2d Dep't 2002).

NEGLIGENCE—REASONABLE RELIANCE/ KNOWLEDGE

Plaintiff's claim that an alleged statement during a telephone conversation with defendant's representative constituted a false assurance that the forklift was safe to use did not raise a triable issue of fact:

> Although the GFC (forklift repairer) representative told the plaintiff over the phone to go ahead and use the forklift, the plaintiff could not have reasonably relied on the alleged statement because he repeatedly admitted that he knew that the brakes on the forklift were defective. Accordingly, in the absence of any evidence of a negligent repair, the defendant was entitled to summary judgment.

Fuchs v. City of New York, 299 A.D.2d 449, 750 N.Y.S.2d 129 (2d Dep't 2002).

NEGLIGENCE—SEAT BELT DEFENSE—NON SUI JURIS

Defendant is not entitled to assert the seat belt affirmative defense where the infant plaintiffs, then two and four years old respectively, extricated themselves from their rear-seat mounted child car seats and made their way to the front passenger seat and the driver, their mother, permitted them to remain unrestrained:

> Pursuant to the unambiguous language of Vehicle and Traffic Law § 1229-c(8), the appellant is expressly precluded from seeking to defend against liability based upon the claim the children were not strapped in their child-car seats at the time of the accident. The appellant's reliance upon *Curry v. Moser* (89 A.D.2d 1, 454 N.Y.S.2d 311) is misplaced, as that case was decided before the enactment of Vehicle and Traffic Law § 1229-c(8).
>
> * * *
>
> The infant plaintiffs themselves, at ages four and two respectively, were non sui juris and incapable of being liable for negligence. Accordingly, since the relevant affirmative defenses are unavailable to defeat the infant plaintiffs' claims of liability, the Supreme Court correctly granted the motion to strike them from the defendants' answers.

Boyd v. Trent, 297 A.D.2d 301, 746 N.Y.S.2d 191 (2d Dep't 2002).

[EDITOR'S NOTE: The court also held that to the extent that the mother was allegedly negligent in failing to ensure that the children remained restrained in their car seats, her contributory negligence may not be imputed to the infant plaintiffs, citing General Obligations Law § 3-111.]

NEGLIGENCE—SECURITY GUARDS—CONTRACTUAL INTERPRETATION—LOBBY POST UNMANNED

Security guard company, whose guard left his lobby post to patrol the parking lot in back of the building, was not liable to plaintiff who was assaulted in vestibule of lobby even though contract with the premises owner required that "the guards shall not leave

their post unless relieved by another guard or supervisor":

> Subparagraphs 12(i) and (n) should be construed to prohibit a guard's going off duty before another guard takes his place, not to prohibit a guard's leaving a building's lobby to go on a patrol.
>
> * * *
>
> The fact that there was no guard in the lobby of 2050 Seward at the time of the assault does not support any inference that the Lance security guard assigned to that building was failing to perform his duties as required by Lance's contract. At the time of the assault, the guard assigned to 2050 Seward was patrolling the parking lot in back of the building, which was one of his duties as the guard assigned to that building. The guard had not simply taken a break and left the building and its immediate surroundings unprotected. Since Lance cannot be held liable for the assault absent proof that a failure by its personnel to perform their contractual duties contributed to the occurrence of the incident, Lance's motion for summary judgment should have been granted.

James v. Jamie Towers Housing Co., Inc., 294 A.D.2d 268, 743 N.Y.S.2d 85 (1st Dep't 2002), *aff'd*, 99 N.Y.2d 639, __ N.Y.S.2d __ 2003 WL 1754781 (2003).

[EDITOR'S NOTE: Two justices strongly dissented, finding that

> rather than reading the material provisions of the contract in the context of the document as a whole, the majority simply embraces the meaning of "post" that supports its interpretation . . . The contract, however, refers to the terms "post" and "patrol" in the alternative, making reference to the need for orientation of a guard "to his/her intended post *and* patrol area" (emphasis added), thereby drawing a distinction between the fixed station and a roving patrol. Whatever meaning is ascribed to "post" in the abstract, a post "in the lobby of the building" cannot extend beyond the lobby of the building.

The relevant contractual provisions in question were:

> 12) Regular Guard Duties . . . :
>
> c. Guards must maintain their posts in the lobby of the building and at specific times patrol basement, roof, and roof landings, stairways, hallways and parking lots.
>
> i. All men must remain at their assigned posts. The supervisor will check the men on duty.
>
> n. The guards shall not leave their posts unless relieved by another guard or supervisor.]

