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Trial Lawyers Section Digest

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

A Message from the Chair

It has been very busy for this lawyer since my first message as Chair.

We had a short supply of attendees at the August 2003 Summer Program at Niagara-on-the-Lake, Ontario. The weather was perfect. The CLE Program was excellent. The geography was splendid. We must get together from all over the state to protect our civil trial system, i.e., lawyer-conducted voir dire, adversarial procedure honed by time and experience, reverence for the different roles of lawyer, judge and juror with ultimate issues decided by citizen jurors.

Tort reform, cynicism bred by lawyer advertising, selfish political motives and misperceptions in the third branch of government all contribute to the possible loss of what is so basic to our democratic birthright: every citizen, poor or rich, has an inalienable right to go to court.

You appreciate that only in New York State can lawyers still pick jurors without court supervision. I hate to preach to the choir. Please be on time for jury selection, be courteous to your opponent, be solicitous of the panel, forget advocacy, learn about the jurors, avoid issues over conduct and challenges, and then sit down.

Be aware of the work being done now by the Commission on the Jury chaired by attorney Mark Zauderer of New York City, sponsored by the Office of Court Administration and the Committee on the Jury System chaired by Peter D. FitzGerald of Glens Falls, initiated by the New York State Bar.

Please also be aware of The Jury Trial Project of the Office of Court Administration, which has adopted certain trial innovations like jury questions, jury note-taking, interim commentary and preliminary instructions to the jury, all without input from the Trial Lawyers Section.

These innovations and others, such as the reduction of peremptory challenges and bringing insurance representatives to pre-trial conferences, must be a concern for this Trial Lawyers Section and the New York State legislature as they each so fundamentally affect our jury trial system.

Inside

NYSBA

We can't suffer a rearrangement of who is important in our courtrooms. It is not the judge, nor the attorneys, not the jurors, but only the litigants.

The Trial Lawyers Section of the New York State Bar Association, all 3,500 members, by resolution of its Executive Committee on December 13, 2003, now oppose the adoption of juror questions in any form to witnesses and jury note-taking at any trial conducted in New York State.

Please come to the Annual Meeting on January 26–31, 2004, in New York City, attend the Boot Camp for the Civil Litigator and enjoy the dinner with the TICL Section, at the Tavern-on-the-Green with political satirist James Carville as speaker.

The Executive Committee meeting on the afternoon of January 28th is a must for all members, particularly our past Chairs.

I have included on page 12 in this *Digest* the remarks of our distinguished awardee, Philip H. Magner, Jr., Esq. of Buffalo, at the 2003 Summer Conference.

Edward C. Cosgrove

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Premises Security: Elements and Defenses

By Harry Steinberg

When a landowner may be held liable for a criminal act which occurs on the premises is governed by a series of well-settled legal principles. Here we offer a review of those principles, focusing on what a plaintiff must establish to state a claim (or to avoid a dispositive motion) and what defenses are available to the landowner.

I. The Duty-Foreseeability-Notice Triad

In premises liability cases based upon a claim of failure to provide proper security, duty, foreseeability and notice are intertwined, with the courts holding that a duty exists based only upon notice that criminal acts were foreseeable which, in turn, arises from notice of prior criminal acts.

A. Duty

A possessor of real property (either as landowner or tenant) is not an insurer of the safety of those using the property, but does have a duty to take minimal precautions to protect those using the property from the foreseeable criminal acts of third persons.[1]

"The law does not require [a landowner] to provide the optimal or most advanced security system available, but only reasonable security measures." Thus, where there was an inoperable lock on the outer lobby door, but a working lock on the inner lobby door and the tenant was shot between the two doors, the landlord would not be held liable.[2]

A landlord who provided locking doors, intercoms and 24-hour security provided the required minimal security and could not be held liable to a visitor assaulted when he was trapped outside the locked security doors.[3]

A landlord did not have the duty to provide 24-hour-a-day doorman service.[4]

B. Foreseeability

That criminal acts of third parties were foreseeable may be established by showing that other criminal acts, even dissimilar criminal acts, occurred in the past, and it is not necessary that the prior acts took place on the same premises; it is sufficient that they occurred within the same group of buildings. Notice of robberies in the same building and rapes in other buildings in the same development were sufficient to put landowner on notice that a rape might occur in this building.[5]

C. Notice

There is no "bright-line" test as to how many criminal incidents, of what type they must be and how often they must have occurred before the courts will hold that a landowner has sufficient notice so that such acts are foreseeable triggering the "minimal duty" to protect.

1. Sufficient Notice

Evidence of drug dealing in the building where the rape took place and evidence of rapes in *other* buildings in the same housing complex was sufficient to establish notice and to make such crimes foreseeable.[6]

One hundred seven (107) reported crimes, including 10 crimes against persons, in 21 months before the plaintiff was shot in the building lobby made the crime foreseeable and was sufficient to invoke the duty to protect even though there was no proof that any crimes occurred in the lobby.[7]

Plaintiff's sworn affidavit as to prior crimes plus defendant's own security complaint reports were sufficient to raise an issue of fact as to whether there was a sufficient history of criminal assaults so as to make assault on plaintiff foreseeable.[8]

> Plaintiff's evidence that the building owners and managing agent received numerous complaints from tenants about criminal activity in the building and, in turn, warned tenants about such activity, that building entrances were left unattended during business hours, that visitors were not screened upon entering the building, and that, in the opinion of a security expert, the assault was the result of inadequate security measures, sufficed to raise triable issues as to whether security measures [were adequate].[9]

Evidence that drug dealers frequented the premises and broke locks was sufficient to put the landlord on notice that an assault was foreseeable.[10]

Evidence of drug dealing was sufficient to put the owner on notice that a shooting was foreseeable.[11]

2. Insufficient Notice

Notice of car break-ins in the parking lot and vagrants in the lobby was insufficient to give notice that an assault was foreseeable.[12]

Shopper abducted and robbed in store parking lot could not state claim because "defendant had no prior notice of any criminal activity which could have caused it to foresee the injury suffered" by plaintiff.[13]

Vague recollection of a single criminal act was "patently insufficient."[14]

Prior criminal activity in the general neighborhood of the premises "was patently insufficient."[15]

That the fire escape ladder provided easy access to plaintiff's window was insufficient absent notice of prior criminal activity.[16]

Evidence of arson at two other properties of the same owner "does not provide a basis from which the jury could infer that defendant landlord was obligated to undertake special security measures."[17]

Two minor thefts and testimony that the building was in a "bad area" was insufficient to put the landowner on notice that shooting was foreseeable.[18]

II. Duty Is Based Only Upon Control of the Premises

Only a possessor of property has a duty to provide minimal security to those using it from the foreseeable criminal acts of third parties.

