NYSBA SUMMER 2002 | NO. 45

Trial Lawyers Section Digest

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

A Message from the Chair

The Trial Lawyers Section has relied on the support of prominent trial lawyers located throughout the state to promote the worthy goals and high professional standards of justice for all litigants who come into our courts. As trial lawyers we must be ever vigilant to preserve the basic rights for all persons who seek legal redress. The basic rights include access to our courts, trial by jury and equal protection of the law.

Unfortunately, personal injury trial lawyers have been under attack not only by political candidates and late-night comics, but also at times, by the general public. We therefore must implement a continuing effort to improve the public's understanding of the civil justice system and the image of trial lawyers.

Steve Krane, our past President of the New York State Bar Association, in his January 2002 message referring to the immediate aftermath of the terrorist attacks of September 11, 2001, wrote, "Etched in my mind is the seemingly endless line of volunteers (lawyers) outside the Association of the Bar of the City of New York who were anxious and prepared to assist family members of victims in the expedited death certificate process." Many of the attorney volunteers, on that day, were active and respected personal injury trial lawyers representing both plaintiffs as well as defendants. This is the kind of pro bono activity that enhances the reputation of all lawyers and improves the understanding by the public of what we accomplish on their behalf.

For the information of our members, the United States Senate voted on July 30, 2002, to table the McConnell Medical Malpractice amendment to the Prescription Drug Bill by a vote of 57-42! Both senators from the state of New York, Senators Charles Schumer and Hillary Clinton, voted to table the bill. This vote constitutes a victory for the consuming public.

Our Section owes a debt of gratitude to William Keniry, Chair of the Summer Meeting at Saratoga and to Stephen O'Leary, Jr., Program Chair, for a marvelous itinerary of events and an outstanding, informative program. Our special thanks to all of the program participants for their learned presentations, and to our member attendees who made this meeting a truly memorable one.

Inside

Finally, it is with a heavy heart that I announce the passing of our dynamic and dedicated past Chair of our Section, Anthony J. DeMarco, Jr. A memorial service in his honor was held on August 8, 2002, at the Supreme Court Building in the county of Kings.

Over a period of 23 years our Trial Lawyers Section sponsored the Moot Court Region II National Trial Competition, involving law students from all of the participating law schools. During those 23 years Anthony J. DeMarco, Jr. was the Chairman of this annual event. His leadership made this annual trial competition into a resounding success. Additionally, at our recent Saratoga Summer Meeting, two of our past Chairs of this Section, Dick O'Keeffe and Gunther Kilsch, both close friends of "Tony's," spoke in his honor. Perhaps most importantly, the students who participated in the annual trial competition were inspired by the supportive professional who organized the competition, namely, Anthony J. DeMarco, Jr.

Seymour Boyers

Important 2001 Decisions

By Steven B. Prystowsky

APPEAL AND ERROR—APPORTIONMENT—AGAINST THE WEIGHT OF THE CREDIBLE EVIDENCE

The jury's finding plaintiff only 5 percent liable when he was injured after slipping and falling on a puddle of diesel fuel, which he noticed before the accident, was against the weight of the evidence:

> While the apportionment of fault is generally a matter for the jury, in this case the jury's apportionment of 95% of the fault in the happening of the accident to the defendant and 5% to the plaintiff was not based on a fair interpretation of the evidence and must be set aside. The plaintiff testified that he knew that diesel fuel is slippery, that he saw the puddle of diesel fuel as he was filling the truck, that the puddle was "very close and that he intentionally stepped into the puddle of diesel fuel." Under these circumstances, a fair interpretation of the evidence does not support the jury's determination that the plaintiff was only 5% at fault in the happening of the accident. Therefore, we reverse the judgment and remit the matter for a new trial.

Stoyanovskiy v. Amerada Hess Corporation, 286 A.D.2d 727, 730 N.Y.S.2d 172 (2d Dep't 2001).

APPEAL AND ERROR—PRESERVATION—NEW ARGUMENT

An appellate court will not hear arguments raised for the first time on appeal:

> These [new] arguments were not made before Supreme Court and are therefore unpreserved for appeal.

Bouchard v. Champlain Enterprises, Inc., 279 A.D.2d 935, 719 N.Y.S.2d 741 (3d Dep't 2001).

[EDITOR'S NOTE: There is a very narrow exception to this rule, which has been recognized by the Court of Appeals. If "facts found or conclusively proven do not justify the conclusions of law upon which a judgment rests, it is not too late to point out the error in an appellate court, even though the original error was due in whole or in part to lack of timely care or wisdom on the part of counsel." *Persky v. Bank of America National Association*, 261 N.Y. 212 (1933). See also Cohen, H. and Karger, A., *The Powers of the New York Court of Appeals*, at 627-628 (1992) [suggesting that, except in jury trials, "if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court"].

The exception, however, is qualified—that is, "where new contentions could have been obviated or cured by factual showings or legal countersteps, they may not be raised on appeal. But contentions which could not have been so obviated or cured below may be raised on appeal for the first time." *Telaro v. Telaro*, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920 (1969).

The Second Department has explained that since appellate review is limited to the record made at the *nisi prius* court, "new facts may not be injected at the appellate level." In *Block v. Magee*, 146 A.D.2d 730, 732, 537 N.Y.S.2d 215 (2d Dep't 1989), the court stated:

> This rule is inapplicable where the appellant is not injecting new facts, but is merely arguing questions of law.
>
> In any event, the rule is that an issue which was not raised before the *nisi prius* court is reviewable by this court if the question presented is one of law which appeared upon the face of the record and which could not have been avoided by [the respondent] if brought to [his] attention at the proper junction.

See also *Knickerbocker Field Club v. Site Selection Board of City of New York*, 41 A.D.2d 539, 339 N.Y.S.2d 485 (2d Dep't 1973) [appellant has a right to urge a proposition of law which appeared upon the face of the record and which could not have been avoided by respondents if brought to their attention at the proper juncture and that such a decisive argument should not be lost because of the error of petitioner's counsel in not raising it earlier]; *Oram v. Capone*, 206 A.D.2d 839, 615 N.Y.S.2d 799 (4th Dep't 1994) ["[a] question of law appearing on the face of the record may be raised for the first time on appeal if it could not have been avoided by the opposing party if brought to that party's attention in a timely manner"]; *G.O.V. Jewelry, Inc. v. United Parcel Service*, 181 A.D.2d 517, 581 N.Y.S.2d 33 (1st Dep't 1992) [plaintiff was not entitled to raise a new "argument for first time on appeal, since defendant would have had the opportunity to counter it factually had it been raised in the IAS court"]; *815 Park Ave.*

Owners, Inc. v. Fireman's Insurance Co. of Washington, D.C., 225 A.D.2d 350, 639 N.Y.S.2d 325 (1st Dep't 1996) [it is well settled that the failure to raise an issue on a motion for summary judgment, thus precluding the other party from submitting documentary evidence in opposition, forecloses its consideration for the first time on appeal]].

ATTORNEY-CLIENT—CONFLICT OF INTEREST—JOINT REPRESENTATION/DRIVER & PASSENGER

In a two-car collision, it was a conflict of interest for an attorney to represent both adult driver [father] and passenger [minor son]:

> Under the circumstances herein presented, it was improper, pursuant to DR 5-105 of the Code of Professional Responsibility (22 N.Y.C.R.R. 1200.24) for plaintiffs' law firm to represent both the father and the minor son. Although plaintiffs' law firm submitted a copy of a consent to joint representation and waiver of any and all conflict to the court below, said waiver and consent fails to satisfy the criteria set forth in DR 5-105(c) (22 N.Y.C.R.R. 1200.24). In light of said conflict of interest, plaintiffs' counsel is disqualified from representing either party. Moreover, the plaintiff father, by virtue of his conflict of interest, is precluded from acting as guardian of his son in the instant matter.

Ganiev v. Nazi, 189 Misc. 2d 83, 730 N.Y.S.2d 661 (App. Term 2d 2001).

AUTOMOBILES—REAR-END COLLISION—DEFENDANT'S VERDICT

Jury verdict in favor of defendant who struck plaintiff's truck in the rear was affirmed since the collision was attributable to other causes than defendant's negligence:

> At the time of the collision, plaintiff had stopped his truck for about 30 seconds to allow his helper to remove warning cones from the roadway. While a rear-end collision presents a prima facie case of negligence, here defendant driver in his duly credited testimony adequately explained the collision as having been attributable to causes other than negligence on his part. He testified that he was traveling below the speed limit when he first observed plaintiff about 50 feet away, stopped around the bend of a downhill curve in the roadway; defendant attempted to change lanes, and, when he could not do so, slammed on his brakes, skidding into plaintiff on the wet pavement.

Torres v. WABC Towing Corp., 282 A.D.2d 406, 724 N.Y.S.2d 49 (1st Dep't 2001).

[EDITOR'S NOTE: The trial court's refusal to charge Vehicle and Traffic Law § 1129 [tailgating] was not error because there was no evidence that the accident was the result of tailgating. In addition, the jury was probably influenced by the trial court's charging federal regulations requiring stopped commercial vehicles to activate hazard lights and requiring trucks to be equipped with certain emergency equipment (49 C.F.R. § 392.22 and 393.95)].

AUTOMOBILES—VICARIOUS LIABILITY/VTL § 388—LOADING AND UNLOADING

A vehicle's owner can be vicariously liable under section 388(1) for injuries resulting from a permissive user's negligent loading and unloading:

> Notably, the statute has not been limited to situations where the vehicle is in motion. The inclusion of loading and unloading of a vehicle within the statute's protections thus also fits logically with previous interpretations of the law and continues to fulfill the primary legislative objective, which is "to provide recourse to an injured party against a person, financially able to respond, without whose conduct in permitting use of the vehicle the accident would not have happened."

Argentina v. Emery World Wide Delivery Corp., 93 N.Y.2d 554, 693 N.Y.S.2d 493 (1999).

[EDITOR'S NOTE: The court also declared that under VTL § 388(1) it is not necessary that the vehicle be the proximate cause of the injury before the vehicle's owner may be held vicariously liable. The court distinguished VTL § 388 from the line of no-fault cases that held that where a person's injuries while unloading a truck were produced by an instrumentality other than the vehicle itself, the first-party benefits under the No-Fault Insurance Law were not available. See *Walton v. Lumbermens Mut. Cas. Co.*, 88 N.Y.2d 211, 644 N.Y.S.2d 133 (1996):

> The purpose of section 388(1) of the Vehicle and Traffic Law is different.

> Unlike the No-Fault Law, it is not meant to be an expedient in procuring coverage for losses due to motor vehicle use, but instead to ensure recourse to the vehicle's owner, a financially responsible party. Section 388(1) also seeks to discourage owners from permitting people who are irresponsible or who might engage in unreasonably dangerous activities to use their vehicles.
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> Furthermore, section 388(1) differs from Insurance Law § 5103(a)(1) in that it relies on the traditional limitation on recovery—proof of fault.
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> Having different purposes, section 5103(a)(1) of the Insurance Law and section 388(1) of the Vehicle and Traffic Law should not be interpreted identically. The touchstone of no-fault liability is loss from the use or operation of a vehicle regardless of fault. It was enacted to compensate for injuries without proving negligence. On the other hand, the touchstone of section 388(1) is injury resulting from the negligence in the use or operation of a vehicle. Here, it is uncontroverted for the purposes of this case that the truck was negligently loaded, a use contemplated by the Legislature. To read an additional limitation into section 388(1) and require that the vehicle itself be the instrumentality or a proximate cause of plaintiff's injury would tend to circumvent the statute's negligence requirement and unduly limit its intended beneficial purpose.]

CONTRIBUTION—ARTICLE 16—DEFENDANT—NONDELEGABLE DUTY

CPLR 1602(2)(iv) does not preclude apportionment where a defendant's liability arises from a breach of a nondelegable duty. Thus a municipality (the county of Nassau) whose liability arose from a breach of a nondelegable duty (to protect a prisoner) is entitled to have the jury apportion damages between the county and the assailant:

> Specifically, CPLR 1602(2)(iv) is a savings provision that preserves principles of vicarious liability. It ensures that a defendant is liable to the same extent as its delegate or employee, and that CPLR article 16 is not construed to alter this liability. . . . Similarly, CPLR 1602(2)(iv) prevents an employer from disclaiming respondeat superior liability under article 16 by arguing that the true tortfeasor was its employee. However, nothing in CPLR 1602(2)(iv) precludes a municipality, landowner or employer from seeking apportionment between itself and other tortfeasors "for whose liability [it] is not answerable."
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> * * *
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> We reject the interpretations of some courts holding that CPLR 1602(2)(iv) creates a non-delegable duty exception to article 16. None of these cases involve any meaningful analysis of CPLR 1602(2)(iv); rather, they assume, without explanation, that CPLR 1602(2)(iv) precludes application of CPLR 1601. As discussed above, that conclusion is incorrect.

Rangolan v. County of Nassau, 96 N.Y.2d 42, 725 N.Y.S.2d 611 (2001).