PLEADINGS—AMEND COMPLAINT—INORDINATE DELAY (10 YEARS)—MERITORIOUS AMENDMENT

Where there was an inordinate delay in moving to amend pleading, the moving party must set forth a reasonable excuse for the delay and an affidavit of merits:

> In deciding whether to grant a motion to serve an amended pleading in a long-pending case, "the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether the amendment is meritorious, and whether a reasonable excuse for the delay was offered."
>
> * * *
>
> The plaintiffs offered no excuse for their inordinate 10 year delay, and they failed to explain why the amendment could not have been made at an earlier time. Furthermore, they failed to support their motion with any evidence showing any merit to the proposed amendments. While it is true that the plaintiffs were not obligated to prove their case at the pleading stage, they were obligated to "make some evidentiary showing that a proposed amendment has merit."

Boyd v. Trent, 297 A.D.2d 301, 746 N.Y.S.2d 191 (2d Dep't 2002).

PLEADINGS—ARTICLE 16—CPLR 1602(5)

Negligent premises owner is entitled to apportionment of damages if plaintiff is injured by a non-party assailant under Article 16. The court rejected plaintiff's argument that the fact that a non-party tortfeasor acted intentionally does not bring a pure negligent action within the scope of the exclusion:

> Our interpretation of section 1602(5) does not render section 1602(11)

duplicative [because 1602(11) is to prevent apportionment among multiple intentional tortfeasors acting together].

* * *

There is . . . no indication in the legislative history that section 1602(5) was intended to create what would amount to a broad exception to apportionment at the expense of the low-fault, merely negligent landowners and municipalities—the very parties article 16 intended to benefit.

Finally, we know the objective the Legislature intended by article 16 and note that plaintiff's interpretation would result in the very inequity the Legislature sought to eliminate. Under plaintiff's reading of the statute, the right of a low-fault defendant to apportion would depend entirely on the nature of the culpability of the third-party tortfeasor. A negligent defendant could apportion liability with a negligent or reckless third-party tortfeasor, but not an intentional tortfeasor. Such a result is not only illogical but also inconsistent with the chief remedial purpose of article 16.

Chianese v. Meier, 98 N.Y.2d 270, 746 N.Y.S.2d 657 (2002).

PRE-TRIAL DISCOVERY—SURVEILLANCE VIDEO TAPES—PLAINTIFF'S DEPOSITION

Under CPLR 3101(i), plaintiff is entitled to immediate production of all surveillance video tapes even before he is deposed:

> CPLR 3101(i) created a separate and distinct disclosure device pertaining to a party's right to obtain surveillance materials—unrelated to the priority of depositions set forth in CPLR 3106(a).
>
> * * *
>
> A review of the statute's legislative history indicates that the Legislature intended to codify and to expand the ruling in *DiMichel* [*v. South Buffalo Ry. Co.*, 80 N.Y.2d 184 (1992)]. However, prior to the enactment of CPLR 3101(i), the Advisory Committee on Civil Practice Law and Rules and the Division of State Police opposed the bill, in part, because it did not codify that portion of the *DiMichel* holding which limited disclosure until after a plaintiff had been deposed.
>
> * * *
>
> CPLR 3101(i) makes no mention of the timing of the "full disclosure" in relation to the conduct of depositions. Furthermore, subdivision (i) fails to incorporate, by express language, or by implication, the provisions of CPLR 3106(a) [Priority of Depositions].
>
> * * *
>
> We find that requiring a defendant to turn over surveillance materials upon a plaintiff's demand and prior to depositions need not result in any undue prejudice, such as tailored testimony by the plaintiff, since a defendant may seek an appropriate protective order pursuant to CPLR 3103(a).

Falk v. Inzinna, 299 A.D.2d 120, 749 N.Y.S.2d 259 (2d Dep't 2002)

[EDITOR'S NOTE: The legal principle set forth in *Falk* was adopted in *Tran v. New Rochelle Hosp. Medical Center*, 99 N.Y.2d 383, 756 N.Y.S.2d 509 (2003)].