A tenant who was assaulted at an outer entrance could not state a claim because the "landlord has no duty to safeguard tenants from neighborhood crime as such. The duty to protect against criminal intruders only arises when ambient crime has seriously infiltrated the premises or when the landlord is on notice of a serious risk of such infiltration."[19]

A shopping center owner whose security staff patrolled the parking lot had no duty, contractual or otherwise, to patrol inside the store in which the employee was raped nor was there evidence to establish the foreseeability of the attack.[20]

A distributor of gasoline to a service station could not be held liable for an attack on an attendant because it did nothing more than supply gasoline; it had no duty to maintain, supervise or control the day-to-day operations.[21]

A tenant of a building had no duty to protect a visitor to its office who was killed in the parking lot because the tenant had no possessory interest or control of the parking lot.[22]

A bar owner was not liable for an injury which resulted when two patrons left the premises and engaged in a fight outside because "the defendant's duty was limited to conduct on its premises, which it had the opportunity to control, and of which it was reasonably aware."[23]

A nightclub which was one of three building tenants had no duty to one of its patrons who was stabbed in the parking lot because its lease did not vest it with the duty to control or maintain the parking lot.[24]

III. Duty and the Third Party

As a rule, third parties who have some relationship with the possessor of the property cannot be held liable for criminal acts which cause injury to a tenant or visitor. Typically this means that security guard providers and others will succeed when they move for summary judgment.

A. Summary Judgment Granted

The Appellate Division reversed denial of a summary judgment motion by a security guard provider because there was no privity between the guard provider and the injured tenant.[25]

The defendant guard provider could not be held liable even if one of its guards observed the attack and refused to intercede.[26]

The phone company could not be held liable for a rape where the intruder gained access to the apartment by using a terminal box under the window as a step because there was no duty to prevent misuse of the box; placement of the box was not a proximate cause of the crime, but only furnished the condition for its occurrence.[27]

A visitor who was raped when an intruder easily pushed through the defective front-door lock had no cause of action against the locksmith because there was no relationship between the visitor and locksmith.[28]

The installer of windows could not be held liable where the assailant made his entry through a window which lacked locks.[29]

B. Summary Judgment Denied

Questions of fact barred summary judgment against the landlord and guard provider where the robbery occurred during a change of shifts which left the housing complex unguarded for 15 minutes.[30]

A landowner who erected a scaffold on its own property could be held liable for injuries to the tenant of an *adjoining* building by a burglar who used the scaffold to enter her apartment.[31]

The failure of guards to be positioned throughout the theater, as required by contract, was sufficient to permit a jury to find that the guard service breached its duty to protect the employee of the theater which hired the guard service.[32]

IV. Substantial Cause (a.k.a. Proximate Cause)

The mere fact that a duty has been breached by failing to take reasonable steps to protect persons on the

premises from the foreseeable criminal acts of third parties (for example, by failing to repair a broken door lock) still leaves open the question of whether such negligence was the substantial (proximate) cause of the complained of injury. Thus, in addition to proving, for example, that a door was not properly locked, a plaintiff must also prove that the assailant used the unlocked door to gain access to the premises and that the assailant was an intruder rather than a visitor or guest of a tenant.

The problem of proving proximate cause was often a formidable one since criminals rarely leave calling cards or remain on the premises to explain to their victims that they are trespassers. As a result, even where a crime victim proved that a lock was broken, the victim often remained unable to surmount the proximate cause barrier because the victim could not prove that the assailant was an intruder.[33] Plaintiff's claim that the failure to provide a lock for the entrance door permitted the assailant to enter the building was dismissed because she failed to establish that the assailant entered via the unlocked door, thereby failing to establish proximate cause.[34]

Faced with this problem in a pair of cases (one seeking reversal of a motion for summary judgment and one seeking reinstatement of a plaintiff's verdict), the Court of Appeals, in *Burgos v. Aqueduct Realty Corp.*,[35] lowered the proximate cause barrier by stating a "rule of reason" as to how a victim could prove that an assailant was an intruder.

In *Burgos*, the lead case, plaintiff testified that the building was a small building, that she knew all of the tenants and those who frequented the building and that she did not recognize the assailant. This, the Court of Appeals held, was sufficient to raise a triable issue of fact, plaintiff's burden on a motion for summary judgment.

In *Gomez*, the companion case, the jury heard evidence that neither the victim nor other witnesses recognized the assailant, that when the assailant got into the elevator he did not select a floor and made no effort to hide his identity as he escaped through an unlocked door. This, the Court of Appeals held, was sufficient to allow a jury to conclude that the assailant was an intruder.

A. Post *Burgos* Law

In the wake of *Burgos*, the courts have accepted a wide variety of evidence as proof that the assailant was an intruder.

The intruder was unmasked.[36]

The buzzer system was inoperative, the door frequently did not lock, the door was the only practical entrance to the building and the intruder was apprehended and proved to be a stranger.[37]

Although the intruder was masked, witnesses did not recognize him and he was seen fleeing premises.[38]

Witnesses did not recognize the assailants who were seen forcing their way into the building.[39]

The witness did not recognize the assailant and expert testimony indicated that the unmasked intruder was not a resident as he had no fear of being identified.[40]

V. The Indoor/Outdoor Dichotomy

Generally, the courts have taken a very narrow and limited view of when liability can be established for a crime that starts, or takes place, outdoors or off-premises.

A. Recovery Barred

The defendant had no duty to secure the front door of a building to protect a passerby from the danger of criminal acts by drug dealers in and around the building. Although the plaintiff was returning to the building from an errand while visiting a tenant of the building, that he was 191 feet from the building when he was shot made the shooting "a mere fortuity."[41]

A landlord had no duty to protect a passerby, who was hit with shotgun pellets, from potential dangers arising from drug trafficking in a storefront.[42]

The plaintiff, who was dragged from the street into a building and robbed and raped, failed to state a cause of action against the building owner who failed to maintain a security system. "Under the circumstances of this case, where neither the victim nor the crime were connected with the defendant's building, we hold that plaintiff was not within the zone of foreseeable harm and that, as a consequence, liability cannot be imposed."[43]

A plaintiff assaulted on a Co-Op City pathway failed to state a claim. "It would be an unreasonable burden to impose on Co-Op City the duty of preventing such a random act of violence which could have occurred anywhere on its over 32 miles of sidewalks and pathways."[44]

B. Recovery Possible

Questions of fact remained as to whether the hotel knew of prior thefts from its driveway and whether it took reasonable steps to prevent such theft.[45]

A defendant can be held liable for a violent act on the front steps of the building, *but* no liability would attach here because there was no history of violence and once the fight started the doorman promptly called police.[46]

VI. Relationship Between Victim and Assailant

Where the assailant is lawfully on the premises (i.e., as a tenant or guest) or where there is a relationship between the assailant and the victim the courts will find that the assault was an unforeseeable intervening force that cuts off any negligence by the landlord as a proximate cause of the injury.