[EDITOR'S NOTE: In a case decided the same day, *Faragiano v. Town of Concord*, 92 N.Y.2d 776, 725 N.Y.S.2d 609 (2001), the court explained when a municipality is and is not entitled to contribution. In *Faragiano*, plaintiff was injured when his Jeep in which he was a passenger veered off the road and rolled over several times. Plaintiff sued the driver of the Jeep, the owner of a camper, which his Jeep struck, the contractor that resurfaced the road [Midplant Asphalt], and the town of Concord. The Court of Appeals held that the town of Concord, although it may be liable for a breach of nondelegable duty, is not precluded by CPLR 1602(2)(iv) from seeking apportionment between itself and other joint tortfeasors for whose liability it is not answerable:

> However, to the extent that plaintiffs alleged that the Town is vicariously liable for the negligence of defendant Midplant Asphalt in its resurfacing of the road, we note that CPLR 1602(2)(iv) precludes apportionment between them.]

CORPORATIONS—SHAREHOLDER LIABILITY/PIERCE THE CORPORATE VEIL

The court erred in failing to grant summary judgment to defendant shareholder of corporation, which may be liable to plaintiff for personal injuries when the brick parapet wall of the building it owned collapsed:

> An owner and shareholder of a corporation is not individually liable for the torts of that corporation unless it is established that complete domination was exerted by the owner or shareholder to commit a wrong against the one seeking to pierce the corporate veil. Where, as here, the corporation has insufficient assets or insurance to satisfy plaintiff's potential damages, that is not a basis upon which to impose a corporate liability on an individual owner or shareholder. Plaintiff must plead and prove with specific facts that the corporation has been used to conduct the personal business of the owner or shareholder, aside from the undercapitalization or insufficient insurance coverage. There is no showing that Dillenberger used his corporate position for "personal rather than corporate ends."

Brito v. DILP Corporation, 282 A.D.2d 320, 723 N.Y.S.2d 459 (1st Dep't 2001).

DAMAGES—CPLR 5501(C)—REASONABLE COMPENSATION

In reducing the jury award for future pain and suffering to plaintiff—a 30-year-old who fell 25 feet, fracturing two vertebrae but recovered and returned to his former employment without any major restriction—from $500,000 to $400,000, the Appellate Division, First Department, explained how it is charged by CPLR 5501(c) to review damages for inadequacy and excessiveness:

> The method of that review is to evaluate whether the appealed award deviates materially from comparable awards. Such a method cannot, due to the inherently subjective nature of noneconomic awards, be expected to produce mathematically precise results, much less a per diem pain and suffering rate. Our task necessarily involves identification of relevant factual similarities and the application of reasoned judgment.
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> * * *
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> No jury can determine the issue of material deviation and we cannot, consistent with CPLR 5501(c), attempt to use the rationale of deference to a jury verdict in resolving that issue when we are supposed to compare analogous verdicts.
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> * * *
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> Review of damage awards involves the use of two distinctly different standards. One . . . whether or not the verdict is supported by the evidence. Another line of inquiry, the review explicitly mandated by CPLR 5501(c) and upon which the arguments in this case have been based, requires us to determine what awards have been previously approved on appellate review and decide whether the instant award falls within those boundaries.
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> While 5501(c) review has of course been used as a control on "runaway juries", the vast bulk of decisions have involved fractional reductions as a by-product of greater scrutiny in a legislatively-mandated attempt to keep compensation reasonable and uniform.
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> * * *
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> If, for example, case comparison demonstrates that individuals with similar injuries but without the ability to return to work have received smaller awards, the appealed award deviates materially. Other factors which may affect the reasonableness of an award include the need for future surgery as well as the nature and severity of subjective pain.
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> * * *
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> Our logic is simple and straightforward. Other plaintiffs, unable to return to work, have received lesser compensation for analogous injuries. Under CPLR 5501(c) plaintiff's verdict is unreasonable since it deviates materially. Plaintiff's return to his demanding work duties, despite his continuing, constant pain, requires us to find the award for future pain and suffering deviates materially from what is reasonable compensation under the circumstances. In analogous cases involving spinal injuries, permanent pain and a loss of mobility, reasonable compensation has been found to be substantially less than that awarded by this jury even when those claimants were unable

> to return to work or manifested more serious pain. Unlike those claimants, plaintiff has returned to his former employment and performed his duties for years without limitation, does not require any surgery to correct whatever lasting effects of the accident remain and does not have the type of pain requiring ongoing recourse to medication.

Donlon v. City of New York, 284 A.D.2d 13, 727 N.Y.S.2d 94 (1st Dep't 2001).

[EDITOR'S NOTE: Justice Mazzarelli vigorously dissented, finding "little value" in "analogizing" plaintiff's circumstances to the court's other precedents, since those opinions lack sufficient detail to determine whether the analogy was valid:

> Modification of damages, which is a speculative endeavor, cannot be based upon case precedent alone, because comparison of injuries in different cases is virtually impossible.
>
> Comparison of cases is an even more tenuous endeavor for an appellate court because we are constrained to rely on what are often scant summary factual recitations in prior decisions.
>
> Most of the cases cited in the majority's decision in support of reducing the future pain and suffering award contain no information about the age of the plaintiff at the time of the accident, nor do they specifically discuss the value of expected future impairments accompanying degenerative conditions.
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> * * *
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> Thus there is little value to analogizing those cases to this case. Further, assuming, arguendo, that some comparison can be made between the plaintiff's injuries and the future pain and suffering expected in Adams, Brown and Orris, the awards in those cases should be discounted to reflect the years which have passed since those decisions were rendered.

Justice Mazzarelli concluded that the "more accurate method of awarding damages" is relying on a "jury's review of the facts of a specific case rather than an appellate court's comparison to precedent."]

DAMAGES—$9,535,193

A 31-year-old iron worker, who was injured when he fell from a ladder, is entitled to $9,535,193 as damages for personal injuries sustained, reduced by the trial judge. The jury award was $12,356,658:

> The evidence demonstrated that plaintiff faces a lifetime of constant pain and severe physical limitations only partially relievable by future medical procedures such as spinal fusion surgery and hip replacement. Finally, the awards for future economic loss and future medical expenses are amply supported by testimonial and/or documentary evidence, largely unrefuted, at trial.

Kirby v. Turner Construction Company, 286 A.D.2d 618, 730 N.Y.S.2d 314 (1st Dep't 2001).

[EDITOR'S NOTE: The breakdown of damages—the verdict and post-trial decision—is as follows:

	Jury	Court
Past damages		
Past pain and suffering	$1,500,000	$750,000
Past medicals	$61,000	$61,000
Past wage loss	$219,374	$219,374
Past—wife	$350,000	$100,000
Subtotal past	$2,130,374	$1,130,374
Future damages		
Future pain & suffering: 41.5 yrs.	$2,500,000	$1,250,000
Future medicals 41.5 yrs.	$1,307,830	$1,307,830
Future loss of earnings 25.6yrs.	$5,692,308	$ 5,692,308
Credit for future earnings—Alternative work 2.0 yrs.	($256,253)	($677,718)
Loss of pension 9.5 yrs.	$ 632,399	$632,399
Future—wife 41.5 yrs.	$350,000	$200,000
Subtotal past	$10,226,284	$8,404,819
Total damages	**$12,356,658**	**$9,535,193**]

DAMAGES—BRAIN INJURY—PARALYSIS—AROUND-THE-CLOCK CARE —EXCESSIVENESS

Plaintiff's award of $3,000,000 for past pain and suffering, $12,000,000 for future pain and suffering, and $23,000,000 for future medical care and life care expenses based on a 41-year life expectancy, deviated materially from what would be reasonable compensation based

upon the court's review of comparable cases with respect to past and future pain and suffering and to future medical and life care expenses.

The Appellate Division reduced plaintiff's award to $1,000,000 for past pain and suffering, $6,000,000 for future pain and suffering and $8,000,000 for future medical and life care expenses:

Rappold v. Snorac, Inc., 289 A.D.2d 1044, 735 N.Y.S.2d 687 (4th Dep't 2001).

[EDITOR'S NOTE: According to the opinion, plaintiff sustained the following damages: a severe brain injury that impaired cognitive function and most physical functions, resulting in the need for around-the-clock care. He is for the most part paralyzed on the left side of his body. He cannot feed or groom himself, walk, or use a motorized wheelchair because of his cognitive and/or physical limitations. He can speak only a few words, and he communicates by blinking his eyes, making hand gestures, and shaking his head. He is aware of the effect of his injuries on his life and recognizes that he cannot return to law school. He also recognizes that he can no longer engage in athletics or play the piano, activities that he enjoyed prior to the accident.]

DAMAGES—FAILURE TO MITIGATE—VOCATIONAL REHABILITATION

The court did not err in instructing the jury that plaintiff was obligated to mitigate his damages by seeking vocational rehabilitation:

> We also reject plaintiff's argument that inasmuch as his position was that he was no longer able to work, it was error for the trial court to charge that he was obligated to mitigate damages by seeking vocational rehabilitation. On the issue of plaintiff's ability to work, as the others, credibility issues were raised, warranting a charge on the general legal duty to mitigate damages by seeking vocational rehabilitation.

Thompson v. Port Authority of NY and NJ, 284 A.D.2d 232, 728 N.Y.S.2d 15 (1st Dep't 2001).

DAMAGES—PAIN AND SUFFERING—DUTY TO MITIGATE

The Court of Claims erred in limiting damages for plaintiff's pain and suffering based upon its finding that claimant's pain could have been avoided or reduced had he made a timely decision to change his lifestyle by giving up dairy farming and becoming a farming equipment salesperson and that this failure constituted a breach of his duty to mitigate his damages:

> As a general rule, "a party who claims to have suffered damage by the tort of another is bound 'to use reasonable and proper efforts to make the damage as small as practicable' and if an injured party allows the damages to be unnecessarily enhanced, the incurred loss justly falls upon him."
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> * * *
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> In our view, the record demonstrates that having made significant adjustments to reduce the stress on his spine, it was not unreasonable for claimant to continue his livelihood of farming and, indeed, it was unreasonable for the Court of Claims to require that he completely change his occupation. In fact, this Court is unaware of any case law requiring changes in lifestyle and occupation to the extent effectively required by the Court of Claims. We find that the court's presumptions that other jobs and, in particular, selling farm equipment, were available to claimant on a full-time basis and would not have aggravated the stress on claimant's thoracic spine are speculative and not supported by any medical testimony or any other part of the record.

Novko v. State of New York, 285 A.D.2d 696, 728 N.Y.S.2d 259 (3d Dep't 2001).

DAMAGES—PAIN AND SUFFERING—$46,219,000 REDUCED TO APPROXIMATELY $9,000,000

Plaintiff, who suffered brain damage during a medical procedure, was awarded $46,219,000, including $6,000,000 and $25,000,000 for past and future pain and suffering, respectively. The gross award was reduced by the trial judge to $12,076,000; past pain and suffering to $2,000,000 and future pain and suffering to $8,000,000. The Appellate Division, First Department, further reduced the future pain and suffering award to $4,500,000.

Weinstein v. New York Hospital, 280 A.D.2d 333, 720 N.Y.S.2d 475 (1st Dep't 2001).

[EDITOR'S NOTE: $6,500,000 for past and future pain and suffering appears to be one of the largest awards for conscious pain and suffering sanctioned by an appellate division.

Previously in *Bermeo v. Atakent*, 241 A.D.2d 235, 671 N.Y.S.2d 727 (1st Dep't 1998), plaintiff was awarded $45,295,573. This consisted of $1,600,000 for 16 years of past pain and suffering, $7,875,000 for 62 years of future pain and suffering, $4,070,573 for 29.8 years of loss of earning capacity, $252,000 for future physician services and medical equipment, $472,000 for future physical and occupational therapy and $31,026,000 for future group home care for 63 years.

The Appellate Division, First Department, reduced this award to a total of $8,700,000. The $31,026,000 award for future group home care was reduced to $3,150,000, the past and future pain and suffering of $9,475,000 was reduced to $4,750,000 ($1,600,000 for past pain and suffering and $3,150,000 for future pain and suffering).

In *Andree v. Winthrop Univ. Hospital*, 277 A.D.2d 625, 715 N.Y.S.2d 658 (1st Dep't 2000), judgment of $7,5000,000 was affirmed, which included $1,000,000 for past pain and suffering, $1,160,900 for future pain and suffering, $1,392,950 for future medical expenses and equipment, $1,392,950 for future physical and occupational therapy, $2,321,000 for future custodial care and $232,200 for impairment of earning capacity.

In the Second Department, see *Brown v. City of New York*, 275 A.D.2d 726, 713 N.Y.S.2d 222 (2d Dep't 2000), where the award sustained was $18+ million, including $1,000,000 for past pain and suffering and $3,000,000 for future pain and suffering.]

DAMAGES—REASONABLE—LEG AMPUTATION—$7,663,078

Award of $7,663,078, including $2,000,000 and $3,600,000 for past pain and suffering to plaintiff for amputation above the knee of her right leg, was reasonable:

> Nor do the damages for an amputation above the knee of plaintiff's right leg deviate from what is reasonable compensation under the circumstances.

