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Trial Lawyers Section Digest

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Message from the Chair


Evan Goldberg

The past year has certainly been tumultuous, both at home and abroad. With the emergence of economic strife, the continuity of foreign conflict and a historic yet divisive battle for the presidency, many still find comfort in the stability and respect offered by our civil justice system. Increasingly, Americans feel powerless as they watch their retirement funds disappear, their mortgages go into default and their loved ones being sent into harm's way; but even the most marginalized victim can take solace when bringing a personal controversy for redress in the courts. The availability of a chance for justice is the promise of our nation and, for the most part, it has been kept. But promises must be safeguarded, renewed and expanded. That is the concern of every American and, particularly, that of the trial lawyer.

The Trial Lawyers Section maintains its strong commitment to promote improvements in the system that is our livelihood. Our members, made up of plaintiff's and defendant's attorneys in various specialties, have continued their dedicated service to the profession through participation in committees, programs and events, and the submission of commentary on legislative proposals affecting the rights of our clients. While many bemoan how partisan our government has become, in contrast, our Section recognizes that attorneys on opposite sides of litigation remain comrades in the ongoing battle to preserve entitlements and dignity within our society. The old joke that one attorney in a town can't make a living but two can make a nice living applies equally to the securing of justice. The adversarial system not only keeps relevant issues on the table but also serves as a check on the positions of advocates.

One of the most important safeguards we must protect is the jury system. Aside from being the mechanism from which we extract justice for our clients, juries provide our membership with a rare gift. Indeed, it is almost impossible to put down in words what a trial lawyer feels when conducting a thorough *voir dire*. It's as if every law, practice and guideline comes to life from the musty libraries of our institutions, with humanity finally becoming not only the foundation of our liberties but also the result being sought. Trial lawyers are truly privileged when offered this opportunity.

However, there is a risk that those charged with implementing and/or revising the jury system may lose sight of its purpose. To some, dealing with that system is just another aspect of a job. To others, it fluctuates between being a political hot potato and an annoyance. While admittedly much depends on one's perspective, we think it evident that the jury system represents the very best result of the experiment called America. It must be allowed to flourish. It therefore falls to us to not only serve our clients but also to serve the system for the future well-being of our nation. Accordingly, any prac-

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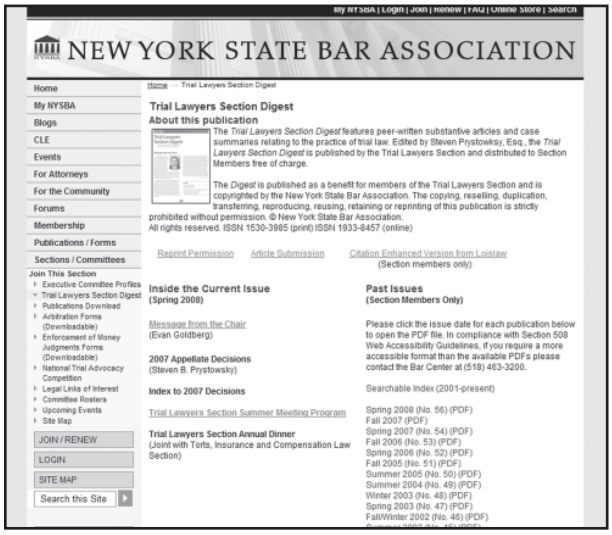

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tice impeding thoughtful and unfettered questioning of a potential juror's viewpoints is anathema and must not be countenanced. During the 50-year history of the Trial Lawyers Section, that has always been our policy. In these days of inflammatory headlines and altered realities, such an approach is especially vital.

We expect jury system reform to be on the legislative agenda in the coming session. If you are interested in becoming involved, please contact the Chair of our Trial Practice Committee. Similarly, if you have an interest in serving on any of the substantive Committees listed on p. 29 of this *Digest*, please call the listed chair or any of the officers of our Section. Committee participation provides an invaluable opportunity to put words into action and is also a path for advancement within our Section.

As a guild, we always seek new and innovative ways to indoctrinate and educate our younger members, including newly admitted attorneys and law students. Recently the Trial Lawyers Section, along with other Sections, sponsored a membership cruise on the Hudson River. With 575 young lawyers aboard, the networking and camaraderie, which was juxtaposed with the New York City Waterfalls exhibit, was truly exciting. During this perfect evening, with the moonlight illuminating the eyes of our passengers, even hardened practitioners caught a glimpse of the idealism that once lifted them towards the noble calling of law. The opportunities of meaningful participation were explained, and the younger lawyers dedicated themselves to continuing the journey so many lawyers have navigated before.

Our Summer Meeting in Bermuda was similarly successful. Beautiful weather, provocative speakers and thorough materials all worked together to provide a quality CLE program that advanced the knowledge of the members who attended. And, of course, there was time enough for golf and good times. During the Executive Committee meeting, and in accordance with a survey of our membership, it was resolved that our next Summer Meeting will be in Newport, Rhode Island, from July 19 to 22, 2009 at the Hyatt Regency. All members are encouraged to save the date.

The State Bar is planning "Bar Week," to be held in New York City during the last week of January 2009. Our annual dinner will be on January 28, 2009 at Cipriani Wall Street, with the CLE program to be held the next day. Last year's dinner at the Water Club was a huge success, well attended by the most prominent members of our judiciary, including Chief Judge Judith Kaye, Chief Administrative Judge Ann Pfau and their colleagues. The program was equally well received. The planning for this year's event is under way, and we expect to accomplish the results our members look forward to. We hope to see you there.

Evan M. Goldberg

Premises Security: Elements and Defenses

By Harry Steinberg

This article revisits a subject we last considered in the Winter 2003 edition of the *Trial Lawyers Section Digest.* What must a plaintiff in a premises security case show to establish a *prima facie* case and, more important, to defeat a dispositive motion? What must a premises owner show to establish entitlement to judgment as a matter of law?

This article reviews the current state of the law and reflects the latest thinking of the appellate courts on issues such as duty, notice, proximate cause, apportionment of liability and other issues that frequently arise in premises security cases.

I. The Duty-Foreseeability-Notice Triad

In premises security cases based upon a claim of failure to provide adequate 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 a landowner or a tenant) is not an insurer of the safety of those using the premises but does have a duty to take minimal precautions to protect those using the premises from the foreseeable criminal acts of third persons.[1]

"Landlords have a common-law duty to take minimal precautions to protect tenants from foreseeable criminal conduct by a third person."[2]

"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 assaulted between the two doors, the landlord could not be held liable.[3]

A landlord who provided locking doors, intercoms and 24-hour security met its duty to take the required minimal security precautions and could not be held liable to visitor assaulted when trapped outside the security doors.[4]

Landlord "satisfied its initial burden of establishing its entitlement to judgment as a matter of law by presenting evidence that the lock and the intercom system on the front door was operable, and with testimony from its security guard that the basement door was locked during the 90-minute period before the assault."[5]

"[W]hile the inner door lock did remain nonfunctional for a period of a few weeks, one set of locked doors was sufficient to discharge defendants' duty of security."[6]

"No factual issue is raised by the circumstance that the lock on the vestibule's outer door had been removed, allowing access to the vestibule to anyone from the street, where there was a functioning lock on the vestibule's inner door leading to the building."[7]

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 in the same group of buildings.[8]

"[T]he scope of the possessor's duty is defined by past experience and the 'likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor.'"[9]

To establish foreseeability, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location.[10]

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 that such criminal 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 were sufficient to create notice and to make such crimes foreseeable.[11]

There is no requirement that past criminal activity be at the same location or be of the same type to which plaintiff was subjected.[12]

One hundred seven reported crimes, including 10 crimes against persons, in 21 months before 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 of the prior crimes occurred in lobby.[13]

"[M]ore than 70 felonies, including murder, forcible rape, arson, assault and burglaries with forced entries, committed during the two years prior to the date the plaintiff was raped, demonstrate that the Glenwood Houses suffered from an extensive history of violent criminal activity."[14]

"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 the security measures" were adequate in view of the evidence of prior criminal activity.[15]

2. Insufficient Notice

There was insufficient notice since there was "[no] notice of prior sexual assaults at the subject pool before the alleged sexual assaults were perpetrated upon infant plaintiffs."[16]

Evidence of a total of eight criminal acts, three of which were crimes against the person which occurred in the general area of the building, and four other crimes coupled with expert affidavit attesting that the building was in a high crime area, was insufficient to put building owner and manager on notice of crimes. "That a woman entering her apartment in New York City might be subject to a sexual assault is conceivable, but conceivability is not the equivalent of foreseeability.[17]

"At most, plaintiffs have demonstrated ambient neighborhood crime, which was insufficient to raise an issue as to the foreseeability of criminal activity within the motel."[18]

"Ambient neighborhood crime alone is insufficient to establish foreseeablity."[19]

A history of rapes and violent crimes in the 83rd Precinct was insufficient to establish foreseeability given the absence of prior crimes within the building.[20]

No shootings in the 65-year history of the Empire State Building and only two muggings in the two years preceding the attack and several robberies in the ground floor retail space meant that there was no issue of fact as to foreseeability.[21]

Notice of car break-ins in the parking lot and vagrants in the lobby was insufficient to give notice of the assault.[22]

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.