Where the plaintiff was targeted by drug dealers, a broken front door lock could not be a proximate cause of the assault.[47]

Where the plaintiff was the targeted victim of a longtime enemy who had access to the building because he had friends living there, the assault was "an unforeseeable intervening force" which cut off any negligence by the landlord in failing to repair the door lock.[48]

A guest stabbed by the tenant's former boyfriend cannot state a claim.[49]

A landlord could not be held liable where an ex-lover stalked the tenant and shot her as she was entering the vestibule of the building in which she lived.[50]

A landlord had no duty to control one tenant who assaulted another.[51]

A landlord was not liable where one tenant shot another with a BB gun.[52]

Given the motivation of the tenants who assaulted plaintiff, the assault was "extraordinary and unforeseeable."[53]

However, where the victim was attacked by a tenant who had a right to be on the premises, liability could be imposed on the landlord for negligence in failing to lock the vacant apartment into which the victim was forced by the attacker.[54]

A landlord could not be held liable for a rape committed in the laundry room by a guest of a tenant because even if the laundry room had been locked the guest-assailant would have had access to it.[55]

A tenant who opened the apartment door and admitted an acquaintance who assaulted her failed to establish that the assailant's entry into the building was a result of the defendant's negligence.[56]

That the victim admitted the assailant did not bar recovery since the victim was expecting a visitor.[57]

VII. The Duty of a Commercial Landowner

Commercial landowners who invite the public onto their premises are not liable for sudden and unforeseeable criminal acts. But they can be liable where there is notice of criminal activity or where they fail to do what they can to protect persons on their premises.

A. Recovery Possible

While a public establishment has no duty to protect customers from the unforeseeable criminal acts of third persons, it does have a duty to control the conduct of third persons when it has the opportunity to do so; jury verdict of liability affirmed where a store manager observed an assault and failed to attempt to stop it.[58]

A store owner had no duty to protect a shopper in the mall's common area, *but* the mall operator, knowing of "gangs" loitering outside the store, may have had a duty "to take minimal precautions to protect [shoppers] from the reasonably foreseeable criminal acts of third persons."[59]

> Although a landlord or owner of a public establishment has no duty to protect its patrons from unforeseeable and unexpected assaults nor to take any protective measures unless there was a foreseeable risk of harm from criminal activities of third persons . . . a landowner nevertheless has the duty to control the conduct of persons present on its premises when it has the opportunity to control or is reasonable aware of the necessity for such control.[60]

B. Recovery Barred

A fast-food restaurant owner had no duty to protect a patron from a sudden, unforeseeable assault by another patron.[61]

Neither the owner of the property nor the operator of the store could be held liable for injuries which occurred when an arsonist threw a firebomb into the store given the total lack of evidence that the act was foreseeable.[62]

A restaurant patron failed to establish that it was foreseeable that he would be assaulted in the men's room. "The mere fact that a single similar incident, involving different patrons, may have occurred in the defendant's restaurant approximately five months prior to the incident involved in this case does not, without more, establish that the defendant owed a duty to protect the plaintiff against such an unexpected and sudden assault."[63]

VIII. The Duty of ATM Providers

Although banks, especially automatic teller machines, may be regarded as "high hazard" locations, the rule that the criminal acts of third persons must be foreseeable remains the rule and there must be some pattern of past conduct before the courts will find foreseeability that gives rise to a duty.

However, the courts have also held that while most landowners have only a "minimal duty" to secure their premises, the provider of an ATM "has a duty to take *reasonable precautions* to secure its premises if it knows or should have known that there is a likelihood of conduct on the part of third persons likely to endanger the safety of those using its premises."[64]

"[A]n ATM owner has a duty to take reasonable precautions to secure its premises if it knows or should know that there is a likelihood of conduct on the part of third persons likely to endanger the safety of those using the premises."[65]

The above two cases represent a tale of two Appellate Divisions.

In the first case plaintiff prevailed by adducing evidence not of prior crimes on the premises, but that the locking mechanism on the vestibule door had been inoperable for at least a year. QUERY: Was the broken lock a proximate cause of the robbery? Could not the criminal have committed the same crime by waiting outside a properly locked vestibule door and waylaying ATM users there?

However, in the second case plaintiff's claim was dismissed because he failed to establish that there was any evidence of past crimes in the ATM vestibule where he was assaulted, but not robbed. Evidence that the area was a high-crime area was insufficient to establish that the bank was required to provide some heightened form of security.

A plaintiff who was shot at an ATM failed to show a pattern of conduct that would have put the bank on notice that criminal acts by third persons were foreseeable.[66]

"[T]hat a person using an ATM might be subject to robbery is conceivable, but conceivability is not the equivalent of foreseeability."[67]

Plaintiff was entitled to records of all criminal conduct and assaults at all of defendant's Manhattan branches for a three-year period, since prior criminal conduct need not be of the same type as conduct which harmed plaintiff.[68]

IX. The Governmental/Proprietary Function Dichotomy

Governmental bodies enjoy immunity from claims arising from their governmental functions but not from claims arising from their proprietary functions. This rule is easy enough to state, but not necessarily easy to apply.

A. The Rule Stated

> When the liability of a governmental entity is at issue, "[i]t is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability, not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred."[69]

In *Miller*, the Court of Appeals held that the state could be held liable because its operation of dormitories was a proprietary activity—arising from providing residences—and rejected claims that the state's failure to provide protection was really a claim of police failure and, therefore, a governmental activity.

In *Weiner*, upon which *Miller* relied, the Court of Appeals held that the failure to provide security at subway stations involved the governmental function of allocation of police resources and that a private common carrier could be held liable for failure to provide security under similar circumstances was of no moment.[70]

B. The Rule Applied

The plaintiff could not state a claim for failure to warn of criminal activity because that was a governmental police, not proprietary, function.[71]

A college was not liable for an injury inflicted by an inmate released from prison to attend school as it had no duty to restrict the prisoner's access to campus.[72]

The state could not be held liable to a campus visitor who was injured by a bullet fired from a dormitory.[73]

The claim that the Housing Authority was liable for failing to protect a tenant from a bullet fired through a door was a claim for lack of police protection, which was a governmental function to which immunity attached.[74]

The city could not be held liable for an injury caused by a prisoner whose handcuffs were removed for medical treatment; the decision to remove the handcuffs was discretionary.[75]

While the city could not be held liable for failure to provide police protection, there was a question of fact, which barred summary judgment, as to whether the city provided proper crowd control at a public concert where the stampede occurred.[76]

The estate of a passenger failed to state a claim for misallocation of security resources, *but* did state a claim if the Transit Authority employees observed the assault from a place of safety and failed to summon aid.[77]

The failure to lock exit gates involves a governmental function and is not actionable.[78]

The failure to properly light an exit area involves a governmental function and is not actionable.[79]

The failure to properly maintain a key security system is a governmental function and is not actionable.[80]

The failure to properly maintain locks on a school gate is a governmental function and is not actionable.[81]

X. The Higher Duty of Schools

Unlike landowners, schools have a higher duty to protect students; schools are not the guarantors of their students' safety, but they are required to act as a prudent parent would under the circumstances. However, this rule applies only to students, not to teachers and other school employees.