Hoenig v. Shyed, 284 A.D.2d 225, 727 N.Y.S.2d 80 (1st Dep't 2001).

[EDITOR'S NOTE: This award is consistent with the First Department's orders in *John v. City of New York*, 236 A.D.2d 210, 652 N.Y.S.2d 15 (1st Dep't 1997), affirming an award of $6,500,000 for past and future pain and suffering (amputation of both legs below the knee) and *Sladick v. Hudson General Corporation*, 226 A.D.2d 263, 641 N.Y.S.2d. 270 (1st Dep't 1996), affirming an award of $7,500,000 for past and future pain and suffering (amputation of plaintiff's leg eight inches above the knee, deterioration of parts of his surviving leg, and plaintiff's numerous operations). In *Walker v. Zdanowitz*, 265 A.D.2d 404, 696 N.Y.S.2d 509 (2d Dep't 1999), the Second Department reduced an award of $7,000,000 to $5,300,000 ($2,500,000 for past pain and suffering, $1,500,000 for future pain and suffering, and $1,300,000 for future medical expenses). Defendants failed to timely diagnose plaintiff's suffering from peripheral vascular disease resulting in both of her legs being amputated].

DAMAGES—TRAUMATIC BRAIN INJURY—PAST PAIN AND SUFFERING—$1,000,000/NOT EXCESSIVE

Damage award of $1,000,000 for past pain and suffering to pedestrian who suffered traumatic brain injury when struck by a truck was not excessive:

> Although defendants maintain that the jury verdict as to past pain and suffering is excessive, in view of the extensive medical opinion offered at trial that plaintiff had, in the subject accident, suffered a traumatic brain injury, termed a diffuse axonal injury, which caused post-accident brain-function deficits, we do not find that the jury's award for past pain and suffering materially deviates from reasonable compensation. The jury was free to reject defendants' evidence that plaintiff's post-accident deficits were not accident related, but attributable to alcohol abuse, depression and attention deficit disorder.

Roness v. Federal Express Corporation, 284 A.D.2d 208, 726 N.Y.S.2d 645 (1st Dep't 2001).

EVIDENCE—ADMISSION—EMPLOYEE—HEARSAY

Admission by unidentified Wal-Mart employee who told husband of slip and fall plaintiff that "I told somebody to clean up this mess," is not admissible as a spontaneous declaration. In reversing the Appellate Division, Third Department, the Court of Appeals stated:

> The Appellate Division erred, however, in concluding that the testimony was admissible because there was "no evidence to suggest that the statement was anything other than a spontaneous declaration." That conclusion improperly shifted the burden of establishing the exception to the hearsay rule. Because in this case plaintiff failed to show that

> at the time of the statement the declarant was under the stress of excitement caused by an external event sufficient to still her reflective faculties and had no opportunity for deliberation, the statement should not have been admitted as a spontaneous declaration.

Tyrrell v. Wal-Mart Stores, Inc., 97 N.Y.2d 650, 737 N.Y.S.2d 43 (2001).

EVIDENCE—BLOOD ALCOHOL CONTENT

Absent proof when plaintiff's blood alcohol content measurement was taken, the trial court correctly excluded defendant's expert witness from testifying:

> The court properly disallowed expert evidence regarding the plaintiff's blood alcohol content (hereinafter BAC) at the time of the accident in the absence of any proof as to when the BAC measurement was taken. Under this circumstance, there was no basis for the expert's "relation back" testimony and any conclusions as to the plaintiff's BAC level at the time of the occurrence would have been purely speculative.

Shea v. New York City Transit Authority, 289 A.D.2d 558, 735 N.Y.S.2d 609 (2d Dep't 2001).

EVIDENCE—CPLR 3101(d)(1)—EXPERT DISCLOSURE NOTICE

Defendants were entitled to a new trial, the lower court having erred in admitting into evidence defendants' CPLR 3101(d)(1); the prejudice from the erroneous admission of the notices was substantial:

> Defendants' CPLR 3101(d)(1) expert disclosure notices, which were not drafted by defendants' experts but by defendants' attorneys, were not admissible as prior inconsistent statements of the experts. Nor were they admissible as judicial admissions since "[s]uch statements are not sworn, as are interrogatory answers, affidavits, trial or pretrial testimony, nor are they in the nature of pleadings, to be used for any purpose against a party."

Veneski v. Queens Long Island Medical Group, 285 A.D.2d 369, 727 N.Y.S.2d 105 (1st Dep't 2001), WL 748187.

EVIDENCE—HEARSAY—NON-ADMISSIBLE

In a medical malpractice action, the IAS Court correctly ruled, before it set aside the verdict, that plaintiff's cousin could not testify that she spoke to a 17-year-old school intern, present in the operating room, who said that an anesthesia technician, Debra Fader, stated that plaintiff Nucci's hypoxia was the result of defendant Dr. Proper's inattention or the inattention of the OR staff:

> Reliability is the sum of the circumstances surrounding the making of the statement that render the declarant worthy of belief. Relevant factors include "spontaneity, repetition, the mental state of the declarant, absence of motive to fabricate, . . . unlikelihood of faulty recollection and the degree to which the statement was against the declarant's. . . . Courts have also "considered the status or relationship to the declarant of the person to whom the statement was made . . ., whether there was a coercive atmosphere, whether it was made in response to questioning and whether the statements reflect an attempt to shift blame or curry favor."
>
> In stark contrast to the out-of-court statements at issue in *Letendre* [*v. Hartford Accid. & Indem.*, 21 N.Y.2d 518, 289 N.Y.S.2d 183 (1968)], there are no indicia of reliability here. The proffered statements were not made in writing or under oath. They were made several days after the incident occurred at a gathering of Nucci relatives and their friends and they were reported by Osborne, who, as Nucci's first cousin, may have had a strong motive to shade her testimony. Some of the statements involved double hearsay, e.g., what Osborne heard Higgins say concerning Faver's statements. Furthermore, Higgins was a young, inexperienced high school student with no medical training. Indeed, plaintiffs acknowledge that Higgins was not an agent of the hospital, such that any statement she made could properly be considered a declaration against interest.
>
> In light of these circumstances, a significant probability exists that the statements may implicate the dangers of the

> declarant's faulty memory or perception, insincerity, or ambiguity—traditional testimonial infirmities which the hearsay rule is designed to guard against. Furthermore, the statements may have been misunderstood, or incorrectly reported. These infirmities are not cured simply by Higgins' presence at trial and her availability for cross-examination because Higgins denied making those statements plaintiffs deemed crucial to their case. Thus, we reject plaintiffs' argument that Osborne's testimony is admissible under *Letendre*.

Nucci v. Proper, 95 N.Y.2d 597, 721 N.Y.S.2d 593 (2001).

EVIDENCE—STATEMENT/UNIDENTIFIED EMPLOYEE

Plaintiff did not raise a question of fact in opposing defendant's motion for summary judgment concerning actual or constructive notice of a hazardous condition with a statement by unidentified employee:

> Alleged statements by unidentified employees of defendant purportedly made to plaintiff, that they had seen the foreign substance on the floor prior to the incident and had asked someone to clean it up, were not competent evidence to defeat defendant's summary judgment motion since, *inter alia*, the alleged statements were not shown to have been made within the scope of the employees' authority.

Pascarella v. Sears, Roebuck & Co., 280 A.D.2d 279, 720 N.Y.S.2d 461 (1st Dep't 2001).

EVIDENCE—X-RAY— CPLR 4532—ADMISSIBILITY

The court erred in permitting an X-ray of the plaintiff's lungs to be placed in evidence requiring reversal of plaintiff's verdict:

> In order to lay a proper foundation for the admission of X-rays of a party into evidence, CPLR 4532-a requires that the X-ray be inscribed with the name of the patient, the date taken, the identifying number, and the name and address of the physician under whose supervision it was taken. Since the subject X-ray did not conform to these requirements, it should have been excluded. Moreover, we are not persuaded that the admission of the X-ray into evidence was harmless error. During the testimony of the plaintiffs' expert physician, the X-ray was displayed to the jury, and the physician used the X-ray to demonstrate to the jury the alleged abnormalities in Aguirre's lung fields which supported his diagnosis of asbestosis.

Aguirre v. Long Island Rail Road Company, 286 A.D.2d 658, 730 N.Y.S.2d 122 (2d Dep't 2001).

INDEMNITY—COMMON-LAW INDEMNITY—OWNER/GENERAL CONTRACTOR/SUBCONTRACTORS

Even though the school district (owner) is vicariously liable for plaintiff's injuries under the Labor Law and is entitled to full common-law indemnification from the "actor who caused the accident," it is not entitled to a conditional judgment of common-law indemnification against subcontractor (Gebhardt) where another party may also be responsible for the accident:

> "[W]here more than one party might be responsible for the accident, summary judgment granting indemnification against one party is improper." The record establishes that defendant Diamond Roofing Company, Inc. (Diamond) may be responsible in part for the accident. Diamond directed the work of the roofers, including plaintiff, and failed to provide safety devices. Thus, the School District's cross motion was premature and we modify the order accordingly.

Doherty v. Palmyra-Macedon Central School District, 286 A.D.2d 950, 730 N.Y.S.2d 760 (4th Dep't 2001).

INSURANCE—BREACH OF CONTRACT TO PURCHASE INSURANCE—DAMAGES LIMITED TO LOSS ACTUALLY SUFFERED

Landlord, who purchased general liability insurance, is limited in his breach of contract action against the tenant for failure to purchase insurance covering the landlord to recovering only out-of-pocket expenses, such as premiums and any additional costs incurred, including co-payments and increased future premiums:

> The landlord obtained its own insurance and therefore sustained no loss beyond its out-of-pocket costs.
>
> * * *
>
> Under settled contract principles, however, the landlord—the only appellant

> before us—is entitled to be placed in as good a position as it would have been had the tenant performed. Its recovery is limited to the loss it actually suffered by reason of the breach. . . . Contrastingly, the common-law collateral source rule is inherently a tort concept. It has a punitive dimension that does not comport with contract law. Contract damages, unlike tort damages, are limited to the economic injury caused by the breach.

Inchaustegui v. 666 5th Avenue Limited Partnership, 96 N.Y.2d 111, 725 N.Y.S.2d 627 (2001).

INSURANCE—BREACH OF CONTRACT TO PURCHASE INSURANCE—DAMAGES

Contractor, who had purchased its own insurance, can recover from his subcontractor based on breach of contract for failing to purchase insurance. Recovery is limited to the full cost of insurance and any out-of-pocket expenses incurred incidental to the policy and any increase in future insurance premiums resulting from the present liability claim:

> Turner [contractor] does not dispute that it was covered by its own insurance covering the risk for which Northberry [subcontractor] was supposed to obtain insurance. Therefore, the proper measure of Turner's recovery from Northberry would be the full cost of insurance to Turner, including, to the extent pertinent, the premiums it paid for its own insurance, any out-of-pocket costs that may have been incurred incidental to the policy, and any increase in its future insurance premiums resulting from the present liability claim.

Sheppard v. Blitman/Atlas Building Corp., 288 A.D.2d 33, 734 N.Y.S.2d 1 (1st Dep't 2001).

[EDITOR'S NOTE: This is the first decision applying the holding of *Inchaustegui v. 666 5th Avenue Limited Partnership*, 96 N.Y.2d 111, 725 N.Y.S.2d 627 (2001), to a construction contract.]

INSURANCE—INSURED CONTRACTS

Insurance company is obligated to defend and indemnify the owner of a building [MAS] because (a) the tenant's lease required it [Elm] to procure insurance and (b) the insurance policy that Elm procured obtained insured contracts:

> Since the insurance contract between Elm and Hartford Insurance Company required Hartford to defend and indemnify "any . . . organization with whom [Elm] agreed, because of a written contract or agreement or permit to provide insurance," the Supreme Court also correctly granted summary judgment declaring that Hartford is obligated to defend and indemnify MAS.

Wilson v. Commercial Envelope Mfg. Co., Inc., 286 A.D.2d 731, 730 N.Y.S.2d 352 (2d Dep't 2001).

INSURANCE—NO FAULT—SERIOUS INJURY—HERNIATED DISC—MRI

Plaintiff's MRI of the cervical spine, which revealed two protruding discs, according to his physician, Dr. Berkowitz, was sufficient to raise a question of fact to rebut plaintiff's *prima facie* showing that upon examination, plaintiff had full range of motion with no evidence of herniated discs:

> Whether a herniated disc satisfies the "serious injury" threshold is a question for the trier of facts. An MRI constitutes objective evidence providing an ample medical foundation in support of a patient's subjective complaints of extreme pain, and thus raises a triable issue on the question of "serious injury."
>
> Dr. Berkowitz' affidavit was drawn not only from Stuart's [plaintiff] subjective expressions of pain, but more importantly, from an evaluation of his medical records, including the MRI. Under these circumstances, the motion court could not conclude, as a matter of law, that Stuart had not suffered serious injury as a result of the accident.