Plaintiff who was dragged from the street into the 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."[23]

A tenant who was assaulted at the building's outer entrance could not state a claim because a "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."[24]

A nightclub owed no duty to a patron who was assaulted 15 feet from its entrance.[25]

"[D]efendant neither owned nor assumed sufficient control over the parking lot to have assumed a duty to protect plaintiff from the assault."[26]

There was no liability for an assault which occurred on the sidewalk outside the bar.[27]

There can be no liability for an assault which occurred either on a private sidewalk leading to the entrance or on an adjoining public sidewalk.[28]

A shopping center owner whose security staff patrolled the parking lot owed no duty, contractual or otherwise, to patrol the inside of the store in which an employee was raped.[29]

The 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 station's day-to-day operations.[30]

"[B]ecause the tragic shooting occurred in the common area of the housing project NYCHA had no duty to protect the decedent."[31]

III. Duty and the Third Party

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

A. Security Guards

A security guard provider could not be held liable to a shop clerk injured by an intruder who remained hidden in the shop after the security guard checked the premises before closing.[32]

While the landlord could be held liable for an assault based upon a claim that there were non-working locks, "the complaint against the security company was properly dismissed since the security company, in its contract with the building owners, did not expressly assume any protective duty enforceable by the tenants."[33]

The defendant security company owed neither a contractual nor a common-law duty to protect a student who was assaulted at school; nor was the student a third-party beneficiary of the contract between the school and the security company.[34]

B. Others

Plaintiff could not state a claim against the security system installer "as the two are not in privity and [the contractor] owed no duty to him."[35]

A visitor raped when an intruder easily pushed through a defective front-door lock had no cause of action against the locksmith because there was no relationship between the visitor and the locksmith.[36]

The phone company could not be held liable where an intruder gained access to an apartment by using a terminal box placed under a window as a step because the phone company owed no duty to prevent misuse of the box; the placement of box was not a proximate cause of the crime but only furnished the condition for its occurrence.[37]

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

The mere fact that a landowner breached a duty 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 any such negligence was the substantial (proximate) cause of the assault. 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 establish that the assailant was an intruder.[38]

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.*,[39] recognized the need to "balance a tenant's ability to recover for an injury caused by the landlord's negligence against a landlord's ability to avoid liability when its conduct did not cause any injury."

The balance the Court of Appeals struck was to adopt what it characterized as the ordinary burden a plaintiff must meet, holding that "a plaintiff who sues a landlord for negligent failure to take minimal precautions to protect tenants from harm can satisfy the proximate cause burden at trial even where the assailant remains unidentified, *if the evidence renders it more likely or more reasonable than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance*."[40]

In *Burgos*, the lead case, plaintiff testified that the building was a small building, that she knew all of the tenants and visitors 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.[41]

In *Gomez*, the companion case, the jury heard evidence that (a) the victim knew most of the building's tenants and neither she nor the other witnesses recognized the assailant; (b) when he got into the elevator the assailant did not select a floor; and (c) the assailant 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.[42]

Citing *Burgos*, the Appellate Division, held that in a premises security case "the causal link is established where the plaintiff demonstrates by a preponderance of the evidence that it is more likely than not that the intruder gained access through a negligently maintained door."[43]

A. Evidence Sufficient to Prove Assailant Was Intruder

In the wake of *Burgos*, the courts have accepted a variety of evidence to establish that the assailant was an intruder.

The assailant made no effort to conceal his identity and the plaintiff did not recognize the assailant.[44]

The intruder was unmasked.[45]

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 was a stranger.[46]

Although the intruder was masked, witnesses did not recognize him and he was seen fleeing the premises.[47]

The witnesses did not recognize the assailants who were seen forcing their way into the building.[48]

B. Evidence Insufficient to Prove Assailant Was Intruder

However, some evidence as to proximate cause still remains a necessity.

Proof that the plaintiff admitted the assailant eliminated any negligence by the landlord as a proximate cause of the assault.[49]

That the front door lock was broken was not a proximate cause of the assault where the victim was targeted by drug dealers.[50]

The landlord's proof that the door was working on the day before the assault and plaintiff's failure to show how the assailant entered the building required dismissal of the complaint.[51]

There was a question of fact whether plaintiff's opening of the apartment door without checking the peephole was an intervening cause even where the front door locks were broken.[52]

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, in an outdoor area.

Defendant owed no duty to secure the front door of the building to protect a passerby from the danger of criminal acts by drug dealers in and around the building. Although plaintiff was returning to the building from an errand while visiting a tenant of the building, that plaintiff was 191 feet from the building when he was shot made the shooting "a mere fortuity."[53]

Property owner would not be held liable where the shooting "occurred in the outdoor common area of the housing project" and defendant had no opportunity to control the actions of the assailants.[54]

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."[55]

VI. Relationship Between Victim and Assailant

Where there is a relationship between the assailant and the victim or the victim is "targeted," 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 evidence showed that the assailant had approached plaintiff twice and where the rape matched a pattern of attacks, "plaintiff was targeted well in advance by a serial rapist, severing any causal connection between her injuries and defendant's alleged negligence in failing to repair a broken front door lock."[56]

The court reversed the jury verdict in plaintiff's favor since "the evidence also clearly established that the murders were a result of a planned hostage taking and armed robbery."[57]

Plaintiff could not state a premises security claim since "[p]laintiff's injury was a result of an intervening, intentional criminal act of sophisticated armed robbers disguised as agency workers who targeted the defendant and his home in advance."[58]

Plaintiff could not state a claim where he was targeted by drug dealers; the broken front door lock was not a proximate cause of the assault.[59]

Where plaintiff was the targeted victim of longtime enemy who had access to 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.[60]

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 have sufficient time to intervene and prevent an assault either before it starts or while it is in progress.

A. Recovery Possible

While a public establishment has no duty to protect its customers from unforeseeable criminal acts of third persons, it has duty to control the conduct of third persons when it has the opportunity to do so. Therefore, the Appellate Division affirmed a verdict in plaintiff's favor where the store's manager observed an assault and failed to attempt to stop it.[61]

A security guard injured in a melee at a nightclub's entrance could state a claim against the nightclub's owner and a party promoter who were aware that the nightclub had oversold advance tickets.[62]

There was a question of fact whether defendant "failed to intervene in a timely fashion in the altercation, in light of conflicting testimony as to the length of time that the incident lasted."[63]

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 [plaintiff] from the reasonably foreseeable criminal acts of third parties."[64]

B. Recovery Barred

No liability would be imposed upon a bowling alley operator given that the assault was sudden.[65]

The mere fact that the assault occurred at a hip-hop club was insufficient to put the owners on notice of the likelihood of the assault.[66]

Absent proof of an escalating situation there could be no liability for a sudden and unexpected assault.[67]

Restaurant owners were entitled to summary judgment. "The assault upon the plaintiffs at the appellants' restaurant was sudden and was not an act that the appellants could reasonably be expected to anticipate or prevent."[68]

VIII. The Duty of Banks and ATM Providers

Although banks, and especially automatic teller machines (ATMs), may be regarded as "high-hazard" locations (banks are, after all, where the money is), the rule that the criminal acts of third persons must be foreseeable applies in this setting as well, and there must be some past criminal conduct before the courts will find the 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 "[t]he owner 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 facility.'"[69]

This rule was restated in *Coronel v. Chase Manhattan Bank*.[70] In *Coronel*, plaintiff was shot after withdrawing money from an ATM, and the Appellate Division reversed an order denying summary judgment because "'[w]ithout evidentiary proof of notice of prior criminal activity, the owner's duty reasonably to protect those using the premises from such activity never arises."[71] The Court of Appeals gave plaintiff even shorter shrift, stating: "We agree with the Appellate Division that plaintiff failed to raise an issue of fact sufficient to defeat defendant bank's summary judgment motion."[72]

Coronel is in accord with two earlier cases, *Golombek v. Marine Midland Bank N.A.*,[73] in which the Appellate Division held that a plaintiff 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, and *Dyer v. Norstar Bank, N.A.*,[74] in which the Appellate Division held "that a person using an ATM might be subject to robbery is conceivable, but conceivability is not the equivalent of foreseeability."

In *Williams v. Citibank, N.A.*,[75] 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. 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.

Where there is notice of prior similar crimes, the courts will find an issue of fact whether the bank provided the required security.[76]

IX. The Governmental/Proprietary Function Dichotomy

Governmental entities enjoy immunity from claims arising from the discharge of 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.

Where a government entity undertakes a proprietary duty, it can be held liable under the same theories as a private entity would be held liable.[77]

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.'"[78]

In *Miller v. State*,[79] the Court of Appeals held that the New York 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 actually a claim of failure to provide police protection and, therefore, a governmental activity.