A. The Rule and Its Application

In *Mirand v. City of New York*,[82] the Court of Appeals set forth the duty owed by schools to their students as follows:

- "[A] teacher owes it to his [or her] charges to exercise such care as a parent of ordinary prudence would observe in comparable circumstances."[83]
- The school must have knowledge, actual or constructive, of prior similar conduct.[84]
- An injury caused by a sudden impulsive act of a fellow student will not support a finding of negligence.[85]

In *Mirand*, the Court of Appeals concluded that the school was liable where students reported a conflict and nothing was done and where, in violation of a School Security Plan, there were no guards present at the exit at which the assaults took place.

In *Johnsen v. Carmel Central School District*,[86] the Appellate Division held that a school could not be held liable for an injury during a fight because there was no prior conduct that would have allowed the school to anticipate the altercation.

However, in *Nelson v. Sachem Central School District*,[87] the Appellate Division held that a school could be held liable for injuries resulting from an altercation even where the aggressor had no past history if it could be shown that the altercation developed over time and that the school failed to take prompt action to limit or avoid the altercation.

In *Garcia v. City of New York*,[88] the Appellate Division affirmed a plaintiff's verdict in a case in which a young boy was sexually molested when he went to the bathroom alone notwithstanding that there had been no such prior incidents. The court reasoned that the school did not act as a prudent parent would have acted in allowing a five-year old kindergartner to go to the bathroom alone. Helping lead the court to this conclusion were two written procedures which stated that children in school grades three or lower should not be allowed to go the bathroom alone, but should be sent with a "buddy."

In *Murray v. Research Foundation of State University of New York*,[89] violation of procedures also convinced the Appellate Division that summary judgment was inappropriate. Here, a child was molested by an adult who met alone with the child behind closed doors notwithstanding a rule that prohibited such meetings.

However, in *Schrader v. Board of Education*,[90] violation of a procedure was not sufficient to keep a school from obtaining summary judgment dismissing the claim of a female student who had been molested by two male students. Notwithstanding a school rule that permitted only one student of each sex to leave the classroom at the same time, the Appellate Division concluded that because the two boys had no history of bad behavior that would put the school on notice, the school could not be held liable for the attack.

In *Maness v. City of New York*,[91] the Appellate Division dismissed the claim of a student who was shot outside school during a post-lunch recess period because the absence of supervision was not a proximate cause of the student's injury.

However, in *Bell v. Board of Education*,[92] the Court of Appeals held that a school could be held liable for an off-premises sexual assault where the assault occurred because the school was negligent in supervising the student-victim in allowing her to leave her class group while her class was on a field trip.

B. Teachers and Employees

The higher duty that schools owe students does not apply to teachers and other school employees.

In *Bisignano v. City of New York*,[93] the Appellate Division held that a school cannot be held liable for a student's attack on a teacher because the school had no special duty to the teacher.

In *Ferrara v. Board of Education*,[94] the Appellate Division held that a school had no special duty to its employee who was assaulted by an intruder in the principal's office.

XI. Limiting Liability Based Upon CPLR Article 16

CPLR Article 16 provides an important tool by which defendants, even if liable, can limit the extent of their liability.

CPLR 1601(1) provides that where there are two or more liable defendants each defendant remains, as under the common law rule, jointly and severally liable for all of plaintiff's economic damages. However, if one defendant is found to be liable for 50% or less of the total lia-

bility, then such defendant is liable only for the assigned percentage of non-economic damages.

Example: D-1 and D-2 are both found liable and the jury assigns 30% of the fault to D-1 and 70% of the fault to D-2 and awards plaintiff economic losses of $100,000 and non-economic losses of $100,000.

If D-2 is judgment-proof, D-1 must pay plaintiff a total of $130,000, consisting of *all* of plaintiff's economic losses and $30,000 of non-economic losses.

If D-1 is judgment proof, D-2 must pay $200,000 consisting of *all* of plaintiff's damages.

A. Applicability of Article 16

CPLR 1601 provides that Article 16 does not apply where plaintiff can establish that despite diligent efforts jurisdiction could not be obtained over the missing party.

Article 1602 contains a long list of exceptions to CPLR 1601(1); most notable among the exclusions are motor vehicle accidents, unlawful release of hazardous materials and actions requiring proof of intent.

The party claiming that Article 16 does not apply bears the burden of proof on that issue.

B. The Intentional/Negligent Hybrid Case

Until the Court of Appeals spoke, there was a split of authority among the Appellate Divisions as to whether Article 16 applied in the typical premises security case in which the landlord is charged with negligence but there is another defendant who can be charged with an intentional tort.

In *Chianese v. Meier*,[95] the Court of Appeals resolved that question, holding that Article 16 did apply to the hybrid negligence/intentional act case that is typical in premises security litigation and that a property owner in cases like these could, if the assailant was subject to jurisdiction, seek to apportion liability between itself and the assailant.