Lesser v. Smart Cab Corp., 283 A.D.2d 273, 724 N.Y.S.2d 412 (1st Dep't 2001).

INSURANCE—NO FAULT—LOSS OF USE/BODY ORGAN—TOTAL

A party seeking to meet the no-fault threshold when claiming "permanent loss of use of a body organ, member, function or system" must prove "total" loss of use, not partial. The court rejected plaintiff's argument that under the statute, limitation of the use of plaintiff's arm itself qualifies as "permanent loss of use of a body member, body function and body system":

> First, the statute speaks in terms of the loss of a body member, without qualification. Thus, the legislative intent is shown in the actual wording of the statute. Second, requiring a total loss is consistent with the statutory addition, in 1977, of the categories "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system." Had the Legislature considered partial losses already covered under "permanent loss of use," there would have been no need to enact the two new provisions.

Oberly v. Bangs Ambulance Inc., 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001).

[EDITOR'S NOTE: Plaintiff, a dentist, claimed he suffered from chronic ulnar neuropathy resulting in loss of nerve fibers innervating ulnar hand and forearm muscles in his right arm, resulting in a permanent, partial loss of use of his right arm. Plaintiff claimed that his injuries would interfere with the fine motor movements his profession requires. Plaintiff abandoned any claim concerning "permanent consequential limitation" or "significant limitation of use of a body function or system." Plaintiff only lost three weeks of work following the accident. There was no evidence that his injuries required him to limit his dental practice or other day-to-day activities in any meaningful way.]

INSURANCE—NO FAULT—SERIOUS INJURY—POST-TRAUMATIC STRESS DISORDER (PTSD)

Evidence of plaintiff's post-traumatic stress disorder, sustained as a result of a car accident, was sufficient to establish a *prima facie* case of serious injury within the meaning of the no-fault law, despite the absence of testimony concerning diagnostic testing:

> Plaintiff established a prima facie case, sufficient to permit the issue to be submitted to the jury, by the testimony of his treating psychiatrist who based his opinion on a review of plaintiff's full history and on the fact that he suffered such symptoms as anxiety, nightmares, sleep disturbance, hyperarousal, hypervigilance, fear, depression, anger, preoccupation with his physical condition and impotence. Moreover, it was his orthopedist's observation of plaintiff's emotional overlay that prompted the original reference to his treating psychiatrist in 1987, resulting in the original working diagnosis of PTSD and his continuous treatment from that day to the present for this condition. Some of plaintiff's symptoms were capable of being objectively observed by his treating physicians and some were objectively established by his testimony and that of his wife, especially with respect to hyperarousal (collapsing in a theater while viewing a car chase scene), hypervigilance (constantly talking to drivers of other automobiles when he is driving), and withdrawal (sleeping in, and otherwise spending too much time of his day in, a "therapeutic" chair). In our view, this evidence sufficiently established both a permanent loss of use of a body function or system, (given the chronic nature of the problem) and a significant limitation of use of a body function or system and provided a medical foundation for plaintiff's complaints of psychological trauma for the jury's consideration, and not based simply on his subjective complaints.

Chapman v. Capoccia, 283 A.D.2d 798, 725 N.Y.S.2d 430 (3d Dep't 2001).

INSURANCE—NO FAULT—SERIOUS INJURY—SIGNIFICANT LIMITATION/USE/BODY FUNCTION—90/180 DAY LIMITATION

Plaintiff's failure to oppose defendant's threshold motion with "competent medical evidence based upon objective medical finding and tests to support his claim of serious injury and to connect the condition to the accident" warranted summary judgment dismissing his complaint:

> Defendant presented evidence that chest, cervical spine and lumbosacral spine X rays and a head CAT scan taken at the emergency room immediately after the accident were all negative, and an examination revealed no neurological deficits. A January 1998 MRI of plaintiff's neck and February 1998 electrophysiologic studies including EMG's and nerve conduction studies produced normal results. The affidavit memorializing a December 1998 independent medical examination by a Board-certified neurologist revealed no head or cranial nerve abnormalities or neurological deficits, noting only plaintiff's subjective complaints of extreme

pain. This evidence amply satisfied defendant's initial burden of demonstrating that plaintiff did not sustain a serious injury.

* * *

Other than his own EBT testimony regarding his treatment, injuries and limitations, plaintiff relied solely on the January 2000 affidavit of his treating physician, Honorio Dispo, who first examined him in September 1997, diagnosing a "musculoligamentous injury to the neck and interscapular area and post traumatic bilateral carpel tunnel syndrome." Dispo opined in his affidavit, without explanation, that the injuries were causally related to the December 1996 motor vehicle accident and left plaintiff "temporarily totally disabled." Dispo's affidavit reflects that he treated plaintiff until March 1998, noted plaintiff's ongoing complaints of severe pain and reported at the follow-up visits continuing palpable spasms, multiple areas of painful trigger points, tightness on palpation, numbness on pin-prick of both arms and hands and limited range of motion, and continued his temporary total disability assessment. There is no indication that Dispo ever examined plaintiff after the last follow-up visit in March 1998 and before he prepared his January 2000 affidavit. Dispo concluded his 2½ page affidavit by reciting the entire statutory definition of "serious injury" found in Insurance Law § 5102(d) and opining in conclusory fashion that plaintiff sustained an unspecified serious injury within that definition.

The court further noted:

A "significant" limitation of use requires something more than a minor limitation of use, and plaintiff's subjective complaints of pain and medical opinions based thereon are not sufficient to establish a serious injury. Plaintiff's evidentiary submissions in opposition in general, and Dispo's affidavit in particular, did not set forth competent medical evidence based on objective findings and diagnostic tests sufficient to overcome defendant's proof and create a triable factual issue on his claim that he sustained a "significant limitation of use of a body function or system."

Blanchard v. Wilcox, 283 A.D.2d 821, 725 N.Y.S.2d 433 (3d Dep't 2001).

[EDITOR'S NOTE: The court also rejected plaintiff's claim of serious injury—he was prevented from performing substantially all of the material acts which constitute . . . his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

Aside from plaintiff's EBT testimony detailing his claimed inability to work or engage in any normal activities since the accident, plaintiff failed to provide sufficient medical evidence to confirm the existence of a medically determined injury attributable to the accident during the 90/180-day statutory period; he likewise failed to support the conclusion that the restrictions on his activities during that period were medically indicated and casually related to the injuries sustained in the accident.]

JUDGMENT—SPOLIATION

Fire insurer's subrogation action against electrical company for negligently performing electrical work causing plaintiff's insured house to burn down was properly dismissed because plaintiff's investigator destroyed the circuit panel alleged to be defective:

Where, as here, a party destroys key physical evidence "such that its opponents are 'prejudicially bereft of appropriate means to confront a claim with incisive evidence,'" the spoliator may be punished by the striking of its pleading. The sanction of striking a pleading may be applied "even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation." The plaintiff intentionally ordered the destruction of the circuit panel in the course of gathering evidence for a potential subrogation action, and the defendants have been prejudiced by the destruction of this key item of physical evidence. Accordingly, dismissal of the plaintiff's complaint was an appropriate remedy.

New York Central Mutual Fire Ins. Co. v. Turnerson's Electric, Inc., 280 A.D.2d 652, 721 N.Y.S.2d 92 (2d Dep't 2001).

LEGAL MALPRACTICE—CONTINUOUS REPRESENTATION DOCTRINE

It was error for the Appellate Division, Second Department, to dismiss a legal malpractice action (failure to timely commence a breach of contract action) when the attorney was contacted before the statute of limitations expired, and he avoided his client's inquiries regarding the status of the matter. The court found that there was continuous representation similar to the continuous treatment doctrine applicable to medical malpractice:

> "Continuous representation" in the context of a legal malpractice action does not automatically come to an end where, as here, pursuant to a retainer agreement, an attorney and client both explicitly anticipate continued representation. Plaintiffs retained defendant for the sole purpose of pursuing their specific contract claim. Thus, upon signing the retainer agreement, plaintiffs and the defendant reasonably intended that their professional relationship of trust and confidence—focused entirely upon the very matter in which the alleged malpractice was committed—would continue. Indeed, even in his letter to the Grievance Committee, defendant acknowledged that his services had been retained specifically to "investigate, research and prosecute their claim against Fleisher"—the equivalent of a "course of treatment" in the legal malpractice context. Moreover, like the "timely return visit instigated by the patient" in *McDermott* [*v. Torre*, 56 N.Y.2d 399, 452 N.Y.S.2d 352 (1982)], plaintiffs' attempt to contact defendant on at least one occasion, in October of 1996, inquiring about the status of their case and requesting a letter in response, confirms this understanding and supports application of the doctrine here. Accordingly, this case appears to fall well within that realm of continuous professional services already recognized by this Court in the medical malpractice context.

Shumsky v. Eisenstein, 96 N.Y.2d 164, 726 N.Y.S.2d 164 (2001) *rvsg*, 270 A.D.2d 245, 704 N.Y.S.2d 113 (2d Dep't 2000).

LIENS—PERSONAL INFANT—MEDICAID—RECOUPMENT—SOCIAL SERVICES LAW § 104(2)

Social Services Law § 104(2), which limits the amount a public welfare official may recoup from an infant who receives public assistance benefits, does not apply to settlements in personal injury actions involving infants since the right to recover from responsible third parties is not derived from section 104 but rather from Medicaid's own assignment, subrogation and recoupment provisions:

> The agencies have broad authority under those provisions [*see* Social Services Law § 366(4)(h)(1); § 367-a(2b); 18 NYCRR 360-7.4(a)(6)] to satisfy the lien from the entire amount of the personal injury judgment or settlement. Contrary to appellants' contention, our holding does not read the limitation in section 104(2) out of existence. This case involves unique recoupment provisions specific to Medicaid, while section 104(1) continues to be a recoupment mechanism when other forms of public assistance are involved. Thus, when public welfare officials rely solely on section 104(1), the limitation in section 104(2) continues to apply.

Gold v. United Health Services Hospitals, Inc., 95 N.Y.2d 683, 723 N.Y.S.2d 117 (2001).

MASTER SERVANT— SCOPE OF EMPLOYMENT—VACATION/DELIVERY OF CHRISTMAS GIFT

Defendant Pepsi-Cola Company, whose sales representative [Traver], while on vacation and using his own vehicle to deliver a Christmas gift to the manager of one of the major stores in his territory, is not entitled to summary judgment when Traver's vehicle collided with plaintiff's vehicle; there is an issue of fact whether he was acting in the "scope of employment" at the time of the accident:

> The issue whether an employee was acting in the "scope of employment" at the time of an accident is "heavily dependent on factual considerations" and thus the issue is ordinarily one for the trier of fact. Here, there is an issue of fact whether Traver was conducting a personal errand at the time of the accident or whether he was acting in furtherance of defendant's business

> purposes, giving rise to respondeat superior liability on the part of defendant.

Virtuoso v. Pepsi-Cola Company, 286 A.D.2d 868, 730 N.Y.S.2d 601 (4th Dep't 2001).

MOTIONS—EXPERT AFFIDAVIT—NO PRIOR CPLR DISCLOSURE

The court correctly considered plaintiff's expert's witness affidavit in opposing defendant's motion for summary judgment although plaintiff failed to comply with CPLR expert disclosure:

> The motion court properly considered the affidavit of plaintiff's expert witness in opposition to summary judgment, notwithstanding plaintiff's failure to disclose the expert's identity previously pursuant to CPLR 3101(d)(1)(I), there being no showing of willfulness in or prejudice caused by the failure to disclose earlier.

Downes v. American Monument Co., 283 A.D.2d 256, 724 N.Y.S.2d 610(1st Dep't 2001).

MOTIONS—REARGUMENT

The IAS Court abused its discretion in granting reargument when it was based on a new theory of law not previously argued:

> A motion for reargument is addressed to the discretion of the court and is designed to afford a party an opportunity, inter alia, to show that the court misapplied the law. However, it is not designed to offer a party an opportunity to argue a new theory of law not previously advanced by it. Accordingly, the Supreme Court should not have granted any part of the plaintiff's motion for reargument.

Frisenda v. X Large Enterprises Inc., 280 A.D.2d 514, 720 N.Y.S.2d 187 (2d Dep't 2001).

MOTIONS—SUMMARY JUDGMENT—GOOD CAUSE

Plaintiff's inability to depose New York State auditor for more than 120 days after filing Note of Issue under order permitting further discovery is a valid excuse for plaintiff's late filing of summary judgment motion:

> A trial court has discretion to consider a motion for summary judgment made more than 120 days after the filing of the note of issue for "good cause shown." Good cause to entertain a belated motion for summary judgment may be established by demonstrating (1) reasonable excuse for the delay, (2) arguable merit, and (3) the absence of prejudice.

Slate v. State of New York, 284 A.D.2d 767, 728 N.Y.S.2d 523 (3d Dep't 2001).