In *Weiner v. Metropolitan Transportation Authority*,[80] the Court of Appeals held that the failure to provide security at a subway station involved the governmental function of allocation of police resources and that it did not matter that a private common carrier could be held liable for failure to provide security under similar circumstances.

In *Sebastian v. State*,[81] the Court of Appeals explained that the conduct of governmental entities falls "along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions." At one end of the continuum, there are the purely governmental functions that fall under general police powers; at the other end, are proprietary functions that are traditionally viewed as acts undertaken by private enterprises.[82]

B. The Rule Applied

In *Jennifer R. v. City of Syracuse*,[83] the Appellate Division held that protection against physical attacks is a governmental function. In *Harris v. City of New York*,[84] the Appellate Division held that the failure to lock a public bathroom in a park was a governmental decision for which a negligence claim could not be stated. In *Arias v. City of New York*,[85] the Appellate Division held that a seller of illegal guns shot during a buy-and-bust operation could not state a claim against the City because a police decision to fire weapons was a discretionary governmental decision.

In *Crosland v. New York City Transit Authority*,[86] the Court of Appeals held that the estate of a passenger failed to state a claim for misallocation of security resources, *but* could state a claim if Authority employees observed the assault from a place of safety and failed to summon aid.

In *Petkevich v. MTA*,[87] the Appellate Division held that whether to fence off an area from which the assailants entered a subway platform was a governmental function.

In *Swift v. City of Syracuse*,[88] the Appellate Division held that the decision not to remove a daughter from her non-custodial father's custody was a governmental function.

In *Price v. New York City Housing Authority*,[89] the Court of Appeals held that a plaintiff could not state a claim for the failure to warn of criminal activity because that was a governmental police, not proprietary, function.

In *Rotz v. City of New York*,[90] the Appellate Division held that while the City could not be held liable on a claim of failure to provide police protection, a question of fact barred summary judgment on the issue of whether the City provided proper crowd control at a public concert where a stampede occurred.

C. The Special Duty/Relationship Rule

Liability can be imposed upon a government entity acting in a governmental role where a plaintiff establishes the elements of a special relationship by showing "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured, (2) knowledge on the part of the municipality's agents that inaction could lead to harm, (3) some form of direct contact between the municipality's agents and the injured party, and (4) the injured party's justifiable reliance on the municipality's affirmative undertaking."[91]

However, establishing the required special relationship can be difficult:

A police decision to scale back 24-hour-a-day protection cannot give rise to a claim given that plaintiffs did not rely upon such protection.[92]

There was no liability based upon a police officer's failure to remove a shotgun which was later used in an assault because there was no assumption of duty.[93]

There was no liability where a father was shot by his daughter's former boyfriend because there was no justifiable reliance upon the municipality's promise of protection.[94]

There was a question of fact whether the police undertook an affirmative duty given the police representation that an electronic monitoring device would prevent the former boyfriend from approaching or assaulting the plaintiff.[95]

There was a question of fact whether a special relationship existed given the mandatory safety workshops and conferences instructing special education teachers in emergency procedures.[96]

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 only when the school is on notice of the need to provide protection and this rule does not apply to teachers and other school employees.

A. The Rule and Its Application

In *Mirand v. City of New York*,[97] 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."
- The school must have knowledge, actual or constructive, of prior similar criminal conduct.
- An injury caused by a sudden impulsive act of a fellow student will not support a finding of negligence.

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.

However, a school must have some notice of an altercation and time to prevent it before liability can be imposed. In *LaPage v. Evans*,[98] a brief verbal exchange between students on a school bus was deemed insufficient to give rise to a claim for injuries that occurred in a later fight given that the students had no history of prior disciplinary problems.

Liability will not be imposed where an altercation erupts suddenly and the school has no opportunity to prevent it.[99]

Liability will not be imposed where a student voluntarily engages in an altercation.[100]

Where a school has knowledge of a student's violent propensities and/or has adequate time to intervene, liability will be imposed.[101]

A claim cannot be stated against a school for an assault by a teacher unless the school has notice of the teacher's violent propensities.[102]

In *Murray v. Research Foundation of State University of New*,[103] the Appellate Division held that summary judgment was not appropriate where a school violated its own procedures, and a child was molested by an adult who met alone with the child behind closed doors notwithstanding a rule that prohibited such meetings.

Liability will only be imposed for incidents which occur on school premises not outside the school.[104]

However, in *Bell v. Board of Education*,[105] 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

by allowing her to leave her class group while on a field trip.

B. Teachers and Employees

Generally, school employees cannot state negligent security claims because they are not owed a special duty as are students.[106]

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, a defendant who is found to be 50% or less culpable is liable only for the assigned percentage of non-economic damages.

Example: D-1 and D-2 are both found liable. 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. In a premises security case, if the assailant fades into the night, Article 16 is not available to defendants.

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, for our purposes, actions requiring proof of intent.

The party claiming that Article 16 does *not* apply bears the burden of proof on that issue. In a premises security case, this means that the *plaintiff* will bear the burden of negating the applicability of Article 16.

B. The Intentional/Negligent Hybrid Case

Until the Court of Appeals addressed the issue in *Chianese v. Meier*,[107] the Appellate Divisions split as to whether Article 16 applied in the typical premises security case in which the landlord is charged with negligence and the assailant is charged with an intentional act.

The Court of Appeals resolved that question, holding that Article 16 does apply, and a property owner in a premises security case can, if the assailant can be located, implead the assailant and seek to have the jury apportion fault to the assailant.

C. Application of Article 16 to Premises Security Cases

The cases decided under the rule stated in *Chianese* show that the courts understand that where there is a negligent tortfeasor and an intentional tortfeasor, the lion's share of the liability should be assigned to the intentional tortfeasor.

In *Stevens v. New York City Transit Authority*,[108] the Appellate Division modified a verdict assigning 40% culpability to the Transit Authority and 60% to the intentional tortfeasor who pushed plaintiff onto the tracks and, instead, assigned 20% of the fault to the Transit Authority and 80% to the assailant because "[a]ny negligence by the train operator cannot approach the culpability of the perpetrator."

In *Roseboro v. New York City Transit Authority*,[109] the Appellate Division modified a verdict assigning 80% of the culpability to the Transit Authority and 20% to the assailants, and, instead, assigned 20% of the culpability to the Transit Authority and 80% to the assailants because "however blameworthy its sleeping clerk may have been, defendant's share of the responsibility cannot approach the degree of culpability of decedent's attackers."

In *Nash v. Port Authority of New York and New Jersey*,[110] the court upheld the jury's finding the Port Authority 68% liable for the bombing of the World Trade Center and the terrorist 32% liable. The Appellate Division, First Department, refused to modify the jury's apportionment of liability as the courts did in *Stevens* and *Roseboro*. The court reasoned that the magnitude of a defendant's negligence does not necessarily diminish "to subordinate significance in the attribution of fault by reason of the circumstances that the harm was concurrently attributable to intentional conduct, even when the intentional conduct is particularly heinous. To the contrary, as this case so vividly illustrates, the blameworthiness of negligence may actually be increased by the heinousness of the wrongdoing it directly and foreseeable facilitates."[111]

D. The Bankruptcy Jurisdiction Issue

As noted above, one of the key exceptions to Article 16 is where jurisdiction cannot be obtained over another party alleged to be partially liable.

Query: Is a co-defendant in bankruptcy deemed to be beyond the court's jurisdiction?

No. Even if an action is severed against a bankrupt defendant, the non-bankrupt defendant is still entitled to have the jury apportion liability to the bankrupt defendant.[112]