Endnotes

1. *Ianelli v. Powers*, 114 A.D.2d 157, 163–64, 498 N.Y.S.2d 377, 381 (2d Dep't 1986) *citing Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 519, 429 N.Y.S.2d 606, 613 (1980).
2. *Tarter v. Schildkraut*, 151 A.D.2d 414, 415, 542 N.Y.S.2d 626, 627 (1st Dep't 1989).
3. *James v. Jamie Towers Housing Corp.*, 99 N.Y.2d 639, 760 N.Y.S.2d 718 (2003), *affirming* 294 A.D.2d 268, 743 N.Y.S.2d 85 (1st Dep't 2002).
4. *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dep't 1999); *Evans v. 141 Condominium Corp.*, 258 A.D.2d 293, 685 N.Y.S.2d 191 (1st Dep't 1999).
5. *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 294–95, 598 N.Y.S.2d 160, 162–63 (1993) (evidence of robberies in same building and rapes in other buildings in same development sufficient to establish foreseeability of rape); *Splawn v. Lextaj Corp.*, 197 A.D.2d 479, 480, 603 N.Y.S.2d 41, 42 (1st Dep't 1993) (evidence of robberies in a hotel sufficient to establish foreseeability of rape).
6. *Jacqueline S.*, 81 N.Y.2d at 294–95, 598 N.Y.S.2d at 162–63.
7. *Nallan*, 50 N.Y.2d at 520, 429 N.Y.S.2d at 614.
8. *Morrisey v. Riverbay Corp.*, 222 A.D.2d 234, 635 N.Y.S.2d 11 (1st Dep't 1995).
9. *King v. Resource Prop. Mgmt. Corp.*, 245 A.D.2d 10, 11, 665 N.Y.S.2d 637, 637 (1st Dep't 1997).
10. *Beatty v. National Ass'n for the Advancement of Colored People*, 194 A.D.2d 361, 362–63, 599 N.Y.S.2d 13, 14–15 (1st Dep't 1993).
11. *Simmons v. City of New York*, 168 A.D.2d 230, 230, 562 N.Y.S.2d 119, 120 (1st Dep't 1990).
12. *Pascarelli v. LaGuardia Elmhurst Hotel Corp.*, 294 A.D.2d 343, 742 N.Y.S.2d 98 (2d Dep't 2002).
13. *Karp v. Saks Fifth Avenue*, 225 A.D.2d 1014, 1016, 639 N.Y.S.2d 575, 576 (3d Dep't 1996). *See also Polomie v. Golub Corp.*, 226 A.D.2d 979, 980–981, 640 N.Y.S.2d 700, 701 (3d Dep't 1996) (prior episodes of solicitation, sleeping in the car and unverified report of person with shotgun in car insufficient to provide notice sufficient to support claim of plaintiff who was abducted, robbed and sexually assaulted in parking lot).
14. *Ospina v. City of New York*, 214 A.D.2d 551, 551, 625 N.Y.S.2d 76, 77 (2d Dep't 1995).
15. *Roszhik v. 1600 Ocean Parkway Assocs.*, 208 A.D.2d 913, 914, 617 N.Y.S.2d 535, 536 (2d Dep't 1995).
16. *Gleason v. 75-10 Boulevard Owners Corp.*, 193 A.D.2d 715, 716, 597 N.Y.S.2d 742 (2d Dep't 1993).
17. *Rodriguez v. Mohr*, 174 A.D.2d 382, 382–83, 571 N.Y.S.2d 221, 222 (1st Dep't 1991).
18. *Ianelli*, 114 A.D.2d at 163, 498 N.Y.S.2d at 381.
19. *Evans v. 141 Condo. Corp.*, 258 A.D.2d 293, 295, 685 N.Y.S.2d 191, 193 (1st Dep't 1999).
20. *Charleen F. v. Cord Meyer Dev. Corp.*, 212 A.D.2d 572, 622 N.Y.S. 555 (2d Dep't 1995).
21. *Ahmad v. Getty Petroleum Corp.*, 217 A.D.2d 600, 601, 629 N.Y.S.2d 779, 780 (2d Dep't 1995).
22. *Smith v. Fishkill Health-Related Ctr., Inc.*, 184 A.D.2d 963, 965, 584 N.Y.S.2d 949, 951 (3d Dep't 1992).
23. *Del Bourgo v. 138 Sidelines Corp.*, 208 A.D.2d 795, 796, 618 N.Y.S.2d 59, 60 (2d Dep't 1994).
24. *Shire v. Ferdinando*, 161 A.D.2d 573, 574, 555 N.Y.S.2d 151, 152 (2d Dep't 1990).
25. *Rudel v, National Jewelry Exch. Co.*, 213 A.D.2d 301, 301, 623 N.Y.S.2d 878, 879 (1st Dep't 1995). *See also King*, 245 A.D.2d at 10, 665 N.Y.S.2d at 637.
26. *Buckley v. I.B.I. Security Serv., Inc.*, 157 A.D.2d 645, 549 N.Y.S.2d 744 (2d Dep't 1990).
27. *Moss v. New York Tel. Co.*, 196 A.D.2d 492, 493, 600 N.Y.S.2d 759, 761 (2d Dep't 1993).
28. *Einhorn v. Seeley*, 136 A.D.2d 122, 125–26, 525 N.Y.S.2d 212, 215 (1st Dep't 1988).
29. *Castorino v. Unifest Bldg. Prods. Corp.*, 161 A.D.2d 421, 555 N.Y.S.2d 350 (1st Dep't 1990).
30. *Gilmartin v. Helmsley-Spear, Inc.*, 162 A.D.2d 275, 276, 556 N.Y.S.2d 632, 633 (1st Dep't 1990).
31. *Russo v. Grace Institute*, 145 Misc. 2d 242, 246–47, 546 N.Y.S.2d 509, 512 (Sup. Ct., N.Y. Co. 1989), *aff'd on opinion below*, 153 A.D.2d 820, 545 N.Y.S.2d 547 (1st Dep't 1989).
32. *Cruz v. Madison Detective Bureau*, 137 A.D.2d 86, 90–91, 528 N.Y.S.2d 372, 374–75 (1st Dep't 1988).
33. *See, e.g., Perry v. New York City Hous. Auth.*, 222 A.D.2d 567, 635 N.Y.S.2d 661 (2d Dep't 1995).
34. *See also Rojas v. Lynn*, 218 A.D.2d 611, 631 N.Y.S.2d 15 (1st Dep't

1995); *Kistoo v. City of New York*, 195 A.D.2d 403, 600 N.Y.S.2d 693 (1st Dep't 1993).