NEGLIGENCE—DUTY—BUSINESS INTERRUPTION

Victims [business and area residents] of building collapse who were required to close their businesses and evacuate the area because of the existing dangers of construction collapses cannot recover for their "economic loss" based upon negligent and public nuisance absent personal injury or property damage:

> As we have many times noted, foreseeability of harm does not define duty. Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm. This restriction is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act. . . . Landowners, for example, have a duty to protect tenants, patrons and invitees from foreseeable harm caused by the criminal conduct of others while they are on the premises, because the special relationship puts them in the best position to protect against the risk. That duty, however, does not extend to members of the general public. Liability is in this way circumscribed, because the special relationship defines the class of potential plaintiffs to whom the duty is owed.

532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc., 96 N.Y.2d 280, 727 N.Y.S.2d 49 (2001).

[EDITOR'S NOTE: The court also dismissed plaintiff's public nuisance claim, finding that the plaintiffs did not suffer a special injury beyond that of the community:

While not as widespread as the transit strike [*see Burns Jackson Miller Summit & Spitzer v. Lindner*, 59

N.Y.2d 314, 464 N.Y.S.2d 712 (1983)], the Madison Avenue and Times Square closures caused the same sort of injury to the communities that live and work in those extraordinarily populous areas. As the trial court in *Goldberg Weprin & Ustin* [*v. Tishman Constr. Corp.*] pointed out, though different in degree, the hot dog vendor and taxi driver suffered the same kind of injury as the plaintiff law firm. Each was impacted in the ability to conduct business, resulting in financial loss. When business interference and ensuing pecuniary damage is "so general and widespread as to affect a whole community, or a very wide area within it, the line is drawn." While the degree of harm to the named plaintiffs may have been greater than to the window washer, per diem employee or neighborhood resident unable to reach the premises, in kind the harm was the same.]

NEGLIGENCE—DUTY—INNKEEPER—NEARBY BEACH CONDITIONS

Hotel, who encouraged its guests to use nearby public beach, had no duty to warn of rip tides resulting in a guest's death. Moreover, the hotel had no duty to discover the actual condition of the land under water at the beach, even though it encouraged and facilitated the use of the beach:

> In support of her claim for a duty to warn of surf conditions, Darby [plaintiff] emphasizes that the hotel encouraged and facilitated use of the beach by providing beach towels, umbrellas and security escorts across the highway. Providing these services, however, does not make the hotel the insurer of its guests' safety at a locale over which it has no control. Moreover, that the hotel chose to warn its guests of the risks of sun exposure and crime does not create any duty to warn against hazards of the sea. While it may well have been good practice, it would be inapt to require such a warning merely because the hotel facilitated beach use and provided other warnings.
>
> * * *
>
> This Court has never gone so far as to hold that a hotel owner or innkeeper has a duty to warn guests as to the danger of using an off-premises beach under these circumstances. We decline to impose one. A duty of this kind would create the prospect of unlimited responsibility to warn of all manner of risks and hazards over which innkeepers have no control. It is the very sort of liability we rejected in *Pulka* [*v. Edelman*, 40 N.Y.2d. 781, 390 N.Y.S.2d 393 (1976)] when we held that the "liability potential would be all but limitless and the outside boundaries of that liability, both in respect to space and the extent of care to be exercised, particularly in the absence of control, would be difficult of definition."

Darby v. Compagnie National Air France, 96 N.Y.2d 343, 720 N.Y.S.2d 731 (2001).

NEGLIGENCE—LABOR LAW § 240(1)—FALLING ASBESTOS

Plaintiff, injured by falling asbestos from several chemical tanks, has a cause of action under Labor Law § 240(1) even though the asbestos was, as planned, purposefully released and allowed to fall to a targeted area below that had been cleared of workers:

> The falling asbestos that struck Roberts was inadequately secured thus creating a risk covered by Labor Law § 240(1). We further conclude that any number of the safety devices enumerated in the statute, had they been furnished, would have prevented the dangerous free fall of the asbestos without unduly impeding the progress of the work that Roberts and his co-workers were engaged in at the time of the accident. Consequently, the failure to provide any safety device was a proximate cause of the accident.

Roberts v. General Electric Company, 282 A.D.2d 791, 723 N.Y.S.2d 243 (3d Dep't 2001).

[EDITOR'S NOTE: The Court of Appeals reversed, 97 N.Y.2d 737, 742 N.Y.S.2d 188 (2002), agreeing with the two dissenters that plaintiff was not injured by an object that was "improperly hoisted or inadequately secured" so as to trigger the strict liability of Labor Law § 240(1):

> Here, the asbestos "that fell on plaintiff was not a material being hoisted or a load that required security for the purposes of the undertaking at the time it fell, and thus Labor Law § 240(1) does not apply. . . . This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected." Accordingly, there was no basis for liability pursuant to Labor Law § 240(1).]

NEGLIGENCE—LABOR LAW § 240(1)—FALLING OBJECT

Worker whose right arm was severely cut by a falling large piece of glass from an adjacent window frame on the building when he was removing a steel window frame but who did not fall from a ladder cannot invoke Labor Law § 240(1):

> Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.
>
> * * *
>
> Thus, for section 240(1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute . . . The hazard posed by working at an elevation is that, in the absence of adequate safety devices (e.g., scaffolds, ladders), a worker might be injured in a fall. By contrast, falling objects are associated with the failure to use a different type of safety device (e.g., ropes, pulleys, irons) also enumerated in the statute. Because the different risks arise from different construction practices, the hazard from one type of activity cannot be "transferred" to create liability for a different type of accident.
>
> Applying these principles to the facts in Narducci, the glass that fell on plaintiff was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell, and thus Labor Law §240(1) does not apply. No one was working on the window from which the glass fell, nor was there evidence that anyone worked on that window during the renovation. The glass that fell was part of the preexisting building structure as it appeared before work began. This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected.
>
> * * *
>
> The absence of a necessary hoisting or securing device of the kind enumerated in Labor Law §240(1) did not cause the falling glass here. This was clearly a general hazard of the workplace, not one contemplated to be subject to Labor Law §240(1).
>
> * * *
>
> Thus, since the ladder had no legally sufficient causal connection to this injury, it could not be deemed "inadequate" under these facts.

Narducci v. Manhasset Bay Associates, et al., 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001), *rvsng*, 270 A.D.2d 60, 704 N.Y.S.2d 233 (1st Dep't 2000).

[EDITOR'S NOTE: The Appellate Division, in denying defendant's motion for summary judgment, concluded

> While plaintiff concededly did not fall from his elevated position; plaintiff was injured by an object that fell from an elevated worksite.

The First Department was also influenced by the fact that one of the contractors testified that a scissor jack—a type of hydraulic platform—to perform the work would be needed. In fact, ultimately plaintiff was given a scissor jack.

The Court of Appeals rejected this argument:

> Plaintiff argues that if he had performed the task of a scissor jack it might have prevented the accident since he would have performed his work horizontally instead of vertically and, as a result, would been in a different location when the glass fell. Also plaintiff asserts that a scissor jack might have protected him from falling glass. As noted, however, a scissor jack is designed to protect the worker falling, an entirely different risk. Here, plaintiff was adequately secured. The only risk was the glass. Since the glass was not an object being hoisted or secured, Labor Law §240(1) does not apply.

The two dissenting judges pointed out that Labor Law § 240(1) liability is not present where the injury is caused by a separate danger totally unrelated to the very "risk brought about and need for the safety device in the first instance."

In a companion case, *Capparelli v. Zausmer Frisch Associates, Inc., et al.*, 96 N.Y.2d 259, 37 N.Y.S.2d 727 (2001), *affg*, 256 A.D.2d 1141, 682 N.Y.S.2d 751 (4th Dep't 1998), the Court of Appeals also held that Labor Law § 240(1) does not apply where plaintiff did not fall from a ladder when he was struck by a lighting fixture which cut his right hand and wrist.

The Court of Appeals noted that the ceiling that plaintiff was working at was ten (10) feet high while the ladder he was given was eight (8) feet tall. Plaintiff was standing no less than halfway up the ladder when the light fixture fell on his arm causing the injury. In affirming, the Court of Appeals reasoned:

> Under these undisputed facts, there was no height differential between plaintiff and the falling object. Plaintiff was working at ceiling level when his accident occurred. That being so, this is not a case that entails the hazards presented by "a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." The fact that gravity worked upon this object which caused plaintiff's injury is insufficient to support a section 240(1) claim.
>
> While many workplace accidents, including this one, could be classified as "gravity-related" occurrences stemming from improperly hoisted or inadequately secured objects, courts may nonetheless distinguish those occurrences that do not fit within the Legislature's intended application of Labor Law §240(1). The exclusion made for the de minimus elevation differential in this case is appropriate.]

NEGLIGENCE—LABOR LAW § 240(1)—FALLING SAFETY DEVICE—12 FEET

Plaintiff was entitled to partial summary judgment under Labor Law § 240(1) when one of his co-workers dropped his end of a scaffold pick that he and plaintiff were carrying up the ladder. The pick, which was at a height of approximately 12 feet, fell and struck plaintiff on the shoulder:

> Supreme Court properly granted plaintiffs' motion for partial summary judgment on liability pursuant to Labor Law § 240(1). Plaintiff sustained injuries as the result of being struck by an object that was being improperly hoisted to a level above the level at which plaintiff was working. Additionally, Labor Law § 240(1) protects workers, not only from the dangers of building materials falling from elevated worksites, but also from dangers associated with safety devices or pieces thereof falling and striking them.

Micoli v. City of Lockport, 281 A.D.2d 881, 721 N.Y.S.2d 891 (4th Dep't 2001).

NEGLIGENCE—LABOR LAW § 240(1)—OWNER

Owners, who lease land and did not own the building erected on their land, are liable under Labor Law § 240(1) as owners notwithstanding that they had leased the land and did not own the building:

> Liability under Labor Law § 240(1) may lie against the owner of land on which a building is located, even though the owner leased the land to another and did not own the building itself. Here, the Moriellos own the land beneath the building where the accident occurred, a fact which is sufficient to establish their liability pursuant to Labor Law § 240(1). Since their liability rests upon their ownership of the land, whether they "had contracted for the work or benefited from it is legally irrelevant." The Moriellos are "owners" for the purposes of ascertaining their liability pursuant to the Labor Law.

Mejia v. Moriello, 286 A.D.2d 667, 730 N.Y.S.2d 131 (2d Dep't 2001).

NEGLIGENCE—LABOR LAW § 240(1)—ROUTINE MAINTENANCE

Plaintiff, who was replacing a broken fluorescent light ballast and fell from a ladder when he was hit by a falling object, is not protected under Labor Law § 240(1):

> Contrary to the conclusion of the Supreme Court, the activity in which Sanacore was engaged when he fell constituted mere routine maintenance. Therefore, that branch of the defendants' motion which was for summary judgment dismissing the cause of action based on Labor law § 240(1) should have been granted.

Sanacore v. Solla, 284 A.D.2d 321, 725 N.Y.S.2d 383 (2d Dep't 2001).

NEGLIGENCE—MUNICIPAL LIABILITY—TRAFFIC PLANNING—REJECTION/PRIVATE STUDY RECOMMENDING TRAFFIC LIGHT

Nassau County was not liable in a wrongful death action for failing to install a traffic light for cars turning left to enter shopping center's driveway notwithstanding that a private engineering firm, commissioned by shopping center, recommended a traffic signal:

> A recommendation from a private engineering firm that a signal be installed at a particular location does not, itself, raise a triable issue of fact. As we noted in *Weiss* [*v. Fote*, 7 N.Y.2d 579, 200 N.Y.S.2d 409 (1960)], something more than a choice between conflicting opinions of experts is required before a governmental body may be held liable for negligently performing its traffic planning function. The plaintiff must show not merely that another option was available but also that the plan adopted lacked a reasonable basis. Plaintiff did not make this showing. To the contrary, the County adequately demonstrated that its decision not to install a traffic signal was based on a weighing of factors that implicated broader concerns than those addressed in the PSC study, and summary judgment dismissing the complaint was properly granted.

Affleck v. Buckley, 96 N.Y.2d 553, 732 N.Y.S.2d 625 (2001).

NEGLIGENCE—NEGLIGENT ENTRUSTMENT—EXPLOSIVE NAIL GUN

Infant plaintiff, who was entrusted by his father with a hammer and a container of nails which included an "explosive nail gun cartridge," has a cause of action against his father for injuries sustained after he struck the cartridge with the hammer, and the cartridge exploded:

> While a child may not sue a parent for negligent supervision, the infant plaintiff possesses a cognizable claim that his injuries were proximately caused by the defendant's alleged breach of a duty of care owed to the world at large, one that exists outside of, and apart from, a family relationship. "The duty not to negligently maintain explosives is a duty owed to all and is not simply a duty emanating from the parent child relationship."

Hoppe v. Hoppe, 281 A.D.2d 595, 724 N.Y.S.2d 65 (2d Dep't 2001).