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. *Mason v. U.E.S.S. Leasing Corp.*, 96 N.Y.2d 875, 878, 730 N.Y.S.2d 770, 772 (2001). *See also Gross v. Empire State Building Associates*, 4 A.D.3d 45, 47, 773 N.Y.S.2d 354, 356 (1st Dep't 2004) ("landlords . . . have a firmly established common-law duty to take only 'minimal precautions' to protect tenants and visitors from foreseeable harm, including foreseeable criminal acts").
3. *Tarter v. Schildkraut*, 151 A.D.2d 414, 415, 542 N.Y.S.2d 626, 627 (1st Dep't 1989).
4. *James v. Jamie Towers Housing Co.*, 99 N.Y.2d 639, 760 N.Y.S.2d 718 (2003), *aff'g* 294 A.D.2d 268, 743 N.Y.S.2d 85 (1st Dep't 2002).
5. *Alvarez v. Masaryk Towers Corp.*, 15 A.D.3d 428, 429, 789 N.Y.S.2d 727, 728-29 (2d Dep't 2005).
6. *Anzalone v. Pan-Am Equities*, 271 A.D.2d 307, 309, 706 N.Y.S.2d 409, 411 (1st Dep't 2000).
7. *Nelson v. Osborne Realty Corp.*, 294 A.D.2d 162, 162, 742 N.Y.S.2d 31, 32 (1st Dep't 2002). *See also Jackson v. Lefferts Heights Housing Development Fund Co.*, 38 A.D.3d 610, 610, 831 N.Y.S.2d 528, 530 (2d Dep't 2007) (affirming summary judgment where "movants established that the entrance to the building was equipped with an inner door lock, which was operable, and an intercom and buzzer system"); *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dep't 1999) (landlord did not have duty to provide 24-hour-a-day doorman.); *Evans v. 141 Condominium Corp.*, 258 A.D.2d 293, 295-96, 685 N.Y.S.2d 191, 193 (1st Dep't 1999) (no claim can be stated where assault occurred during doorman's scheduled one-hour break).
8. *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).
9. *Mehashwari v. City of New York*, 2 N.Y.3d 288, 294, 778 N.Y.S.2d 442, 445 (2004), *quoting Nallan*, 50 N.Y.2d at 519, 429 N.Y.S.2d at 613.
10. *Novikova*, 258 A.D.2d at 152-153, 694 N.Y.S.2d at 448.
11. *Jacqueline S.*, 81 N.Y.2d at 294-95, 598 N.Y.S.2d at 162-63.
12. *Cardena v. Alexander Wolfe & Co., Inc.*, 303 A.D.2d 313, 314, 758 N.Y.S.2d 15, 16 (1st Dep't 2003).
13. *Nallan*, 50 N.Y.2d at 520, 429 N.Y.S.2d at 614.
14. *Venetal v. City of New York*, 21 A.D.3d 1087, 1089, 803 N.Y.S.2d 609, 612 (2d Dep't 2005).
15. *King v. Resource Property Management Corp.*, 245 A.D.2d 10, 11, 665 N.Y.S.2d 637, 637 (1st Dep't 1997).
16. *Osorio v. City of New York*, 44 A.D.3d 553, 553, 843 N.Y.S.2d 853, 853 (1st Dep't 2007).
17. *Maria T. v. New York Holding Co. Associates*, 52 A.D.3d 356, 358-59, 862 N.Y.S.2d 16, 18-19 (1st Dep't 2008), *citing Williams*, 247 A.D.2d 49, 51, 677 N.Y.S.2d 318, 320 (1st Dep't 1998).
18. *Regina v. Broadway-Bronx Motel Co.*, 23 A.D.3d 255, 256, 804 N.Y.S.2d 305, 306 (1st Dep't 2005).
19. *Buckeridge v. Broadie*, 5 A.D.3d 298, 300, 774 N.Y.S.2d 132, 134 (1st Dep't 2004).
20. *Johnson v. City of New York*, 7 A.D.3d 577, 578, 777 N.Y.S.2d 135, 136 (2d Dep't 2004).
21. *Gross*, 4 A.D.3d at 47, 773 N.Y.S.2d at 356.
22. *Pascarelli v. LaGuardia Elmhurst Hotel Corp.*, 294 A.D.2d 343, 742 N.Y.S.2d 98 (2d Dep't 2002).
23. *Waters v. New York City Housing Authority*, 69 N.Y.2d 225, 226, 513 N.Y.S.2d 356, 356-57 (1987). *See also Brown v. New York City Housing Authority*, 39 A.D.3d 744, 834 N.Y.S.2d 279 (2d Dep't 2007) (no liability where plaintiff is brought onto negligently unsecured premises).
24. *Evans v. 141 Condominium Corp.*, 258 A.D.2d 293, 295, 685 N.Y.S.2d 191, 193 (1st Dep't 1999).
25. *Murphy v. Chaos*, 26 A.D.3d 231, 810 N.Y.S.2d 39 (1st Dep't 2006).
26. *Taft v. Connell*, 285 A.D.2d 992, 992, 727 N.Y.S.2d 572, 573 (4th Dep't 2001).
27. *Mujsce v. Powell*, 264 A.D.2d 765, 765-66, 695 N.Y.S.2d 378, 379 (2d Dep't 1999).
28. *Yanas v. Chester Investigational Agency, Inc.*, 230 A.D.2d 845, 846, 646 N.Y.S.2d 632, 632 (2d Dep't 1996).
29. *Charleen F. v. Cord Meyer Development Corp.*, 212 A.D.2d 572, 622 N.Y.S.2d 555 (2d Dep't 1995).
30. *Ahmad v. Getty Petroleum Corp.*, 217 A.D.2d 600, 601, 629 N.Y.S.2d 779, 780 (2d Dep't 1995).
31. *Daly v. City of New York*, 227 A.D.2d 432, 642 N.Y.S.2d 907, 908 (2d Dept. 1996).
32. *Rahim v. Sottile Security Co.*, 32 A.D.3d 77, 817 N.Y.S.2d 33 (1st Dep't 2006).
33. *Anokye v. 240 East 175th Street Housing Development Fund Corp.*, 16 A.D.3d 287, 288, 792 N.Y.S.2d 417, 418 (1st Dep't 2005). *See also King*, 245 A.D.2d at 10, 665 N.Y.S.2d as 637.
34. *Dabbs v. Aron Security, Inc.*, 12 A.D.3d 396, 398, 784 N.Y.S.2d 601, 602 (2d Dep't 2004). *See also Durham v. Beaufort*, 300 A.D.2d 435, 752 N.Y.S.2d 88 (2d Dep't 2002) (security guard provider owed no contractual nor common-law duty to protect shopping mall employees from attack based upon contract with shopping mall owner).
35. *Esteves v. City of New York*, 44 A.D.3d 538, 539, 844 N.Y.S.2d 33, 34 (1st Dep't 2007).
36. *Einhorn v. Seeley*, 136 A.D.2d 122, 125-26, 525 N.Y.S.2d 212, 215 (1st Dep't 1988).
37. *Moss v. New York Telephone Co.*, 196 A.D.2d 492, 493, 600 N.Y.S.2d 759, 761 (2d Dep't 1993).
38. *See, e.g., Perry v. New York City Housing Authority*, 222 A.D.2d 567, 635 N.Y.S.2d 661 (2d Dep't 1995) (plaintiff's claim that failure to provide lock for outer door permitted assailant to enter building was dismissed because she failed to establish that assailant entered via unlocked door, thereby failing to establish proximate cause).
39. 92 N.Y.2d 544, 551, 684 N.Y.S.2d 139, 142 (1998).
40. *Id.* at 551, 684 N.Y.S.2d at 142 (emphasis added).
41. *Id.* at 551-52, 684 N.Y.S.2d at 142.
42. *Id.* at 552, 684 N.Y.S.2d at 142.
43. *Venetal*, 21 A.D.3d at 1090, 803 N.Y.S.2d at 612.
44. *Esteves*, 44 A.D.3d at, 539, 844 N.Y.S.2d at, 34.
45. *Perez v. New York City Housing Authority*, 294 A.D.2d 279, 742 N.Y.S.2d 289 (1st Dep't 2002).
46. *Brewster v. Prince Apartments, Inc.*, 264 A.D.2d 611, 695 N.Y.S.2d 315 (1st Dep't 1999).
47. *Jiggets v. New York City Housing Authority*, 263 A.D.2d 426, 693 N.Y.S.2d 601 (1st Dep't 1999).
48. *Rios v. Jackson Associates*, 259 A.D.2d 608, 686 N.Y.S.2d 800 (2d Dep't 1999).
49. *Raghu v. 24 Realty Co.*, 7 A.D.3d 455, 777 N.Y.S.2d 487 (1st Dep't 2004).
50. *Cerda v. 2962 Decatur Avenue Owners Corp.*, 306 A.D.2d 169, 761 N.Y.S.2d 220 (1st Dep't 2003).
51. *Lester v. New York City Housing Authority*, 292 A.D.2d 510, 739 N.Y.S.2d 200 (2d Dep't 2002).

52. *Carmen P. v. PS&S Realty Corp.*, 259 A.D.2d 386, 687 N.Y.S.2d 96 (1st Dep't 1999).

53. *Rodriguez v. Oak Point Management, 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).

54. *Daly*, 227 A.D.2d at 433, 642 N.Y.S.2d at 908.

55. *Leyva v. Riverbay Corp.*, 206 A.D.2d 150, 153-54, 620 N.Y.S.2d 333, 336 (1st Dep't 1994).

56. *Cynthia B. v. 3156 Hull Avenue Equities, Inc.*, 38 A.D.3d 360, 360, 832 N.Y.S.2d 520, 520 (1st Dep't 2007).

57. *Flores v. Dearborne Management, Inc.*, 24 A.D.3d 101, 101, 806 N.Y.S.2d 478, 479 (1st Dep't 2005).

58. *Buckeridge*, 5 A.D.3d at, 300, 774 N.Y.S.2d at 134.

59. *Cerda*, 306 A.D.2d at 169, 761 N.Y.S.2d at 220.