PRODUCTS LIABILITY—ENHANCED INJURIES—INTOXICATED DRIVER—COMPARATIVE FAULT

Although plaintiff's decedent was highly intoxicated when he lost control of his vehicle and crashed into a utility pole, plaintiff may maintain a suit against Volkswagen, the manufacturer of the automobile, for plaintiff's crashworthiness claim notwithstanding *Barker* [*v. Kallash*, 63 N.Y.2d 19, 479 N.Y.S.2d 201 (1984]/*Manning* [*v. Brown*, 91 N.Y.2d 116, 667 N.Y.S.2d 336 (1997)], which bars suits for injuries sustained during commission of serious crimes, such as manufacturing a pipe bomb [*Barker*] or joyriding [*Manning*]:

> The *Barker/Manning* rule is based on the sound premise that a plaintiff cannot rely upon an *illegal act* or *relationship* to define the defendant's duty. We refuse to extend its application beyond claims where the parties to the suit were involved in the underlying criminal conduct, or where the criminal plaintiff seeks to impose a duty arising out of an illegal act.
>
> If Volkswagen did defectively design the Jetta as asserted by plaintiff's expert, it breached a duty to any driver of a Jetta involved in a crash regardless

> of the initial cause. Plaintiff does not seek to "profit" from her husband's intoxication—she asks only that Volkswagen honor its well-recognized duty to produce a product that does not unreasonably enhance or aggravate a user's injuries. The duty she seeks to impose on Volkswagen originates not from her husband's act, but from Volkswagen's obligation to design and market a safe vehicle.
>
> The *Barker/Manning* rule embodies a narrow application of public policy imperatives under limited circumstances. Extension of the rule here would abrogate legislatively mandated comparative fault analysis in a wide range of tort claims. In essence, the dissent would have this Court extend the *Barker/Manning* rule to relieve Volkswagen in this case of its duty to manufacture a safe vehicle. This we will not do.

Alami v. Volkswagen of America, Inc., 97 N.Y.2d 281, 739 N.Y.S.2d 867 (2002).

PRODUCT LIABILITY—EXPERT TESTIMONY—PRECLUSION

The trial court correctly precluded the expert from testifying as to plaintiff's claim of snowmobile's defective throttle design because he failed to lay a proper foundation:

> Plaintiff's expert did not perform the tests and the tests were not performed on a Yamaha throttle but, rather, were performed in 1983 or 1984 on an unidentified machine which was manufactured on an unspecified date in the mid-1970s. Among the substantial "unknowns" were the number of tests, the specifics of the testing procedures and the mileage and maintenance history of the tested machines, and no records of the tests were provided. Thus, even if plaintiffs' showing satisfied the *Frye* test regarding scientific evidence, a doubtful conclusion on this record, plaintiffs failed to offer any foundational proof, as required for the admission of all evidence at trial, regarding the adequacy of the specific procedures used to test the throttle cables so as to establish the admissibility of this evidence.

McCarthy v. Handel, 297 A.D.2d 444, 746 N.Y.S.2d 209 (3d Dep't 2002).

PRODUCTS LIABILITY—SUMMARY JUDGMENT—DEFECTIVE DESIGN—EXPERT'S AFFIDAVIT

Plaintiff, an experienced carpet installer who lost control of his carpet cutting knife causing him personal injuries, claimed that the knife was defectively designed because it lacked a thumb rest and did not have adequate slip resistant features on its handle. The Appellate Division affirmed defendant's motion for summary judgment, rejecting the affidavit submitted by plaintiff's expert, a licensed professional engineer, finding that

> the expert failed to present evidence of any practical experience or personal knowledge in the design of carpet-cutting knives or hand tools. Moreover, the expert's opinion was not supported by any foundational facts such as actual testing of the knife, a deviation from industry standards, statistics showing frequency of injury resulting from the design of the knife, or consumer complaints. As such, the expert affidavit was insufficient to raise a triable issue of fact that the knife was not reasonably safe. Indeed, the record reflects that the plaintiff himself utilized the knife on a regular basis for approximately eight months to a year before the accident without any difficulty, complaint, or injury.
>
> Having failed to submit any evidence to demonstrate that the design of the knife presented "an unreasonable risk of harm" or "a substantial likelihood of harm" to the user, the plaintiff failed to sustain his burden to raise a triable issue of fact.

Martinez v. Roberts Consolidated Industries, 299 A.D.2d 399, 74 N.Y.S.2d 279 (2d Dep't 2002).