NEGLIGENCE—PREMISES—FLOOR DEPRESSION—¾ TO 1 INCH DEEP DEFECT

The IAS court correctly denied landlord's motion for summary judgment where plaintiff claimed he fell on a depression that was designed to hold a mat, allegedly measuring ¾ to 1 inch deep and four-feet square. The question whether the defect was trivial was for the jury. The mat had been missing for years:

> Under the circumstances of this case, there exists a triable issue of fact as to whether the depression in the floor, without a mat, constituted a dangerous or defective condition. While injuries resulting from trivial defects are not actionable, in determining whether a defect is trivial, a court must examine all the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place and circumstances. Furthermore, there is an issue of fact as to whether the alleged defect was so open and obvious that it did not create an unreasonable risk of harm.

Smith v. A.B.K. Apartments, Inc., 284 A.D.2d 323, 725 N.Y.S.2d 672 (2d Dep't 2001).

NEGLIGENCE—PREMISES—NOTICE—SUMMARY JUDGMENT

In a lead paint poisoning case, a triable issue of fact is raised when plaintiff shows that the landlord: (1) retained a right of entry to the premises and assumed a duty to make repairs; (2) knew that the apartment was constructed at a time before lead-based interior paint was banned; (3) was aware that paint was peeling on the premises; (4) knew of the hazards of lead-based paint to young children; and (5) knew that a young child lived in the apartment:

> In Chapman . . . the landlord [was] aware that, due to its age, the premises probably contained lead paint and, that ingestion of lead paint chips posed a health hazard to young children. The landlord further admitted awareness that young children lived in the apartment and that there had been complaints about chipped and peeling paint. Under these circumstances, a jury could reasonably infer that the landlord, at the least, *should have known*

of the hazardous lead paint condition. (Emphasis in original).

* * *

We decline to impose a new duty on landlords to test for the existence of lead in leased properties based solely upon the "general knowledge" of the dangers of lead-based paints in older homes. . . . We hold only that a landlord who actually knows of the existence of many conditions indicating a lead paint hazard to young children may, in the minds of the jury, also be charged constructively with notice of the hazard.

* * *

By contrast, in *Stover*, there is no record evidence that the landlord was on actual or constructive notice of a chipped or peeling paint condition inside the apartment. The landlord had entered to make repairs to the bedroom door and toilet and had repaired holes in a stairway wall—a common area of the building never identified as a source of lead contamination. The evidence is insufficient to raise an issue of fact as to whether the landlord in *Stover* should have known of a lead paint condition.

Chapman v. Silber, 97 N.Y.2d 9, 734 N.Y.S.2d 541 (2001).

NEGLIGENCE—PREMISES OWNER—INTERVENING AND SUPERSEDING ACT

Plaintiff's failure to look through apartment door peephole or to inquire who was at the door is not an independent intervening act that, as a matter of law, absolved defendants of responsibility especially where there was a question of fact whether defendants had taken minimal security precautions to prevent plaintiff's assailant from entering the building:

> On a motion for summary judgment, a plaintiff need only raise a triable issue of fact regarding whether defendant's conduct proximately caused plaintiff's injuries. Here, questions of fact remain as to whether defendants negligently failed to exclude Toole [rapist]. The record reveals that Toole, who had relatives residing in the complex, had been involved in several criminal acts in the complex, including robbery, attempted rape and the beating of a security guard; that he had been arrested on the premises; and that defendants kept an arrest photo of him. We cannot conclude as a matter of law that Toole's involvement in criminal activity on the premises was not a significant foreseeable possibility. More discovery is warranted to discern how foreseeable a risk he was and what measures defendants had in place to deal with him.
>
> Finally, we agree with the Appellate Division majority that, on the facts of this case, plaintiff's opening of her apartment door without looking through the peephole or inquiring who was there was not an independent intervening act that, as a matter of law, absolved defendants of responsibility.

Mason v. U.E.S.S. Leasing Corporation, 96 N.Y.2d 875, 730 N.Y.S.2d 770 (2001).

NEGLIGENCE—PREMISES OWNER—OPEN AND OBVIOUS—EMPLOYED TO SURVEY BUILDING

Plaintiff, whose employer was hired by the New York City Housing Authority to conduct a survey concerning renovating an abandoned building, cannot sue the Housing Authority for injuries sustained when he slipped and fell on stairway debris because plaintiff was aware of the existence of substantial debris in the building before he fell:

> Liability under a theory of common law negligence will not attach when the allegedly dangerous condition of which a plaintiff complains was open and obvious, particularly where, as in the instant case, the plaintiff was actually aware of the condition.

The court also rejected plaintiff's claim that he is entitled to sue because the Housing Authority violated the Administrative Code:

> The plaintiffs' claims pursuant to the City Administrative Code and Municipal Dwelling Law should also be dismissed. The plaintiffs' sole purpose in the building was to complete the necessary survey so that renovations to bring the building into compliance with all applicable codes and ordinances could commence. Since the plaintiff's accident was caused by the defects he was present to remedy, he

> may not recover pursuant to the Administrative Code of the City of New York or the Multiple Dwelling Law for the Authority's alleged failure to provide him with a safe work place.

Bojovic v. New York City Housing Authority, 284 A.D.2d 356, 726 N.Y.S.2d 444 (1st Dep't 2001).

NEGLIGENCE—PREMISES OWNER—OPEN AND OBVIOUS—UNINSULATED OVERHEAD ELECTRIC WIRES

Plaintiff, who was injured when he climbed a tree on defendant's property and touched an electric transmission wire suspended through the tree, cannot recover for failure to warn the tenant of the dangers presented by the wires:

> We have held that a landowner has no duty to warn of an open and obvious danger. By contrast, a latent hazard may give rise to a duty to protect entrants from that danger. While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence.

Tagle v. Jakob, 97 N.Y.2d 165, 737 N.Y.S.2d 331 (2001).

[EDITOR'S NOTE: Not every case where the danger is open and obvious is plaintiff's action dismissed. In *Chambers v. Povich*, 285 A.D.2d 440, 726 N.Y.S.2d 725 (2d Dep't 2001), the IAS Court dismissed plaintiff's complaint based upon an open and obvious condition. Plaintiff was seated in the audience of the Maury Povich Show when a chair slipped off a platform, causing her to fall into the aisle. In reinstating plaintiff's cause of action, the court stated:

> The case before us presents precisely that situation. The photograph of the tree and wires taken from the backyard—stipulated by plaintiff at argument to be an accurate portrayal of the scene at the time of the accident—shows two electric wires running above the ground, entering the property, passing into the tree, leaving the tree, and then exiting the property. Any observer reasonably using his or her senses would see the wires and the tree through which the wires passed. It is unimaginable that an observer could see the wires entering and leaving the tree and not know that the wires passed through it. In short, there is nothing that Jakob knew or should have known that was not readily obvious to the tenant. We conclude that, as a matter of law, Jakob had no reason to expect that the tenant would not observe the hazard or any conceivable risk associated with it. We therefore hold that Jakob had no duty to warn the tenant of that hazard.]

NEGLIGENCE—PROXIMATE CAUSE

The jury's determination that defendant, who struck plaintiff's vehicle making a left turn from a dedicated turn lane, was negligent but that his negligence was not a proximate cause of plaintiff's injuries, cannot be reconciled with the evidence presented at trial. In reversing judgment in favor of defendant and ordering a new trial, the court noted:

> Although plaintiff's acknowledgement that she failed to look out for oncoming traffic before initiating her turn would have provided a basis for finding that she was negligent, it could not have had had the effect of eliminating defendant's negligence as a proximate cause of the accident. In our estimation, no view of the evidence would support the conclusion that plaintiff's conduct was so extraordinary or unforeseeable as to make it unreasonable to hold defendant responsible for the resulting damage.

Petrone v. Mazzone, 284 A.D.2d 634, 725 N.Y.S.2d 752 (3d Dep't 2001).

NEGLIGENCE—*RES IPSA LOQUITUR*—COLLAPSING BOOKSHELVES—SUBLESSOR

Plaintiff cannot invoke the theory of *res ipsa loquitur* against sublessor when she was injured by bookshelves that collapsed while cleaning an office:

> [The theory of res ipsa loquitur is warranted] only when a plaintiff can establish that: (1) the accident is of a kind that ordinarily does not occur in the absence of negligence; (2) the agency or instrumentality causing the accident was in the exclusive control of the defendant; and (3) the accident was not due to any voluntary action or contribution by the plaintiff. Here, the plaintiff failed to establish the second ele-

ment of "exclusive control." The evidence did not fairly rule out the chance that the accident was caused by some means other than the respondent's negligence.

Criales v. Two Penn Plaza Associates, 287 A.D.2d 534, 731 N.Y.S.2d 236 (2d Dep't 2001).

NEGLIGENCE—SHOPPING CART—INFANT SEAT—WARNING

Storeowner, whose shopping cart was not defective and contained warning signs that it should not be used to carry children while shopping, is not liable to 17-month-old infant injured when he stood up and fell over the side of the cart. Although plaintiff's mother knew that the shopping carts were not equipped with child safety seats, she contended that there were no signs on the cart referring to the hazards which could be encountered by placing children in the cart. The court rejected this argument:

> Viewing the evidence in the light most favorable to plaintiffs, the parties opposing the motion, we fail to find any "fact[][or] condition[] from which defendant['s] negligence can be reasonably inferred."
>
> Even if the cart contained no warning, Bazan admitted that she knew that it had no child safety seat and fully acknowledged the potential danger to her child. Finally, had we determined that the absence of a child safety seat in such cart created a defect, there still would have been no duty to warn Bazan of the danger in using such cart for child since such "defect" was open and obvious.

Bazan v. Rite Aid of New York, 279 A.D.2d 762, 718 N.Y.S.2d 487 (3d Dep't 2001), *lv. to appeal dnd.*, 96 N.Y.2d 709, 726 N.Y.S.2d 373 (2001).

PLEADING—ASSUMPTION OF RISK

Defendant's failure to assert assumption of risk as an affirmative defense precluded the trial court's declining to consider this defense against plaintiff, who tripped in a two-inch deep hole in a concrete surface of the defendant's school yard while jogging in preparation for a touch football game:

> Assumption of the risk is an affirmative defense which is deemed waived if not specifically pleaded.
>
> Under the circumstances of this case, we reject the defendant's argument that the affirmative defense of the plaintiff's culpable conduct is sufficient to plead assumption of the risk. Assumption of the risk "in this form is really a *principle of no duty*, or no negligence and so *denies the existence of any underlying cause of action*." Unlike the defense of a plaintiff's culpable conduct, the defense of assumption of the risk, where sustained, renders irrelevant any consideration of comparative fault and bars recovery against the defendant.

Charnovesky v. City of New York, 283 A.D.2d 385, 724 N.Y.S.2d 199 (2d Dep't 2001), *lv. to appeal dnd.*, 96 N.Y.2d 720, 733 N.Y.S.2d 372 (2001).

PRE-TRIAL DISCOVERY—DEFAULT—INQUEST

The trial court erred in refusing to permit defense counsel to participate in an inquest after defendant defaulted in answering and plaintiff was awarded judgment on liability and the matter set down for an inquest on the issue of damages:

> It is well settled that a defaulting defendant is entitled to present testimony and evidence and cross-examine the plaintiff's witnesses at the inquest on damages. The trial court improperly refused to allow defense counsel, who appeared at the inquest, to participate.
>
> * * *
>
> We note that at the inquest the plaintiff is required to establish the extent of the damages that he sustained.

Godwins v. Coggins, 280 A.D.2d 582, 720 N.Y.S.2d 809 (2d Dep't 2001).

[EDITOR'S NOTE: At one time, defendants were permitted to conduct pre-trial discovery on plaintiff's damages before the inquest. See *Ayala v. Boss*, 120 Misc. 2d 430, 466 N.Y.S.2d 128 (S. Ct., Bronx Co. 1983). Both the First and Second Departments now hold that a defendant who defaults has "forfeited his right to take the plaintiff's deposition" and a defaulting defendant will not be permitted to conduct discovery of the plaintiff to prepare for an inquest appearance. See *Yeboah v. Gaines Service Leasing*, 250 A.D.2d 453, 673 N.Y.S.2d 403 (1st Dep't 1998) and *Santiago v. Siega*, 255 A.D.2d 307, 679 N.Y.S.2d 341 (2d Dep't 1998)].

PRE-TRIAL DISCOVERY—MARKED OFF—CPLR 3404—MOTION TO RESTORE

Plaintiff, who moved within one year from the date her case was marked off the calendar under CPLR 3404 to restore it to the trial calendar, need only request that the case be restored:

> There was no obligation to demonstrate a reasonable excuse, meritorious action, lack of intent to abandon, and lack of prejudice to the defendants, or some lesser burden.

Basetti v. Nour, 287 A.D.2d 126, 731 N.Y.S.2d 35 (2d Dep't 2001).

PRE-TRIAL PROCEDURE—DISMISSAL—PRE-NOTE OF ISSUE—CPLR 3404

CPLR 3404 is not applicable to cases where no Notes of Issues have been filed. CPLR 3404 is reserved strictly for cases that have reached the trial calendar:

> The Supreme Court should not have marked the case "off" based upon the failure of the plaintiffs to appear at the conference on March 21, 1997. Rather, the court should have issued an order pursuant to section 202.27(c) dismissing the action in its entirety or directing the payment of a sanction by the plaintiffs and scheduling a final date for the completion of discovery.