60. *Harris v. New York City Housing Authority*, 211 A.D.2d 616, 617, 621 N.Y.S.2d 105, 105-6 (2d Dep't 1995). *See also Tarter*, 151 A.D.2d at 414, 542 N.Y.S.2d at 626 (ex-lover stalked tenant and shot her as she was entering vestibule of building in which she lived.). *But see Gibbs v. Diamond*, 256 A.D.2d 266, 682 N.Y.S.2d 181 (1st Dep't 1998) (although victim was attacked by tenant who had a right to be on premises, liability could be imposed on landlord for negligence in failing to lock vacant apartment into which victim was forced by attacker).

61. *Banyan v. F.W. Woolworth Co.*, 211 A.D.2d 591, 591, 622 N.Y.S.2d 24, 25 (1st Dep't 1995).

62. *Vetrone v. Ha Di Corp.*, 22 A.D.3d 835, 838, 803 N.Y.S.2d 156, 160 (2d Dep't 2005).

63. *Elkady v. Very, Ltd.*, 8 A.D.3d 197, 197-98, 778 N.Y.S.2d 688, 688 (1st Dep't 2004).

64. *Guarcello v. Rouse SI Shopping Center, Inc.*, 204 A.D.2d 685, 685, 612 N.Y.S.2d 239, 240 (2d Dep't 1994).

65. *Millan v. AMF Bowling Centers, Inc.*, 38 A.D.3d 860, 833 N.Y.S.2d 173 (2d Dep't 2007). *See also Petras v. Saci, Inc.*, 18 A.D.3d 848, 796 N.Y.S.2d 673 (2d Dep't 2005) (assault was sudden and could not have been foreseen).

66. *Djurkovic v. Three Goodfellows, Inc.*, 1 A.D.3d 210, 767 N.Y.S.2d 108 (1st Dep't 2003).

67. *Scalice v. King Kullen*, 274 A.D.2d 426, 426-27, 710 N.Y.S.2d 632, 633 (2d Dep't 2000).

68. *DeCruz v. McDonald's Guttierez Food Corp.*, 272 A.D.2d 366, 366, 707 N.Y.S.2d 486, 486 (2d Dep't 2000).

69. *Lechmanski v. Marine Midland Bank*, 259 A.D.2d 966, 966, 703 N.Y.S.2d 612, 613 (4th Dep't 1999) (emphasis added). *See also Williams v. Citibank, N.A.*, 247 A.D.2d at 51, 677 N.Y.S.2d at 321 ("an 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 facility").

70. 19 A.D.3d 310, 798 N.Y.S.2d 41 (1st Dep't 2005), *aff'd*, 8 N.Y.3d 838, 830 N.Y.S.2d 691 (2007).

71. 19 A.D.3d at 311, 798 N.Y.S.2d at 42.

72. 8 N.Y.3d at 838, 830 N.Y.S.2d at 691.

73. 193 A.D.2d 1113, 598 N.Y.S.2d 891 (4th Dep't 1993).

74. *See* note 18, *supra*.

75. *Id*.

76. *Aponte v. Chase Manhattan Bank*, 295 A.D.2d 130, 130-31, 744 N.Y.S.2d 6, 6-7 (1st Dep't 2002) ("we conclude that the robbery at the same branch a few months earlier presents a question of fact as to foreseeability").

77. *Venetal*, 21 A.D.3d at 1087, 803 N.Y.S.2d at 609.

78. *Miller v. State*, 62 N.Y.2d 506, 513, 478 N.Y.S.2d 829, 833 (1984), *quoting Weiner v. Metropolitan Transportation Authority*, 55 N.Y.2d 175, 182, 448 N.Y.S.2d 141, 144 (1982).

79. *See* note 78, *supra.*

80. *Id*.

81. 93 N.Y.2d 790, 793, 698 N.Y.S.2d 601, 603 (1999).

82. *Id*., 698 N.Y.S.2d at 603.

83. 43 A.D.3d 1326, 1326-27, 844 N.Y.S.2d 523, 524 (4th Dep't 2007).

84. 40 A.D.3d 701, 702, 836 N.Y.S.2d 226, 227 (2d Dep't 2007).

85. 22 A.D.3d 436, 437, 802 N.Y.S.2d 209, 210-11 (2d Dep't 2005).

86. 68 N.Y.2d 165, 506 N.Y.S.2d 670 (1986).

87. 38 A.D.3d 513, 514, 832 N.Y.S.2d 65, 66 (2d Dep't 2007).

88. 30 A.D.3d 1089, 1090, 816 N.Y.S.2d 656, 657 (4th Dep't 2006).

89. 92 N.Y.2d 553, 684 N.Y.S.2d 143 (1998).

90. 143 A.D.2d 301, 532 N.Y.S.2d 245 (1st Dep't 1988).

91. *Conde v. City of New York*, 24 A.D.3d 595, 596, 808 N.Y.S.2d 347, 348 (2d Dep't 2005).

92. *Id.* at 597; 808 N.Y.S.2d at 349.

93. *Halpin v. Town of Lancaster*, 24 A.D.3d 1176, 1177, 806 N.Y.S.2d 810, 811 (4th Dep't 2005), *aff'd*, 7 N.Y.3d 827, 822 N.Y.S.2d 754 (2006).

94. *Starr v. County of Cortland*, 6 A.D.3d 775, 777, 774 N.Y.S.2d 596, 598 (3d Dep't 2004).

95. *Hanna v. St. Lawrence County*, 34 A.D.3d 1146, 1148-49, 825 N.Y.S.2d 798, 800-801 (3d Dep't 2006).

96. *Pascucci v. Board of Education*, 305 A.D.2d 103, 104, 758 N.Y.S.2d 54, 56 (1st Dep't 2003).

97. 84 N.Y.2d 44, 49, 614 N.Y.S.2d 372, 375 (1994). *See also Shante D. v. City of New York*, 83 N.Y.2d 948, 615 N.Y.S.2d 317 (1994), *aff'ing* 190 A.D.2d 356, 598 N.Y.S.2d 475 (1st Dep't 1993).

98. 37 A.D.3d 1019, 830 N.Y.S.2d 818 (3d Dep't 2007). *See also Murnyack v. Rebon*, 21 A.D.3d 1406, 801 N.Y.S.2d 658, 659 (4th Dep't 2005) (no liability for school fight given no history of prior similar conduct by assailant); *Taylor v. Dunkirk City School District*, 12 A.D.3d 1114, 1115, 785 N.Y.S.2d 623, 624 (4th Dep't 2004) (prior verbal comments insufficient to state claim where there was no history of physical threats); *Moody v. New York City Board of Education*, 8 A.D.3d 639, 640, 780 N.Y.S.2d 603, 604 (2d Dep't 2004) (denial of summary judgment reversed given "no actual or constructive notice of any prior similar conduct" by assailant).

99. *Kozakiewicz v. Frontier Middle School*, 37 A.D.3d 1138, 1139, 829 N.Y.S.2d 371, 372 (4th Dep't 2007) ("the assault occurred so suddenly that no amount of supervision would have prevented it"); *Filiberto v. City of New Rochelle*, 35 A.D.3d 654, 654, 826 N.Y.S.2d 711, 712 (2d Dep't 2006) ("plaintiff's alleged injuries were the result of a sudden, unforeseeable, and spontaneous attack that could not have been prevented by more intense supervision"); *Van Leuvan v. Rondout Valley Central School District*, 20 A.D.3d 645, 646, 798 N.Y.S.2d 770, 772 (3d Dep't 2005) ("Kelsey's intentional conduct of kicking Van Leuvan was a sudden and spontaneous act that defendant could not have reasonably anticipated.").

100. *Williams v. City of New York*, 41 A.D.3d 468, 469, 837 N.Y.S.2d 300, 302 (2d Dep't 2007) (defendants established that "the infant plaintiff was a voluntary participant in the fight, and thus, the alleged inadequacy of [defendants'] supervision could not be considered a cause of the infant plaintiff's injuries"); *Legette v. City of New York*, 38 A.D.3d 853, 854, 832 N.Y.S.2d 669, 669 (2d Dep't 2007) (because plaintiff voluntarily participated in fight, "the alleged inadequacy of [defendants'] their supervision could not be considered a proximate cause of the infant plaintiff's injuries"). *But see Ambroise v. City of New York*, 44 A.D.3d 805, 843 N.Y.S.2d 685 (2d Dep't 2007) (question of fact whether participation in fight was voluntary).

101. *Smith v. Poughkeepsie City School District*, 41 A.D.3d 579, 839 N.Y.S.2d 99 (2d Dep't 2007) (school knew of assailant's behavior, and plaintiff's mother had complained about her bullying behavior); *Wilson v. Vestal Central School District*, 34 A.D.3d 999, 825 N.Y.S.2d 159 (3d Dep't 2006) (school knew of prior conflicts between students); *Wood v. Watervliet City School District*, 30 A.D.3d 663, 815 N.Y.S.2d 360 (3d Dep't 2006) (argument that led to altercation could support negligent supervision claim given assailant's long disciplinary history); *Siller v. Mahopac Central School District*, 18 A.D.3d 532, 795 N.Y.S.2d 605 (2d Dep't 2005) (presence of teacher sufficient to raise question of fact as to negligent supervision).