35. *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 684 N.Y.S.2d 139 (1998).
36. *Perez v. New York City Hous. Auth.*, 294 A.D.2d 279, 742 N.Y.S.2d 289 (1st Dep't 2002).
37. *Brewster v. Prince Apartments, Inc.*, 264 A.D.2d 611, 695 N.Y.S.2d 315 (1st Dep't 1999).
38. *Jiggets v. New York City Hous. Auth.*, 263 A.D.2d 426, 693 N.Y.S.2d 601 (1st Dep't 1999).
39. *Rios v. Jackson Assocs.*, 259 A.D.2d 608, 686 N.Y.S.2d 800 (2d Dep't 1999).
40. *Sanchez v. New York City Hous. Auth.*, 256 A.D.2d 485, 682 N.Y.S.2d 103 (2d Dep't 1998).
41. *Rodriguez v. Oak Point Mgmt., Inc.*, 87 N.Y.2d 931, 640 N.Y.S.2d 868 (1996), *rev'g* 205 A.D.2d 224, 618 N.Y.S.2d 772 (1st Dep't 1994).
42. *Muniz v. Flohern, Inc.*, 77 N.Y.2d 869, 870, 568 N.Y.S.2d 725, 726 (1991), *rev'g* 155 A.D.2d 172, 553 N.Y.S.2d 313 (1st Dep't 1990).
43. *Waters v. New York City Hous. Auth.*, 69 N.Y.2d 225, 226, 513 N.Y.S.2d 356, 356–57 (1987). *See also Audrey B. v. New York City Hous. Auth.*, 202 A.D.2d 532, 609 N.Y.S.2d 87 (2d Dep't 1994); *Salvamoser v. Pratt Institute*, 150 A.D.2d 666, 541 N.Y.S.2d 540 (2d Dep't 1989).
44. *Leyva v. Riverside Corp.*, 206 A.D.2d 150, 153–54, 620 N.Y.S.2d 333, 336 (1st Dep't 1994); *Allen v. New York City Hous. Auth.*, 203 A.D.2d 313, 609 N.Y.S.2d 678 (2d Dep't 1994).
45. *Penchas v. Hilton Hotels Corp.*, 198 A.D.2d 10, 10, 603 N.Y.S.2d 48, 49 (1st Dep't 1993).
46. *Urena v. Hudson Guild*, 213 A.D.2d 312, 312, 624 N.Y.S.2d 401, 402 (1st Dep't 1995).
47. *Cera v. 2962 Decatur Ave. Owners Corp.*, 306 A.D.2d 169, 761 N.Y.S.2d 220 (1st Dep't 2003).
48. *Harris v. New York City Hous. Auth.*, 211 A.D.2d 616, 617, 621 N.Y.S.2d 105, 105–06 (2d Dep't 1995).
49. *Camacho v. Edelman*, 176 A.D.2d 453, 574 N.Y.S.2d 356 (1st Dep't 1991).
50. *Tarter*, 151 A.D.2d at 415, 542 N.Y.S.2d at 627.
51. *Firpi v. New York City Hous. Auth.*, 175 A.D.2d 858, 573 N.Y.S.2d 704 (2d Dep't 1991).
52. *Johnson v. Slocum Realty Corp.*, 191 A.D.2d 613, 595 N.Y.S.2d 244 (2d Dep't 1993).
53. *Simms v. St. Nicholas Ave. Hotel*, 187 A.D.2d 373, 589 N.Y.S.2d 485 (1st Dep't 1992).
54. *Gibbs v. Diamond*, 256 A.D.2d 266, 682 N.Y.S.2d 181 (1st Dep't 1998).
55. *Provenzano v. Roslyn Gardens Tenants Corp.*, 190 A.D.2d 718, 720, 593 N.Y.S.2d 80, 82 (2d Dep't 1993).
56. *Hendricks v. Kempler*, 156 A.D.2d 425, 548 N.Y.S.2d 544 (2d Dep't 1989).
57. *Mason v. U.E.S.S. Leasing Corp.*, 96 N.Y.2d 875, 730 N.Y.S.2d 770 (2001).
58. *Banyan v. F.W. Woolworth Corp.*, 211 A.D.2d 591, 591, 622 N.Y.S.2d 24, 25 (1st Dep't 1995).
59. *Guarcello v. Rouse SI Shopping Ctr., Inc.*, 204 A.D.2d 685, 685, 612 N.Y.S.2d 239, 240 (2d Dep't 1994).
60. *Rivera v. 21st Century Rest. Inc.*, 199 A.D.2d 14, 15, 604 N.Y.S.2d 106, 107 (1st Dep't 1993).
61. *Davis v. City of New York*, 183 A.D.2d 683, 584 N.Y.S.2d 64 (1st Dep't 1992).
62. *Tsang King Fai v. City of New York*, 172 A.D.2d 515, 567 N.Y.S.2d 862 (2d Dep't 1991).
63. *Lindskog v. Southland Rest., Inc.*, 160 A.D.2d 842, 843, 554 N.Y.S.2d 276, 277 (2d Dep't 1990).
64. *Lechmanski v. Marine Midland Bank*, 259 A.D.2d 966, 966, 703 N.Y.S.2d 612, 613 (4th Dep't 1999) (emphasis added).
65. *Williams v. Citibank, N.A.*, 247 A.D.2d 49, 51, 677 N.Y.S.2d 318, 321 (1st Dep't 1998) (emphasis added).
66. *Golombek v. Marine Midland Bank, N.A.*, 193 A.D.2d 1113, 598 N.Y.S.2d 891 (4th Dep't 1993).
67. *Dyer v. Norstar Bank*, 186 A.D.2d 1083, 1083, 588 N.Y.S.2d 499, 499 (4th Dep't 1992).
68. *Savrides v. Chemical Bank*, 210 A.D.2d 151, 620 N.Y.S.2d 347 (1st Dep't 1994).
69. *Miller v. State*, 62 N.Y.2d 506, 513, 478 N.Y.S.2d 829, 833 (1984), *quoting Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d 175, 182, 448 N.Y.S.2d 141, 144 (1982).
70. *Weiner*, 55 N.Y.2d at 182, 448 N.Y.S.2d at 144.
71. *Price v. New York City Hous. Auth.*, 92 N.Y.2d 553, 684 N.Y.S.2d 143 (1998).
72. *Eiseman v. State*, 70 N.Y.2d 175, 518 N.Y.S.2d 608 (1987).
73. *Adams v. State*, 210 A.D.2d 273, 620 N.Y.S.2d 80 (2d Dep't 1994).
74. *Dawson v. New York City Hous. Auth.*, 203 A.D.2d 55, 55, 610 N.Y.S.2d 28, 29 (1st Dep't 1994).
75. *Montague v. City of New York*, 194 A.D.2d 524, 598 N.Y.S.2d 314 (2d Dep't 1993).
76. *Rotz v. City of New York*, 143 A.D.2d 301, 532 N.Y.S.2d 245 (1st Dep't 1988).
77. *Crosland v. New York City Transit Auth.*, 68 N.Y.2d 165, 506 N.Y.S.2d 670 (1986).
78. *Genovese v. New York City Transit Auth.*, 204 A.D.2d 116, 611 N.Y.S.2d 542 (1st Dep't 1994). *See also Calero v. New York City Transit Auth.*, 168 A.D.2d 659, 563 N.Y.S.2d 109 (2d Dep't 1990).
79. *Rivera v. New York City Transit Auth.*, 184 A.D.2d 417, 585 N.Y.S.2d 367 (1st Dep't 1992).
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81. *Bonner v. City of New York*, 73 N.Y.2d 930, 539 N.Y.S.2d 728 (1989).
82. 84 N.Y.2d 44, 614 N.Y.S.2d 372 (1994).
83. *Id.* at 49, 614 N.Y.S.2d at 375.
84. *Id.*, 614 N.Y.S.2d at 375.
85. *Id.*, 614 N.Y.S.2d at 375. *See also Shante D. v. City of New York*, 83 N.Y.2d 948, 615 N.Y.S.2d 317 (1994), *aff'g* 190 A.D.2d 356, 598 N.Y.S.2d 475 (1st Dep't 1993).
86. 277 A.D.2d 354, 716 N.Y.S.2d 403 (2d Dep't 2000).
87. 245 A.D.2d 434, 666 N.Y.S.2d 456 (2d Dep't 1997).
88. 222 A.D.2d 192, 646 N.Y.S.2d 508 (1st Dep't 1996).
89. 283 A.D.2d 995, 723 N.Y.S.2d 805 (4th Dep't 2001).
90. 249 A.D.2d 741, 671 N.Y.S.2d 785 (3d Dep't 1998).
91. 201 A.D.2d 347, 607 N.Y.S.2d 325 (1st Dep't 1994).
92. 90 N.Y.2d 944, 665 N.Y.S.2d 42 (1997).
93. 136 A.D.2d 671, 524 N.Y.S.2d 49 (2d Dep't 1988). *See also Weinstein v. Board of Educ.*, 127 A.D.2d 655, 511 N.Y.S.2d 882 (2d Dep't 1987).
94. 116 A.D.2d 693, 498 N.Y.S.2d 10 (2d Dep't 1986).
95. 98 N.Y.2d 270, 746 N.Y.S.2d 657 (2002).