Lopez v. Imperial Delivery Service, Inc., 282 A.D.2d 190, 725 N.Y.S.2d 57 (2d Dep't 2001).

[EDITOR'S NOTE: Both the First and Third Departments have followed suit. See *Johnson v. Sam Minskoff & Sons, Inc.*, 287 A.D.2d 233, 735 N.Y.S.2d 502 (1st Dep't 2001) and *McCarthy v. Jorgensen*, 158 A.D.2d 116, 737 N.Y.S.2d 290 (3d Dep't 2002).

In addition, where a case has been calendared and subsequently "marked off," if plaintiff moves within one year to restore the case to the calendar, plaintiff does not have to demonstrate a reasonable excuse, meritorious action, lack of intent to abandon and lack of prejudice to the defendants, or some lesser burden under *Basetti v. Nour*, 286 A.D.2d 126, 731 N.Y.S.2d 35 (2d Dep't 2001). This rule, however, does not apply where, in marking the case off the calendar, the parties stipulate to certain conditions, such as to serve complete expert disclosure, and the conditions are not met (*D'Ecclesiis v. Manna*, 389 A.D.2d 522, 735 N.Y.S.2d 618 (2d Dep't 2001)].

PRE-TRIAL PROCEDURE—VACATE NOTE OF ISSUE

Where plaintiff has incorrectly stated in a Certificate of Readiness that all physical examinations have been conducted and all medical reports have been exchanged when they were not, it was error for the IAS Court not to have vacated the Note of Issue:

> "We have repeatedly held that a note of issue should be vacated when it is based upon a certificate of readiness that contains erroneous facts" including an incorrect statement that all physical examinations and other discovery have been completed or waived.

Ortiz v. Arias, 285 A.D.2d 390, 727 N.Y.S.2d 879 (1st Dep't 2001).

PRODUCTS LIABILITY—CASUAL SELLER—DUTY—OPEN AND OBVIOUS CONDITION

Casual seller of a machine which injured plaintiff is not liable to plaintiff since there was no duty to warn of dangers open and obvious:

> The proof in the record belies plaintiffs' claim that the dangerous condition or defect which existed on the machine was anything other than the open and obvious danger of placing one's hand near an operating gear. Both Columbia's and Newark's management and employees, most of whom, including plaintiff, worked for both employers, were well aware of the specific danger posed by the machine as it was a topic of discussion at plant safety meetings and employee union meetings. The defect or dangerous condition here being open and obvious, Columbia was entitled to summary judgment dismissing plaintiffs' complaint sounding in negligence.

Frisbee v. Cathedral Corporation, 283 A.D.2d 806, 725 N.Y.S.2d 129 (3d Dep't 2001).

[EDITOR'S NOTE: In *Burns v. Haines Equipment, Inc.*, 284 A.D.2d 922, 726 N.Y.S.2d 516 (4th Dep't 2001], the court held that the absence of the safety guard was an open and obvious danger insulating the casual seller from liability:

> Here, the absence of the safety guard was an obvious and readily discernible defect.]

PRODUCTS LIABILITY—DUTY—HANDGUN MANUFACTURERS—MARKETING AND DISTRIBUTION OF HANDGUNS

Handgun manufacturers do not owe a duty of reasonable care in the marketing and distribution of their handguns to persons injured or killed through the use of illegally obtained handguns:

> We have been cautious, however, in extending liability to defendants for their failure to control the conduct of others. "A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control." This judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another.
>
> * * *
>
> The pool of possible plaintiffs is very large—potentially, any of the thousands of victims of gun violence. Further, the connection between defendants, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief. Such broad liability, potentially encompassing all gunshot crime victims, should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs. Giving plaintiffs' evidence the benefit of every favorable inference, they have not shown that the gun used to harm plaintiff Fox came from a source amendable to the exercise of any duty of care that plaintiffs would impose upon defendant manufacturers.

Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 727 N.Y.S.2d 7 (2001).

[EDITOR'S NOTE: The court also concluded that the manufacturers could not be held liable under the theory of negligent entrustment:

> The negligent entrustment doctrine might well support the extension of a duty to manufacturers to avoid selling to certain distributors in circumstances where the manufacturer knows or has reason to know those distributors are engaging in substantial sales of guns into the gun-trafficking market on a consistent basis. Here, however, plaintiffs did not present such evidence. Instead, they claimed that manufacturers should not engage in certain broad categories of sales. Once again, plaintiffs' duty calculation comes up short. General statements about an industry are not the stuff by which a common-law court fixes the duty point. Without a showing that specific groups of dealers play a disproportionate role in supplying the illegal gun market, the sweep of plaintiffs' duty theory is far wider than the danger it seeks to avert.

Finally, the court also held that the doctrine of market share liability, first adopted in *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 541 N.Y.S.2d 941 (1989), could not be applied to manufacturers:

> Unlike DES, guns are not identical, fungible products. Significantly, it is often possible to identify the caliber and manufacturer of the handgun that caused injury to a particular plaintiff.
>
> * * *
>
> We recognize the difficulty in proving precisely which manufacturer caused any particular plaintiff's injuries since crime guns are often not recovered. Inability to locate evidence, however, does not alone justify the extraordinary step of applying market share liability.
>
> * * *
>
> Rather, a more compelling policy reason—as was shown in the DES cases—is required for the imposition of market share liability.]

PRODUCTS LIABILITY—SUBSEQUENT ALTERATION

Plaintiff's employer's attaching a carbide-tipped blade—contrary to the manufacturer's warning—warranted summary judgment in favor of the manufacturer and distributor of a gasoline-powered saw:

> Prior to the plaintiff's use of the saw, his employer attached a carbide-tipped blade to it to use the saw to cut wood, despite warnings that the use of such a blade in the saw would lead to a kick-back.

Fraser v. Stihl Incorporated, 286 A.D.2d 661, 730 N.Y.S.2d 124 (2d Dep't 2001).

RELEASE—GENERAL—DRIVER—OWNER

Plaintiff passenger, who settled with driver, cannot sue vehicle owner after signing a general release that covered "all of the persons, firms or corporations liable or, who might be claimed to be liable" and was executed "for the express purpose of precluding forever any other or additional claims arising out of the aforesaid accident." In reversing the IAS Court, the Second Department held:

> General Obligations Law § 15-108(a) states, in pertinent part, that "[w]hen a party release is given to one of two or more persons liable or claimed to be liable in tort for the same injury it does not discharge any of the other tortfeasors from liability for the injury unless its terms expressly so provide." The statute does not demand that every discharged party be specifically named or identified. Here, contrary to the conclusion reached by the Supreme Court, we find that the language of the release was intended to expressly provide for the release of the appellant as the owner of the vehicle.

Tamayo v. Ford Motor Titling Trust, 284 A.D.2d 529, 726 N.Y.S.2d 709 (2d Dep't 2001).

SETTLEMENT—HIGH-LOW AGREEMENT—COMPARATIVE NEGLIGENCE

Plaintiff, who agreed to a high-low settlement of $900,000 high and $150,000 low "regardless of what the jury comes back with respect to that number" during jury deliberations and was awarded damages of $225,000 is only entitled to $150,000 under the agreement since the jury apportioned plaintiff 75 percent responsible:

> The issue on appeal is whether the phrase "anything the jury comes back with" should be interpreted, as plaintiff claims, as the gross figure arrived at by the jury without apportionment, or, as defendants claim, as calling for an award of the greater of either $150,000 or the amount plaintiff would have received had there been no high-low agreement ($56,250) up to a maximum of $900,000. The interpretation urged by defendants is by far the more reasonable, given that plaintiff's alleged fault for the accident was a substantial component of defendants' defense and an essential component of the jury's verdict, and the stipulation dictated into the record contained no language indicating that defendants were waiving the issue of comparative negligence. Of course, the result would be otherwise had the stipulation contained such language.

Batista v. Elite Ambulette Service, Inc., 281 A.D.2d 196, 721 N.Y.S.2d 355 (1st Dep't 2001).

TRIAL—CPLR ARTICLE 16—CHAPTER 7 BANKRUPTCY

Defendant is entitled to CPLR Article 16 equitable share allocation rights after the bankrupt, uninsured co-defendant chiropractor and his clinic were severed from the action:

> While the bankrupt defendants will not participate in the trial, equity requires that defendants-appellants have the benefit of CPLR Article 16 rights, even though there is an automatic stay by virtue of the bankruptcy. In accordance with the purpose of CPLR Article 16, if the defendants-appellants' culpability is 50% or less, their exposure for non-economic damages should be limited proportionately to their share of fault.

Kharmah v. Metropolitan Chiropractic Center, 284 A.D.2d 94, 733 N.Y.S.2d 165 (1st Dep't 2001).

TRIAL—CONTINUANCE

The trial court did not err in denying defendant an adjournment even though attorney was engaged in another trial, because there was another attorney in the firm who was competent and familiar with the case:

> Defendant's request to adjourn the trial based on his attorney's engagement in another trial was properly denied where the attorney's firm had at least one other attorney who was familiar with the case, and competent to take over the defense in this trial, and had sufficient time and warning of the con-

flicting engagements to prepare someone to do so (22 NYCRR 125.1[e][iv]).

Passaro v. New York Hospital-Cornell Medical Center, 289 A.D.2d 70, 734 N.Y.S.2d 39 (1st Dep't 2001).

TRIAL—DAMAGES—JOINT AND SEVERAL LIABILITY

The IAS Court erred in failing to submit jury interrogatories as to whether Western Products' negligent design of its snowplow, attached to a pickup truck that collided with an automobile, caused or enhanced plaintiff's son's separate and distinct head and leg injuries when the snowplow's hydraulic cylinder came loose and struck plaintiff's son's head. The court set aside the IAS Court order denying to hold the manufacturer jointly and severally:

> Here, . . . the evidence established that the head and leg injuries are each indivisible but separate and distinct from one another. Moreover, the evidence adduced at trial would have allowed the jury to find that the negligent design caused or contributed to either or both of those injuries. To the extent that the alleged negligent design of the snowplow attachment might have been found by the jury to have been a cause of all of the injuries, joint and several liability should have been imposed against the manufacturer for those injuries.
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> * * *
>
> In light of the evidence adduced and the parties' contentions at trial, the jury should have been asked to find whether the negligent design enhanced the head injuries, the leg injuries, or both.
>
> * * *
>
> If, on retrial, the jury finds that Western Products' negligence caused or enhanced the indivisible head injuries, then Western Products shall be jointly and severally liable for the damages allocated to the head injuries. If the jury finds that Western Products' negligence caused or enhanced the indivisible leg injuries, then Western Products shall be jointly and severally liable for the damages allocated to the leg injuries. If the jury finds that Western Products' negligence caused or enhanced both the head and leg injuries, then Western Products shall be jointly and severally liable for all damages attributable to the head and leg injuries.

Said v. Assaad, 289 A.D.2d 924, 735 N.Y.S.2d 265 (4th Dep't 2001).

[EDITOR'S NOTE: There was a strong dissent from Justice Hayes, who voted to reverse the order and hold Western Products' jointly and severally liable because the jury found (a) Western Products 5 percent liable and (b) the defect in the design of the snowplow attached to the pickup truck aggravated or enhanced the injuries of plaintiff's son:

> This is not a second collision case with successive tortfeasors. Rather, plaintiff's son was injured as the result of one collision between the vehicle driven by Gabriel Assaad and owned by Momdouth A. Assaad (Assaad defendants) and the pickup truck that was equipped with the snowplow attachment.

Furthermore, contrary to the majority's position, the proof did not establish that there was any reasonable way to allocate the causation of the injuries of plaintiff's son between Western Products or the Assaad defendants. Plaintiff's son sustained multiple injuries, including a skull fracture, a fractured leg, a fractured pelvis, a fractured elbow, a perforated hearing drum with resulting loss of hearing, and depression. The proof did not establish that those injuries could be divided.]

TRIAL—JURY INSTRUCTIONS—SIX-YEAR-OLD INFANT—MISSING WITNESS CHARGE

The trial court did not abuse its discretion in failing to give a missing witness charge concerning a six-year-old (2½ when injured) who is suing for damages sustained when her head became trapped between an amusement ride and a change machine at an amusement kiosk:

> Plaintiff's counsel made known before trial that the child would not testify. In fact, in his opening remarks to the jury, plaintiff's counsel specifically stated that it was "very unlikely" that the child would testify at trial. Given that scenario, defendant was free to subpoena the child and call her as its own witness, subject to a ruling as to her competency to testify.

Mahoney v. Namco Cybertainment Inc., 282 A.D.2d 949, 724 N.Y.S.2d 93 (3d Dep't 2001).