102. *Lisa P. v. Attica Central School District*, 27 A.D.3d 1080, 1082, 810 N.Y.S.2d 772, 774 (4th Dep't 2006) ("there is no evidence in the record that defendant had knowledge of any prior inappropriate conduct by" the teacher.). *But see Doe v. Lorich*, 15 A.D.3d 904, 905, 788 N.Y.S.2d 754, 755 (4th Dep't 2005) (school's discovery of letter written by student raised question of fact as to its knowledge of teacher's inappropriate behavior).

103. 283 A.D.2d 995, 723 N.Y.S.2d 805 (4th Dep't 2001).

104. *Stagg v. City of New York*, 39 A.D.3d 533, 534, 833 N.Y.S.2d 188, 189 (2d Dep't 2007) (student injured at subway station could not state claim because "where a student is injured off school premises, there can generally be no actionable breach of a duty that extends only to the boundaries of school property"). *But see Speigh v. City of New York*, 309 A.D.2d 501, 765 N.Y.S.2d 28 (1st Dep't 2003) (question of fact where student was stabbed on school steps given school's notice of gangs, and that appropriate security is required at arrival and departure times when large numbers of students congregate).

105. 90 N.Y.2d 944, 665 N.Y.S.2d 42 (1997).

106. *Buder v. City of New York*, 43 A.D.3d 720, 843 N.Y.S.2d 206 (1st Dep't 2007) (teacher injured in altercation between two students could not state claim based upon promise of additional support staff); *Feinsilver v. City of New York*, 277 A.D.2d 199, 199, 715 N.Y.S.2d 441, 442 (1st Dep't 2000) ("plaintiff's status as a teacher is insufficient, without more, to create the requisite special duty, as she was in the same position as every other school employee"). *But see Pascucci v. Board of Education*, 305 A.D.2d 103, 104, 758 N.Y.S.2d 54, 56 (1st Dep't 2003) (special education teacher raised issue of fact as to duty owed given mandatory workshops and conferences on staff and pupil safety and school's special procedures).

107. 98 N.Y.2d 270, 746 N.Y.S.2d 657 (2002).

108. 19 A.D.3d 583, 585, 797 N.Y.S.2d 542, 544 (2d Dep't 2005).

109. 10 A.D.3d 524, 526, 782 N.Y.S.2d 23, 25 (1st Dep't 2004). *But see Cabrera v. Hirth*, 8 A.D.3d 196, 779 N.Y.S.2d 471 (1st Dep't 2004) (approving 50% liability to premises owner and 50% to assailant).

110. 51 A.D.3d 337, 856 N.Y.S.2d 583 (1st Dep't 2008).

111. 51 A.D.3d. 337, 354, 865 N.Y.S.2d 583, 595 (1st Dep't 2008).

112. *Kharmah v. Metropolitan Chiropractic Center*, 288 A.D.2d 94, 733 N.Y.S.2d 165 (1st Dep't 2001); *Bifaro v. Rockwell Automation*, 269 F. Supp. 2d 143 (W.D.N.Y. 2003); *In re New York City Asbestos Litigation*, 194 Misc.2d 214, 750 N.Y.S.2d 469 (Sup. Ct., N.Y. Co. 2002), *aff'd*, 6 A.D.3d 352, 775 N.Y.S.2d 520 (1st Dep't 2004).

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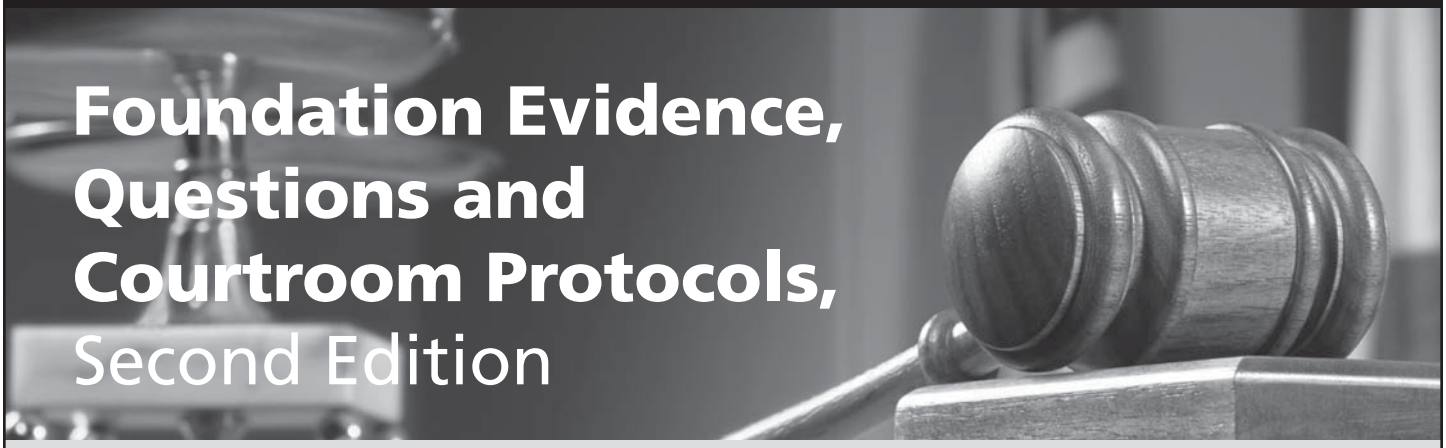

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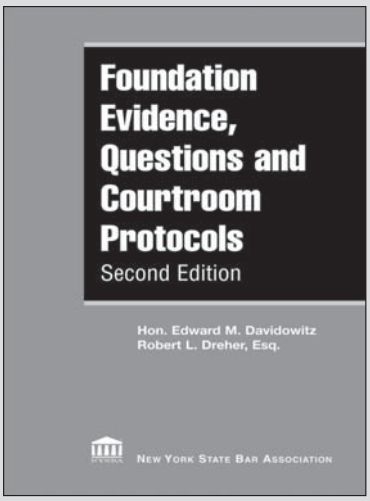

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AUTHORS

Hon. Edward M. Davidowitz
Bronx County Supreme Court
Criminal Court

Robert L. Dreher, Esq.
Office of the Bronx County
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Recalcitrant Worker and Sole Proximate Cause—The Current State of Labor Law § 240

By Anthony H. Gair, Howard S. Hershenhorn and Christopher L. Sallay

Section 240 of the Labor Law provides in pertinent part:

> 1. All contractors and owners and their agents in the erection . . . , repairing, altering, . . . of a building or structure shall furnish or erect or cause to be furnished or erected for the performance of such labor, . . . hoists, . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

A. Brief History of § 240 Liability

Prior to the Court of Appeals doing what the legislature had for years refused to do, weaken the protection afforded to workers pursuant to § 240 of the Labor Law, there was absolutely no doubt that § 240 imposed a nondelegable duty and absolute liability with respect to its provisions upon general contractors, owners and others.[1]

In *Haimes*, plaintiff's decedent was a painter in the employ of a contractor, who suffered death when a ladder upon which he was standing at defendant's premises fell. The ladder was owned by the decedent himself, and the accident occurred by reason of the undisputed fact that the ladder had not been secured against slipping as required by the rules of the Board of Standards and Appeals. Despite the foregoing, and despite the fact that the accident occurred wholly by reason of decedent's failure to secure his own ladder, the Court of Appeals ruled that the defendant was absolutely liable for the accident.

In the text of the opinion itself, the Court had occasion to state that when the legislature wrote § 240 in its existing form, it "minced no words" by fixing "ultimate responsibility for safety practices *** where such responsibility actually belongs, on the owner ***."[2] The Court firmly cemented, as follows, its conclusion as to absolute liability on the part of an owner of property under § 240:[3]

> if *** an owner's liability had been intended to continue to be conditioned on control and supervision, it would have to be said that the Legislature, for all its vaunted labors and professions, had engaged in but an empty charade. There is no basis for such conclusion.

For years, cases after the *Haimes* decision followed the absolute liability there pronounced, holding that issues of negligence and contributory negligence were irrelevant and that a violation of § 240 automatically gives rise to responsibility in damages.

It became well settled that assumption of risk and contributory negligence were not available as defenses against the absolute liability arising under a violation of § 240 of the Labor Law.[4]

In the landmark case of *Koenig v. Patrick Const. Corp.*,[5] the Court wrote:

> For breach of [Section 240] duty, thus absolutely imposed, the wrongdoer is rendered liable without regard to his care or lack of it.
>
> * * *
>
> [T]his statute is one for the protection of workmen from injury, and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed ***. Such an interpretation manifestly rules out contributory negligence as a defense to an action predicated upon violation of the statute to the injury of one in the protected class.