SANCTIONS—SPOLIATION/BLOWN-OUT TIRE

The IAS Court erred in granting plaintiff's motion to preclude defendant from testifying and submitting into evidence any information regarding the tire that was disposed of after defendant's vehicle was towed to the towing company's garage notwithstanding that defendant's defense was that he lost control of his vehicle after his tire blew out:

> The Supreme Court improvidently exercised its discretion in sanctioning

> the defendant for the spoliation of evidence. "Under the circumstances herein, it cannot be presumed that [the defendant] is the party responsible for the disappearance of such evidence or, more importantly, that it was discarded by [the defendant] in an effort to frustrate discovery." Moreover, we note that the defendant is also prejudiced by the loss of the tire.

O'Reilly v. Yavorskiy, 300 A.D.2d 456, 755 N.Y.S.2d 81 (2d Dep't 2002).

TRIAL—BIFURCATION

The IAS Court improvidently exercised its discretion in bifurcating the trial of plaintiff, a tenant, who claimed he was scalded by hot water while taking a shower:

> The nature and extent of plaintiff's burns were inextricably intertwined with the question of defendant's liability, thus requiring medical proof to show the causal connection between the subject incident and the injury in order to establish liability.

Shea v. Broadway Associates, 292 A.D.2d 292, 739 N.Y.S.2d 155 (1st Dep't 2002).

[EDITOR'S NOTE: Where, however, the issue of damages—losses sustained by four occupants of a large office building in a widespread fire—are not so intertwined with the issues of liability, which appear technical and complex, bifurcation was warranted. *See National Broadcasting Co., Inc. v. John Gallin & Son, Inc.*, 292 A.D.2d 192, 739 N.Y.S.2d 48 (1st Dep't 2002).]

TRIAL—BIFURCATED TRIAL—JURY INSTRUCTIONS/INTERROGATORIES

The jury's finding defendant negligent but that her negligence was not a proximate cause of plaintiff's injuries in a bifurcated trial was inconsistent where defendant struck plaintiff's stopped vehicle during a sudden snowstorm when the visibility was almost zero:

> Where, as here, the issues of negligence and proximate cause are so "inextricably interwoven," it is impossible to find negligence without proximate cause. Upon our review of the record, we conclude that the inconsistency may have resulted from the court's improper jury instructions as well as the verdict sheet, which asked the jury to find whether defendant's negligence was a proximate cause of "plaintiff's *injuries*." This was a bifurcated trial on liability only, and the verdict sheet therefore should have been in terms of whether defendant's negligence was a proximate cause of the accident, not plaintiff's injuries.

Di Cesare v. Glasgow, 295 A.D.2d 1007, 743 N.Y.S.2d 646 (4th Dep't 2002).

TRIAL—CONTINUANCE—NON-JURY

The trial court's denial of a continuance of a nonjury trial for a reasonable amount of time for plaintiff to produce his former controller to establish a foundation for admissibility of a computer printout was an improvident exercise of discretion:

> The decision to grant a continuance is ordinarily committed to the sound discretion of the trial court.
>
> * * *
>
> It appears that the testimony of the former controller was material and relevant. Thus, a brief adjournment in this nonjury trial was not likely to cause any prejudice to the defendant, and the plaintiff's attorney did not fail to exercise due diligence.

Cantoni ITC USA, Inc. v. Milano International, Inc., 300 A.D.2d 334, 751 N.Y.S.2d 308 (2d Dep't 2002).

TRIAL—JUDGE'S CONDUCT—CALLING INDEPENDENT WITNESS

A trial court, in the exercise of discretion, cannot call a witness as its own witness after the parties rested when the prosecution and defense did not call him:

> While "neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process," the court's discretion is not unfettered. The overarching principle restraining the court's discretion is that it is the function of the judge to protect the record at trial, not to make it. Although the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial.
>
> * * *

> Under the circumstances of this case, the court abused its discretion as a matter of law. It assumed the parties' traditional rule of deciding what evidence to present, and introduced evidence that had the effect of corroborating the prosecution's witnesses and discrediting defendant on a key issue.
>
> * * *
>
> Although it does not appear from the record that the Trial Judge intended to give an advantage to either side, he abused his discretion in calling Sergeant Miller on a key issue when both parties chose not to. By calling Sergeant Miller, the court deprived defendant of the ability to request that the trier of fact draw a negative inference from the People's failure to produce an ESU officer during its case. Loss of that inference, coupled with the generally damaging testimony of Sergeant Miller, create a significant probability that the verdict would have been affected had the error not occurred.

People v. Arnold, 98 N.Y.2d 63, 745 N.Y.S.2d 682 (2002).