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CPLR Amendments
2003 Legislative Session (Chapters 1-698[1])

CPLR §	Chapter (§)	Change	Eff. Date
304	261 (1)	Extends pilot program on commencement of actions by fax or e-mail until 9/1/05	7/29/03
1012(b)	296 (7)	Requires notice to city, county, town, or village where constitutionality of a local law, ordinance, rule, or regulation is involved and the municipality is not a party	1/1/05
1101(f)	16 (20)	Extends effective date for 1101(f) until 9/1/05	3/31/03
2103(b)(7)	261 (1)	Extends pilot program on service of interlocutory papers by e-mail until 9/1/05	7/29/03
2104	62 (Part J, 28)	Requires defendant to file stipulations of settlement with county clerk	7/14/03
2303(a)	547	Requires service of copy of subpoena on each party so that it is received before the production	1/1/04
3017(c)	694 (1)	Expands to all personal injury and wrongful death cases prohibition on dollar amount in *ad damnum*	11/27/03
3217(d)	62 (Part J, 29)	Requires that all notices, stipulations, and certificates pursuant to CPLR 3217 be filed by defendant with county clerk	7/14/03
4016(b)	694 (2)	Adds provision on reference at trial to dollar amount in personal injury and wrongful death cases	11/27/03
4111(d)	86 (1)	Replaces section with new CPLR 4111(d) on itemized verdict in medical, dental, or podiatric malpractice actions	7/26/03[2]
5031	86 (2)	Replaces section with new CPLR 5031 on basis for determining judgment to be entered	7/26/03[2]
5035	86 (3)	REPEALS CPLR 5035, relating to effect of death of judgment creditor	7/26/03[2]
7803(5)	492 (2)	Adds provision on proceedings to review final determination or order of State Review Officer	9/1/03[3]
8011(h)(1), (2)	11 (2)	Increases sheriff's fees	2/24/03
8018(a)(1)	62 (Part J, 23)	Increases index number fee to $190 (plus $20 under CPLR 8018(a)(3)), for a total of $210)	7/14/03
8019(f)	62 (Part J, 24)	Increases fees for copies of records	7/14/03
8020(a)	62 (Part J, 25)	Increases RJI fee to $95 and subsequent calendaring fee to $30; imposes $45 fee for motions and cross-motions	7/14/03
8020(c)	62 (Part J, 25)	Increases jury demand fee to $65	7/14/03
8020(d)	62 (Part J, 25)	Imposes $35 fee for filing stipulation of settlement pursuant to CPLR 2104 or notice, stipulation, or certificate pursuant to CPLR 3217(d)	7/14/03
8022(a)	62 (Part J, 27)	Increases notice of appeal filing fee to $65	7/14/03
8022(b)	62 (Part J, 27); 686 (Part B, 6)	Increases filing fee to $315 for record on appeal pursuant to CPLR 5530 & imposes $45 filing fee for motions and cross-motions	7/14/03
8023	261 (1)	Extends pilot program on payment of fee by credit card until 9/1/05	7/29/03

Endnotes

1. Chapters 2-3, 443, 480, 609, 628, and 636 are not yet available.
2. Applies to actions and proceedings commenced on or after 7/26/03.
3. Applies to proceedings commenced on or after 9/1/03.

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Special Award Presented to Philip H. Magner, Jr. at Summer Meeting

Our Trial Lawyers Section held a Summer Program at Niagara-on-the-Lake in Ontario, Canada, on August 13 through August 15, 2003.

At the Gala Dinner Celebration on Friday, August 15, 2003, the esteemed trial lawyer, Philip H. Magner, Jr., of Buffalo, received a "Special Award" for his leadership and trial skills for over the years that he has practiced law in New York State.

Mr. Magner was saluted for his membership in the State Bar, and particularly for his unstinting efforts against the no-fault system, the protection of lawyers undergoing grievance and disciplinary process, and his very special concern for the ill and infirmed lawyer.

Mr. Magner was President of the Bar Association of Erie County, and a member of the Torts, Insurance and Compensation Law Section, and Trial Lawyers Section of the New York State Bar Association. He is a member of the Best Lawyers of America, and the American College of Trial Lawyers.

His marvelous remarks to the dinner attendees are printed below.

Edward C. Cosgrove

Since Chairman Ed is no longer District Attorney of Erie County and is once again a plaintiff's personal injury lawyer, he obviously has not forgotten how to lay it on heavy.

Frankly, I was curious myself about the reasons for this "Special Award," so I managed to get a copy of the criteria, and I have it here.

(Pretending to Read):

> "Recipient must be more than *75* years old, must have practiced trial law in Western New York and elsewhere for more than *50* years, have very little hair, an artificial hip and only one eye."

Somehow, they were able to identify me, and here I am.

(Pretending to Read):

> "Chairman Cosgrove thinks this award will be much cheaper than paying big bucks for a real speaker."

Of course, I'm delighted to share the evening, as I have shared most of my life with my dear Monica, who has been my wife, lover, sparring partner, and pal for more than 43 years. It is not always easy to live with a busy trial lawyer with all the highs and lows, the wins and losses, the cases tried near to home and far away. But she has managed to remain calm—relatively—through it all, to tolerate my sometimes high level of cantankerousness, to make our home not just a refuge but a delight, and to do well most of the heavy lifting in raising our two sons to responsible and devoted manhood.

We lions of the courtroom are inclined sometimes to become a bit full of ourselves. After a great victory or a brilliant cross-examination, our balloons sometimes over-inflate and rise to dizzy heights. If your experience is at all like mine, you know that spouses have a special ability to let some air out and bring us back to earth to a soft or bumpy landing as circumstances require. This is a faculty that Monica developed early and used often. While at those times I was inclined to respond "you should have married a shepherd," I knew in my heart that she was right and that I wasn't really quite ready for Valhalla. I've now stopped searching for her mute button, which she assures me I will never, ever find.