In *Long v. Murnane Assoc.*,[6] the Court stated that assumption of risk and contributory negligence are not available as defenses against the absolute liability arising under a violation of § 240 of the Labor Law.

In *Long*, the Court upheld the grant of summary judgment to plaintiff. In that case, decedent was a painter who was working upon a scaffold which he himself had erected improperly so that the horizontal rails were placed outside, rather than inside, their vertical supports. The decedent, prior to the accident, had been ordered by his employer to correct this dangerous condition of the scaffold but never did so before the accident. On those facts, defendant, owner of the premises, was held to be liable under § 240 as a matter of law. The alleged culpability of decedent for not correcting the dangerous condition of the scaffold was held to be totally irrelevant to the liability of defendant.

B. The Recalcitrant Worker

1. A Brief History

In order to understand the recent break from precedent by the Court of Appeals, it is useful to understand the history of the recalcitrant worker defense. For years

the leading recalcitrant worker case was *Smith v. Hooker Chemicals and Plastics Corp.*[7] The rule enunciated therein was that"the statutory protection (afforded by § 240) does not extend to workers who have adequate and safe equipment available to them but *refuse to use it*"[8] (emphasis added).

The facts in *Smith* are important in order to understand how the Court of Appeals in recent decisions has expanded the reach of the recalcitrant worker defense by relying on cases such as *Smith* while ignoring the facts upon which the holdings were based, thereby in effect failing to follow long established precedent.

For example, in *Smith* the plaintiff went up on a roof despite the fact that safety equipment had been removed and after a co-worker had refused to do so unless the safety equipment was put back in place.

The Court's holding was thus based on the fact the plaintiff knowingly chose not to use safety devices which he knew had been in place and were readily available. His accident was also contemporaneous in time with his refusal to use the safety devices which his co-worker insisted be in place before the co-worker got on the roof.

The Court of Appeals followed the reasoning of *Smith* for years, as did the Appellate Division in numerous cases.

In *Gordon v. Eastern Railway Supply, Inc.*,[9] the plaintiff was standing on a ladder leaning against a railroad car while using a hand-held sandblaster to clean the exterior of the car. He was injured when he fell from the ladder. In rejecting the defendant's claim that the plaintiff was a recalcitrant worker, the Court stated:[10]

> Defendants' claim here rests on their contention that plaintiff was repeatedly instructed to use a scaffold, not a ladder, when sandblasting railroad cars. We have held, however, that an instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a "safety device" in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment (*Stolt v. General Foods Corp., supra*; see also, *Hagins v. State of New York*, 81 NY2d 921, 922-923). Evidence of such instructions does not, by itself, create an issue of fact sufficient to support a recalcitrant worker defense.

In *Hagins v. State of New York*,[11] the claimant was injured when he fell from the top of an unfinished abutment wall that rose 15 feet above a road construction site. The Court rejected the recalcitrant worker defense since the claimant had not *refused* to use available safety devices:[12]

> Claimant was properly granted partial summary judgment on the issue of the State's liability under Labor Law § 240(1). The State's allegations that claimant had repeatedly been told not to walk across the abutment are not alone sufficient to create a triable issue of fact under the "recalcitrant worker" doctrine that was recognized in *Smith v. Hooker Chems. & Plastics Corp.*, 89 AD2d 361, appeal dismissed 58 NY2d 824, since that defense is limited to cases in which a worker has been injured as a result of a refusal to use available safety devices provided by the employer or owner (see, *Stolt v. General Foods Corp.*, 81 NY2d 918 (decided herewith)). Furthermore, the State cannot rely on claimant's own negligence in using an unsafe route to cross the road as a "supervening cause" of his injuries, since the accident was plainly the direct result of the failure to supply guardrails or other appropriate safety devices.

Similarly, in *Stolt v. General Foods Corp.*,[13] the Court rejected the recalcitrant worker defense where a plaintiff fell from a ladder which had broken a week earlier and plaintiff had been instructed not to use it unless a co-worker was present to secure it. Despite this, the plaintiff attempted to climb the ladder when his supervisor left the work area. The Court specifically held that:[14]

> the so-called "recalcitrant worker" defense cannot be invoked in these circumstances (see, *Smith v. Hooker Chems. & Plastics Corp.*, 89 AD2d 361, appeal dismissed 58 NY2d 824). That defense, which has been widely recognized by the lower courts in this State (e.g. *Koumianos v. State of New York*, 141 AD2d 189; *Morehouse v. Daniels*, 140 AD2d 974; *Cannata v. One Estate*, 127 AD2d 811; *Lickers v. State of New York*, 118 AD2d 331; *Heath v. Soloff Constr.*, 107 AD2d 507), requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer (see, *Hagins v. State of New York*, 81 NY2d 921 [decided herewith]). It has no application where, as here, no adequate safety devices were provided (see, *Zimmer v. Chemung County Performing Arts*, 65 NY2d 513, 525-526 [Simons, J., concurring]). We note that an instruction by the employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not itself a "safety device."

Jastrzebski v. North Shore School District,[15] in which the Court dismissed plaintiff's complaint based on the recalcitrant worker defense, is instructive in that it clearly states what had to be established to prevail upon the defense. The plaintiff was on a ladder and in the process of affixing a piece of plywood to a wall when his supervisor told him to get off the ladder. After he did so the supervisor told him the ladder was no good and told him to use a scaffold which was already in place. After the supervisor left, the plaintiff climbed back on the ladder from which he then fell.

The Court distinguished *Gordon* as follows:[16]

> Moreover, in the instant case, Seider admonished the plaintiff and, just prior to the accident, gave him very specific orders not to use the ladder and to use the available scaffold. *This immediate and active direction by the supervisor is significantly different from the distant and passive instruction in Gordon.* In Gordon, the evidence indicated only that the plaintiff had been given general safety instructions in the past which had included warnings that the use of a ladder while sandblasting was not proper. There was no evidence in Gordon that the plaintiff had knowingly refused a direct order as the plaintiff in this case had. The instant case involves more than an instruction to avoid using unsafe equipment or to avoid engaging in unsafe practices; rather, the plaintiff here refused to use the available, safe, and appropriate equipment (emphasis added).

Thus, on the basis of the above cases and numerous Appellate Division decisions, it seemed clear that in order to prevail on the recalcitrant worker defense, a defendant had to establish that a *direct, immediate order* not to use the device was given which the plaintiff refused to follow and that safe and appropriate safety devices were available.

2. The Break with Precedent

a. *Cahill v. Triborough Bridge and Tunnel Authority*[17]

The Court of Appeals in *Cahill* completely ignored long-established precedent in holding that, in order to prevail upon the recalcitrant worker defense, it need not be shown that the plaintiff refused to comply with an immediate safety instruction but that one given weeks before was sufficient.

The plaintiff in *Cahill* was working on the repair and reconstruction of the Triborough Bridge. In order to perform his work, plaintiff had to climb up and down forms. The plaintiff wore a safety harness and was supposed to attach a safety line to lanyards affixed to the safety harness. Several weeks before the accident the plaintiff was climbing a form without using a safety line, and his supervisor told him he needed to use the safety line when climbing.

At the time of the accident, weeks later, the plaintiff was climbing a form without using a safety line when he fell.

In reversing the grant of plaintiff's motion for summary judgment, the Court of Appeals held that the plaintiff, in fact, could be found to be a recalcitrant worker despite the fact that instructions to use the safety line had been given weeks before and such was a question of fact for a jury.

The holding completely ignores not only the Court's prior decisions but numerous Appellate Division decisions which mandated that to prevail upon the recalcitrant worker defense it must be shown that a worker refused an immediate instruction.

In point of fact, the Court ignored its holding in *Jastrzebski*, in which it held that the recalcitrant worker defense applied because the plaintiff's supervisor ". . . just prior to the accident, gave him very specific orders not to use the ladder. . . . This immediate and active direction by the supervisor is significantly different from the distant and passive instruction in *Gordon*."[18]

It is submitted that there is no way one can reconcile this holding with the Court's prior holdings in *Gordon* and *Jastrzebski*, as well as those of the Appellate Divisions.

3. The Recalcitrant Worker Post-*Cahill*

The Appellate Court decisions, as might be expected, have issued conflicting opinions regarding the recalcitrant worker defense post *Cahill*. Following are some of the most recent cases.

a. *Miro v. Plaza Construction Corp.*[19]

The plaintiff was installing fire alarms at a building when he slipped and fell as he climbed down a six-foot ladder that was partially covered with sprayed-on fireproofing material which he claimed caused him to fall. He conceded that he could have requested a different ladder but did not. In holding that the defendants should have been granted summary judgment dismissing plaintiff's complaint, the Court, citing *Cahill* and *Blake v. Neighborhood Hous. Servs. of N.Y.C., Inc.*,[20] (discussed *infra*) stated:[21]

> A plaintiff who knowingly chooses to use defective or inadequate equipment notwithstanding being aware that he or she could request or obtain proper equipment has no claim under Labor Law §240(1). In this case, the uncontroverted evidence establishes that plaintiff recognized the undesirability of the fireproofing material on

> his ladder, knew full well that he could have requested that his employer provide him with a new, clean ladder, and yet—for no apparent good reason—chose not to make such a request. Thus, plaintiff's decision not to request a new ladder, not any violation of Labor Law §240(1), was the sole proximate cause of his accident.