[EDITOR'S NOTE: The Court also noted that this was not a case calling for special expertise or other such circumstance, that may require a trial court to call its own witness citing Family Court Act § 350.4(2) as an example. But the practice, the court noted, is not particularly desirable and should be engaged in sparingly, so as to retain the court's impartiality.]

TRIAL—MOTION IN LIMINE

Defendant's oral motion in limine made on the eve of trial did not violate the CPLR:

> Contrary to plaintiff's contentions, there is no requirement that an in limine motion be made in writing and be in accordance with CPLR 2214. The court, therefore, properly considered defendant's oral application.

Wilkinson v. British Airways, et al., 292 A.D.2d 263, 740 N.Y.S.2d 294 (2d Dep't 2002).

TRIAL—POLLING THE JURY—ACCEPTING JURY VERDICT

The court erred in accepting the jury verdict since a juror, during the polling, stated that while he voted guilty on each count of the indictment, it was "not beyond a reasonable doubt." In addition, the juror, upon further questioning outside the presence of the other jurors, stated he could not "reach a true and honest decision" and that he "gave in" to other jurors' decision to find the defendant guilty. Finally, the juror stated he could not resume deliberations with the other jurors:

> The purpose of polling the jury is to make sure that the verdict does indeed express the voluntary verdict of that particular juror. Either party may request polling of the jury after a verdict has been rendered, and if "any juror answers in the negative, the court must refuse to accept the verdict and must direct the jury to resume its deliberations." The Court of Appeals has recognized the responsibility of a trial court to resolve any uncertainties in a juror's response during polling which may engender doubts about a full verdict.
>
> While the Supreme Court's inquiry to clarify juror number four's ambiguous response was proper, it did not resolve the uncertainty as to this juror's vote. The Supreme Court should not have accepted the verdict. Accordingly, a new trial is ordered.

People v. Francois, 297 A.D.2d 750, 748 N.Y.S.2d 384 (2d Dep't 2002).

[EDITOR'S NOTE: The court relied on Criminal Procedure Law § 310.80 which states, in part, that after a verdict has been rendered, it must be recorded and read to the jury and "the jurors must be collectively asked whether such is their verdict." The CPL further states that if upon inquiry any juror answers in the negative, the court must refuse to accept a verdict and must direct the jury to resume its deliberations.

There is no similar provision in the CPLR. However, before a verdict is entered, the party against whom it is rendered has the right to poll the jury. *See Muth v. J & T Metal Products Co., Inc.*, 74 A.D.2d 898, 425 N.Y.S.2d 858 (2d Dep't 1980), *appeal dismissed*, 51 N.Y.2d 745, 432 N.Y.S.2d 365 (1980). In addition, The Court of Appeals has held that it is reversible error in a civil action where the trial judge failed to conduct a limited

inquiry to determine whether a juror's answer during the poll indicated that she may not have participated in the deliberations on any issue other than that of liability. *See Sharrow v. Dick Corp.*, 86 N.Y.2d 54, 629 N.Y.S.2d 980 (1995).]

VENUE—CONVENIENCE OF MATERIAL WITNESSES—DISCRETION

The IAS Court improperly changed venue from Bronx County to Queens County, where the accident took place:

> In order for the court to exercise its discretion [under CPLR 510(3) for convenience of material witnesses] the moving party must provide detailed justification for such relief in the form of the identity and availability of proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the initial venue. Without this showing of inconvenience, the IAS court improvidently exercised its discretion in granting a change of venue that had been properly laid by the statute.

Rodriguez v. Port Authority of New York and New Jersey, 293 A.D.2d 325, 740 N.Y.S.2d 323 (1st Dep't 2002).

VENUE—IMPROPER—TIMELINESS

Defendant's motion was timely in moving to change venue since it was made after it learned of plaintiffs' correct residence:

> The Supreme Court erred in denying the appellant's motion to change the venue of this action from Queens County to Nassau County. The plaintiffs improperly placed the venue of this action in Queens County, where none of the parties reside, thereby forfeiting their right to designate venue. The appellant then promptly moved to change venue to a proper county after ascertaining the plaintiffs' true county of residence. The order therefore must be reversed and the motion granted.

Supino v. PV Holding Corp., 291 A.D.2d 489, 738 N.Y.S.2d 675 (2d Dep't 2002).

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Chianese v. Meier, 98 N.Y.2d 270, 746 N.Y.S.2d 657 (2002), WL 2002 1291324 **[PLEADINGS—ARTICLE 16—CPLR 1602(5)]**

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