[EDITOR'S NOTE: The court also held that even if the failure to give a missing witness charge were error, it was harmless because it did not deprive the defendant of a fair trial:

> Notably, where a missing witness charge is to be given regarding an infant, it must also be coupled with "tender years" instruction to "the jury to consider the infant's age and the circumstances surrounding the accident in determining whether or not [it] deemed it appropriate in this case to invoke the permissible inferences authorized in such a charge." Thus, the degree of any potential adverse inference drawn by the jury to such a charge could be lessened . . . It was undisputed that the child had no recollection of the specifics of the event that occurred when she was 2½ years old. Significantly, plaintiff's damages claim centered on the personality changes that the child allegedly underwent following the accident. It appears that this child could not have provided any insight on this subject. Additionally, there was no real dispute at trial as to the child's symptoms, demeanor and school performance even though the experts disagreed as to their significance and causation. Given that the fact that it is not clear from this record that the child would have provided noncumulative material testimony, we conclude that the absence of the missing witness charge is not reversible error.]

TRIAL—JUROR MISCONDUCT—TAINTED VERDICT

Plaintiff is entitled to a new trial after juror stated during deliberations that plaintiff would receive the entire verdict in a lump sum, as she did, which he could invest because the jury awarded him $4,200,000, rather than $10,000,000. Five jurors, in their affidavits, averred that they thought that $4,200,000, if received in lump sum and invested, would generate $10,000,000:

> The jurors' belief was erroneous. Moreover, the jurors' consideration of this subject was at variance with the court's explicit instructions, which are dictated by statute to the effect that the jurors were to award plaintiff the full amount of his future damages, as found by them, without reduction to present value.
>
> In order to prevail upon a claim that the verdict was tainted by an improper outside influence, it is not necessary to demonstrate to a certainty that the outside influence worked to the prejudice of the complaining party. Rather, "the facts in each case 'must be examined to determine the nature of the material placed before the jury and the likelihood that prejudice would be engendered.'" Under the circumstances, we conclude that plaintiff has made a sufficient showing of improper external influence and prejudice.

Edbauer v. Bd. of Educ. Of North Tonawanda City School Dist., 286 A.D.2d 999, 731 N.Y.S.2d 309 (4th Dep't 2001).

TRIAL—JURY INSTRUCTIONS—COMPARATIVE NEGLIGENCE

The trial court erred in failing to instruct the jury as to plaintiff's comparative negligence where plaintiff was struck by an oncoming subway train after she apparently fell onto the tracks:

> Instruction on the question of comparative negligence should be given to the jury where there is any valid line of reasoning or permissible inferences which could possibly lead rational individuals to the conclusion of negligence on the basis of the evidence presented at trial. Furthermore, whether a plaintiff is comparatively negligent is almost invariably a question of fact and is for the jury to determine in all but the clearest cases. Based upon the evidence adduced in this case, it is far from certain that the plaintiff was free from negligence. At the very least, given that the trial testimony did not definitively establish how the plaintiff came to be upon the tracks, valid reasoning and permissible inferences could lead to the conclusion that the plaintiff's fall was due in part to her own negligence. In denying the defendant's request to charge comparative negligence, the court effectively directed a verdict on this issue in favor of the plaintiff, and thus deprived the defendant of the opportunity to have the triers of fact draw the inferences they could from the evidence presented.

Shea v. New York City Transit Authority, 289 A.D.2d 558, 735 N.Y.S.2d 609 (2d Dep't 2001).

TRIAL—JURY INSTRUCTION—EMERGENCY DOCTRINE—SUDDEN AND UNEXPECTED CIRCUMSTANCE

The IAS Court erred in instructing jury on the emergency doctrine concerning defendant's driving in frozen rain and hail conditions since he was not confronted by a "sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration" when his car slid 175 to 200 feet past the stop sign on a sheet of ice on a hill striking plaintiff's vehicle:

> We hold as a matter of law that there was no qualifying event which justified issuance of the emergency instruction. Given Sanzone's [defendant] admitted knowledge of the worsening weather conditions, the presence of ice on the hill cannot be deemed a sudden and unexpected emergency. Although Sanzone did not encounter patches of ice on the roadways before losing control of his vehicle, at the time of the accident the temperature was well below freezing and it had been snowing, raining and hailing for at least two hours. As such, there was no reasonable view of the evidence that would lead to the conclusion that the ice and slippery road conditions on the Foster Road slope were sudden and unforeseen. Defendants were not, therefore, entitled to an emergency instruction and the charge to the jury constituted reversible error under these circumstances.

Caristo v. Sanzone, 96 N.Y.2d 172, 726 N.Y.S.2d 334 (2001).

[EDITOR'S NOTE: The court also pointed out the trial judge's role "in assessing the propriety of an emergency charge request":

> We require the Judge to make the threshold determination that there is some reasonable view of the evidence supporting the occurrence of a "qualifying emergency." Only then is a jury instructed to consider whether a defendant was faced with a sudden and unforeseen emergency not of the actor's own making and, if so, whether defendant's response to the situation was that of a reasonably prudent person. The emergency instruction is, therefore, properly charged where the evidence supports a finding that the party requesting the charge was confronted by "a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration."]

TRIAL—JURY INSTRUCTION—VIOLATION OF NEW YORK ADMINISTRATIVE CODE PROVISION—EVIDENCE OF NEGLIGENCE

The IAS Court erred in granting plaintiff's motion for a directed verdict on liability based on defendant's violating section 27-531(a)(8)(d) of the New York City Administrative Code entitled "Seating and Assembly Spaces," which the court held constituted negligence *per se*.

Plaintiff claimed that the Administrative Code required a protective guard in the bleachers and there were none, resulting in his falling. The Court of Appeals in reversing, noted that "whether a section of the Administrative Code has the force of statute with respect to application does not determine its tort consequences":

> We hold that, for tort purposes, even a specific duty provision in the Administrative Code must be treated as any other local enactment if its status is that of a local law. The specific nature of the duty imposed does not ameliorate the concerns expressed in *Major* [*v. Waverly & Ogden*, 7 N.Y.2d 332, 197 N.Y.S.2d 165 (1960)] that only an enactment of the Legislature can alter the State common law of negligence.

Elliott v. City of New York, 95 N.Y.2d 730, 724 N.Y.S.2d 397 (2001).

[EDITOR'S NOTE: The court acknowledged that in tort cases such as *Guzman v. Haven Plaza Housing Dev. Fund Co.*, 69 N.Y.2d 559, 565 n.3, 516 N.Y.S.2d 451 (1987) and *Bittrolff v. Ho's Dev. Corp.*, 77 N.Y.2d 896, 899, 568 N.Y.S.2d 902 (1991), the Administrative Code provisions were given statutory treatment and violations were held to be negligent *per se*. The court did not explain why the violations in *Guzman* and *Bittrolff* were negligent *per se* except to note that

> characterizing the vast multitude of ordinances that have been adopted by New York City as State statutes would result in considerable fragmentation and uncertainty in the application of the common law of our State.

Elliott was cited in overturning a plaintiff's verdict in *Huerta v. New York City Transit Auth.*, 290 A.D.2d 333, 735 N.Y.S.2d 5 (1st Dep't 2001), where the trial judge

charged the jury that if the Transit Authority violated any provisions of the Administrative Code requirements and that that violation was a proximate cause of the injury to plaintiff, it would have to find it liable as a matter of law. This was error since any Building Code violation is merely evidence of negligence].

WITNESSES—PRIVILEGE

There is no confidentiality in communication to a social worker unless the social worker is certified:

> [P]etitioner asserts that he was unable to effectively cross-examine F & CS's social worker and the mother about the content of counseling sessions because Family Court ruled that the social worker's notes were privileged pursuant to CPLR 4508(a). This ruling was error since the social worker in question was not certified.

Matter of Shane "MM" v. Family and Children Services, 280 A.D.2d 699, 720 N.Y.S.2d 219 (3d Dep't 2001).

WORKERS' COMPENSATION—CO-EMPLOYEE

Plaintiff, employed by Giamboi Brothers, Inc. ("GBI"), a closely-held family corporation, is barred under the Workers' Compensation Law from maintaining an action for damages for injuries sustained while working at the home of GBI's chairman of the board and principal shareholder. The evidence demonstrated that on the day of the accident, a GBI foreman directed plaintiff to work at defendant's residence and that he was paid his standard union wages for the work performed:

> Workers' compensation qualifies as an exclusive remedy when both the plaintiff and the defendant are acting within the scope of their employment, as coemployees, at the time of injury. Specifically, "a defendant, to have the protection of the exclusivity provision, must . . . have been acting within the scope of . . . employment and not have been engaged in a willful or intentional tort." Parties are coemployees in "all matters arising from and connected with their employment." Furthermore, coemployee status survives "[r]egardless of [the employer's] status as an owner of the premises where the injury occurred." Thus, a corporate principal's ownership of the premises does not negate the coemployee relationship.

Macchirole v. Giamboi, 97 N.Y.2d 147, 736 N.Y.S.2d 660 (2001).

In Memoriam

Anthony J. DeMarco, Jr.

6/27/28 – 7/17/02

On April 13, 2002, the Executive Committee established The Anthony J. DeMarco Best Advocate Award by a unanimous vote.

At the time, Tony was a patient at Staten Island University Hospital, suffering from myriad problems, having undergone several skin grafting procedures to cover open wounds, all of which failed. Subsequently, he had a femoral to popliteal artery bypass which led to an improvement in circulation.

We did not know then that Tony would die of complications of his illness within the next few months, on July 17, 2002. Tony did not know that I had proposed the award to honor him permanently by perpetuating his name. If he had, he would have said "NO!" in a resounding voice.

Knowing this about Tony, why did we honor Tony in this way?

In 1975, I proposed that the Section establish The Trial Lawyer's Cup and Scholarship Award to promote the teaching of trial advocacy in the law schools of this state. There was to be a Cup that rotated among winners, to be held in trust by the law school in this state whose team placed highest in the National Trial Competition which was sponsored by The Texas Young Lawyers Association. Initially the cash stipend was $3,000,which was to be used by the school to promote trial advocacy. Team members received individual silver "keeper" cups suitably engraved.

In 1977, the first year the Cup was awarded, it was given to a team from Syracuse University School of Law, which included a future Chair of this Section, Mae D'Agostino. During the next two years we experienced some difficulties in administering the program. In 1979, we were invited, by the Texas Young Lawyers Association, to assume a more active role and to become the sponsor of the Region II competition, which included New York, New Jersey and Connecticut. In the debate that followed, the major issue was: Who are you going to get to run it?

I am proud to say that as the then-Chair of the Section, I appointed Tony to head the committee.

Tony dedicated himself to the competition, often working singlehandedly, organizing each years competition, cajoling, sometimes dragooning, the professors needed to coach the teams, as well as the judges and the lawyers needed to judge and serve as jurors.

Law schools throughout the state were recruited to act as the host school. Courthouses, both federal and state, were opened for the trials. And so, under Tony's firm guiding hand, the competition grew.

The cash stipend was increased to $5,000, and a second-place cash stipend of $3,500 was added. Now we have added The Best Advocate Award for the student who places highest after all rounds of the competition.

How did this come about? I won't say that the competition would not have continued if Tony had not run the New York end, but the competition would have been remarkably different. Tony, in his unique way, made it better. The indefatigable Mr. DeMarco imbued the Region II Competition with his personality. Tony made it work.

On March 31,2000, the Section honored Tony, by presenting him with a Plaque, following presentation of The Trial Lawyer's Cup at a meeting of the House of Delegates. The Plaque read:

> MR. DeMARCO HAS CONSISTENTLY DEMONSTRATED SINGLENESS OF PURPOSE, PATIENT APPLICATION, TIRELESS ENERGY AND SUPERIOR ACHIEVEMENT IN ORGANIZING AND CONDUCTING EACH YEAR'S COMPETITION FOR THE TRIAL LAWYERS CUP AND SCHOLARSHIP THEREBY PROMOTING AND ENHANCING THE TEACHING OF EXCELLENCE IN TRIAL ADVOCACY IN THE LAW SCHOOLS OF THIS STATE.

DeMarco was rendered speechless as he received a standing ovation. He was close to tears.

So you might ask, "Why The Best Advocate Award if we have already honored him?" Because the prior award was more in the nature of a private reminder of his worth to us and to the legal profession.

A permanent award reminds not only us, but tells the public and future generations of trial advocates, real trial lawyers, of Tony's worth: of his high standards, of his zealous and ethical representation and of his desire to educate all to the beauty and truth to be found in the search for justice in the law.

We now know that during this, the 22nd year of his stewardship of the competition, which also happens to be the 25th Anniversary of the Cup, Tony was becoming desperately ill. He delayed treatment and admission to hospital until he had put this year's competition in place.

Throughout his lifetime, long before it was written, Tony lived the life found in the words of his favorite song, The Impossible Dream. He fought the good fight. Finally, in this, his seventy-fourth year, Anthony J. DeMarco, Jr., Trial Lawyer, finally met the unbeatable foe.

Gunther H. Kilsch

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Publication of Articles

The *Digest* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted on a 3 1/2" diskette (preferably in WordPerfect or Microsoft Word) along with two laser-printed originals. Please submit articles to Steven B. Prystowsky, Esq., 120 Broadway, New York, N.Y. 10271.

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The *Digest* is published for members of the Trial Lawyers Section of the New York State Bar Association. Members of the Section receive a subscription free of charge.

ISSN 1530-3985

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