Not so long ago, four operations in three years took me out of the courtroom and off the tennis courts. I was a good deal better at one than the other, and I'll leave you to wonder which was which. We now spend eight months of Buffalo's glorious winters among our contemporaries on beautiful Longboat Key, Florida, where the principal birth control device is nudity. We play with our grandchildren, test our marriage with a lot of daily togetherness, and observe the passing scene. And what a scene it is. Longboat Key has a wonderful, loving family atmosphere. It's inspiring to see so many men in my approximate age group come down for a weekend or a week with their nieces or grandnieces. Some of them have such large families it is a different niece every trip.

Of course, for some, even the salt air or the miracles of modern chemistry cannot overcome the effects of advancing age. The over-the-hill gang has a lot of great lovers emeritus, extinct volcanoes unlikely ever to erupt again. But I don't sneer. I suspect my own wild oats will soon turn to prunes and all-bran.

It is almost always a mistake to give an old trial lawyer a microphone and a captive audience, and I'm afraid for the next few minutes you must suffer the consequences. *I* will, however, remain mindful that the mind will not absorb what the rear cannot endure.

Section Chair Edward C. Cosgrove and presiding Justice Eugene F. Pigott, Appellate Division, Fourth Department, Supreme Court, State of New York, present special award to Philip H. Magner, Jr.

Old men almost always regard the days of their youth as the best of times, the "golden age" of whatever career they chose, and I am no different. Through a lucky confluence of circumstances, I had the great good fortune to begin in my mid-twenties to try cases in Supreme Court against formidable adversaries.

First as a young lawyer, and later as a lawyer not quite so young, it was my great pleasure and good fortune to be befriended and guided by able lawyers of maturity and experience who helped me in a myriad of ways. The finest upstate trial lawyers of those days were neither so busy or so disinterested that they could not and did not respond generously to a young lawyer seeking advice and criticism as he tried to learn his craft. The encouragement and direction provided by those lawyers to a very junior member of the Bar was valuable beyond price, and it is largely because of those associations and friendships with veteran trial advocates, adversaries and colleagues alike, that the practice of trial law has been for me both exciting and satisfying, and each case a new delight.

I am sorry to say that times have changed somewhat from that "golden age" when trial lawyers practiced honorably and freely, governed only by the canons of ethics, which were vigorously enforced. In more recent years, an avalanche of laws, court rules, blue ribbon committees, task forces, administrative tinkering and meddling, and judicial fiats have combined to restrict our fees, burden our practice, demean our profession, and question our integrity. To his great credit, Presiding Justice Pigott has quite recently abrogated one of those burdensome and offensive rules for the Fourth Department.

I cannot allow this opportunity to pass without expressing my pride in this Section which vigorously opposes recent proposals to open the disciplinary process to public view before final judgment has been rendered. For most of my career, the representation of lawyers and judges charged with professional misconduct has been a small but regular and important part of my practice. Many were from small cities or even smaller towns where professional charges would have been big news. The fact that more than a few of those cases were completely dismissed or only minor violations found when resolved in the Appellate Division would not have been enough to salvage long and valuable careers if early publicity and fatal damage had already occurred. I should note that Justice Pigott has announced publicly his opposition to opening disciplinary proceedings at any nonfinal stage.

My "golden age" was also a time before the Supreme Court of the United States, in its infinite wisdom, decided to throw open the cages of the zoo and release the beast of lawyer advertising for the benefit of the public. Of course, that decision turns out to benefit chiefly the advertisers themselves and those who sell TV and outdoor advertising, plus significantly increasing the weight of the phone book. That decision began the process by which our noble profession became for some only a business in which lawyers compete for public notice with used cars, potato chips, and intimate feminine products. Even a few able and respected trial lawyers who don't want to have apparently felt compelled to advertise in defense of their practices.

Professional reputations of trial lawyers, once rightly earned in the courtroom and in the opinions of colleagues, now leap at us full-grown from bus-side, billboard, and boob tube. The hucksters and fishmongers of the law business with their saturation solicitations have succeeded in lowering the public's opinion of lawyers to its lowest point in my quite-long memory. It seems, unfortunately, that the ancient Shakespearean threat to "kill all the lawyers" is most likely to be accomplished by some of our own.

Yet with all of that, I remain hopeful and proud of our ancient but not always honored profession.

Every day I see dedicated lawyers serving the poor, defending the indigent with devoted service far more valuable than the thin gruel of compensation provided by penurious government. I see lawyers shouldering the burden of community service, providing advice and counsel and often far more extensive services without charge to churches, synagogues, and other charitable, fraternal, and non-profit organizations. In Florida, where I am also licensed, retired lawyers from other jurisdictions can be and many are specially admitted to practice without fee in Housing Court, and thus to level the field against greedy professional landlords. Lawyers continue to devote many nonbillable hours to professional discipline, judicial evaluations, arbitrations, and the myriad of activities in which Bar Associations serve the community, all without much, if any, public recognition.

Indeed, the law is nobly represented not only by your marvelously talented advocates who argue the great and celebrated cases of our time in the highest trial and appellate courts of our state and nation. The best ideals and highest purposes of the law are often served as well by the everyday lawyers, the grunts of our profession, not likely ever to acquire either fame or fortune, but who faithfully day after day, represent our citizens in the justice courts and city courts, the municipal courts and housing courts, the county courts and family courts, for it is in those courts that the law is most likely to touch the largest numbers of our people.

But it is not enough that the law touch the people as it daily does in so many ways. It ought to be part of our purpose as lawyers to help the people touch the law, to shape it with their consciences, to mold it to their needs, and to sustain it with their faith. Every lawyer in daily practice has a personal opportunity to reduce the towering majesty and mystery of the law to manageably useful proportions for his clients, to help them see the law as an instrument for peace in a belligerent world, as a bastion of reason in a tumultuous society, and as an argument for order instead of anarchy.

A career at the trial bar can and ought to be a lifetime experience full of professional challenge, replete with intellectual stimulation, and accompanied by fair financial return, and so it has been for me. I believe I can say with confidence that my attitude toward the practice of law is shared by most seasoned lawyers. After 54 years at the trial bar, the old idealism that made me choose a lifetime in the law, though molded by practicality, is today pretty much unwarped by experience and undimmed by the years, and I continue to believe that law and lawyers are, deserve to be, and surely will continue to be vibrant forces in our society.

Each day I went to work to court or to the office, in Buffalo or in some other city or state, I knew that I would spend that day, however adversarial it might turn out to be, in the company of colleagues whom I deeply admired and respected—men and women as good as any and better than most, so very many of whom through all these years I have been privileged to call my friends.

Among my many weaknesses is a weakness for the Irish poets, who I think often got things right, and I know William Butler Yeats got it just right when he wrote, "Consider how man's glory best begins and ends, and say 'my glory was, I had such friends.'"

I leave you now with my deep appreciation and Monica's, and with an Irish wish:

"May your troubles be less,
And your blessings be more,
And nothing but happiness
Come through your door."

—Philip H. Magner, Jr.

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