Miro was modified by the Court of Appeals[22] on the following certified question: "was the order of this Court, which reversed the order of the Supreme Court, properly made?" The Court of Appeals answered in the negative, holding that "assuming that the ladder was unsafe, it is not clear from the record how easily a replacement ladder could have been procured."

This decision should be of little comfort to plaintiffs since the inference is that had another ladder been available somewhere on the jobsite and the plaintiff was aware of this it would then be the plaintiff's obligation to obtain the ladder rather than the obligation of the general contractor, owner or other statutorily liable defendant to provide it to him. In such a case the plaintiff could be held to be a recalcitrant worker and his conduct the sole proximate cause of the accident.

This Appellate Division decision, although modified as set forth above, highlights the attempt, led by the Court of Appeals, to eviscerate the protection afforded to injured workers under the Labor Law. Here, the plaintiff received no instructions to use another ladder and did not disobey an instruction to use another one but merely didn't request another one. This turns the long-established purpose of the Labor Law on its head and injects, though some may argue otherwise, the plaintiff's own culpable conduct as a defense to § 240. This is so despite the fact that the Courts have couched it in terms of sole proximate cause or recalcitrant worker.

The long-established precedent ignored by the Court of Appeals in *Cahill* and *Blake* was reiterated in The Court of Appeals holding in *Rocovich v. Consolidated Edison Co.*,[23] which summarized the long-established purpose of the Labor Law:

> Section 240(1) of the Labor Law, entitled "Scaffolding and other devices for use of employees" requires that all contractors and owners in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure *shall furnish or erect, or cause to be furnished or erected* for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which *shall be so constructed, placed and operated*, as to give proper protection to a person so employed (emphasis added). The legislative purpose behind this enactment is to protect 'workers by placing "ultimate responsibility for safety practices as building construction jobs where such responsibility actually belongs, on the owner and general contractor" (1969 NY Legis Ann, at 407), instead of on workers, who "are scarcely in a position to protect themselves from accident" (*Koenig v. Patrick Const. Co.*, 298 NY 313, 318 [83 N.E.2d 133]) (*Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 520, 493 N.Y.S.2d 102, 482 N.E.2d 898).

What the Court of Appeals has done in both *Cahill* and *Blake* is to reverse precedent and place ultimate responsibility on the injured worker without directly stating that their prior decisions are no longer the law.

b. *Fitzsimmons v. City of New York*[24]

The Court held:

> Contrary to the appellants' argument, a "recalcitrant worker defense" is unavailable in this case. To raise a triable issue of fact as to a possible recalcitrant worker defense, the appellants must establish that the injured worker deliberately refused to use available and adequate safety devices in place at the work station (see *Harris v. Rodriguez*, 281 A.D.2d 158, 721 N.Y.S.2d 344) . . .

Note, that in this post-*Cahill* decision, the Court did not even cite *Cahill* but reiterated the prior law that a worker must have *deliberately refused* to use available and adequate safety devices *in place at the work station*.

Interestingly, the Court referred to a 2001 case, *Harris v. Rodriguez*,[25] decided long before *Cahill*, which held: "The recalcitrant worker defense requires a showing of the 'injured worker's *deliberate refusal to use available and visible safety devices in place at the work station'*" (emphasis supplied).

c. *Pearl v. Sam Greco Construction Inc.*[26]

The plaintiff was installing a sheet metal roof. Following the end of the workday, safety equipment was stored in a gang box on the roof about 10 feet above the eaves. The plaintiff fell while he was attempting to get to the gang box. The Court rejected the recalcitrant worker defense since "the safety equipment was neither available nor visibly in place."

d. *Palacios v. Lake Carmel Fire Dept., Inc.*[27]

The plaintiff fell from a ladder. He testified that he was using a ladder, not a scaffold, because the owner of his company had told him not to disassemble and move

a scaffold. The owner, a job supervisor, testified that the plaintiff was instructed to use a scaffold. In denying plaintiff's motion for summary judgment, the Court held that there were triable issues of fact since the plaintiff was instructed to use an allegedly available scaffold. Compare this decision with *Gordon*, *supra*, and they are difficult to reconcile.

e. *Andrews v. Ryan Homes, Inc.*[28]

The plaintiff was injured when she fell from a ladder while cleaning a house. The Court found that plaintiff met her initial burden on her motion for summary judgment by establishing that her employer placed a ladder near a window that was to be cleaned and that the plaintiff was injured when she climbed the ladder which slid out from under her. However, the Court held the recalcitrant worker defense was a question of fact for a jury:

> In opposition to the motion, however, defendant presented evidence establishing that, approximately 30 minutes before the accident, Bobbitt told plaintiff not to climb the ladder as it was positioned and, indeed, that Bobbitt had repeatedly told plaintiff not to use the ladder without someone to steady it. Defendant further presented evidence establishing that Bobbitt and another member of the work crew were present and able to steady the ladder and that the ladder was not defective. Furthermore, plaintiff admits that, seconds before the accident, Bobbitt told her not to climb the ladder but she "didn't take [Bobbitt] seriously." We thus conclude that there is an issue of fact whether plaintiff was a recalcitrant worker and, if so, whether her actions were the sole proximate cause of her injuries (see *Montgomery v. Federal Express Corp.*, 4 N.Y.3d 805, 806, 828 N.E.2d 592, 795 N.Y.S.2d 490; *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39-40, 823 N.E.2d 439, 790 N.Y.S.2d 74), precluding partial summary judgment on the issue of liability under Labor Law §240(1).[29]

Compare this with the Court of Appeals' decision in *Stolt* in which the plaintiff had been instructed not to use a ladder unless a co-worker was present to secure it. In both cases, no proper safety devices were provided, and both plaintiffs did not heed instructions not to use the ladder unless a co-worker was present to secure it. The only distinction is the timing of the instructions, which were not of importance to the Court in *Cahill*.

f. *Landgraff v. 1579 Bronx River Avenue, LLC*[30]

The plaintiff's accident took place while he was on a scaffold in order to cut and remove a length of elevated metal pipe with an electric saw when the pipe fell, swinging against the scaffold and tipping it over, causing the plaintiff to fall to the floor. In reversing the denial of plaintiff's motion for summary judgment, the Court held that "the recalcitrant worker defense is not applicable as it is limited to circumstances where a worker is injured as a result of his or her refusal to use available safety devices." Interestingly, the Court did not cite *Cahill* but instead relied upon *Hagins*, *supra*, a pre-*Cahill* case.

g. *Szuba v. Marc Equity Properties, Inc.*[31]

The plaintiff was injured when he fell from the roof of a house on which he was cutting vent holes. It was undisputed that the only safety devices used on the site were two-by-fours which were not in place at the time of the accident. The Court reversed the denial of plaintiff's summary judgment motion, stating that "[t]he presence of safety devices somewhere on the work site does not discharge the owner's duty to provide proper protection to workers. . . ."[32] The Court went on to hold:

> An instruction by an employer or owner to avoid "unsafe practices is not a 'safety device'" in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment (*Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555, 563, 626 N.E.2d 912, 606 N.Y.S.2d 127; see *Stolt v. General Foods Corp.*, 81 N.Y.2d 918, 920, 613 N.E.2d 556, 597 N.Y.S.2d 650).

h. *Guaman v. New Sprout Presbyterian Church of N.Y.*[33]

The plaintiff was on a ladder which had been erected on top of a scaffold. There were no safety devices present. The scaffold tipped, causing the plaintiff to fall. In rejecting the recalcitrant worker defense and granting plaintiff's motion for summary judgment, the Court held:[34]

> The allegation that the plaintiff was instructed prior to the accident to stop work in an unsafe and unstable manner was based on inadmissible hearsay. While hearsay statements have been held to be sufficient to oppose a summary judgment motion under certain circumstances, no such circumstances were present in this case (see *Joseph v. Hemlok Realty Corp.*, 6 A.D.3d 393, 393, 775 N.Y.S.2d 61; *Allstate Ins. Co. V. Keil*, 268 A.D.2d 545, 546, 702 N.Y.S.2d 619). Even if we consider the hearsay statement, it was insufficient to raise a triable issue of fact because *the church failed to demonstrate that the plaintiff refused to use an available safety device* (see *Stolt v. General Foods Corp.*, 81 N.Y.2d 918, 920, 613 N.E.2d 556, 597 N.Y.S.2d 650; *Szuba v. Marc Equity Prop.*, 19 A.D.3d 1176, 1177, 798 N.Y.S.2d 813; *Andino v.*

BFC Partners, 303 A.D.2d 338, 340, 756 N.Y.S.2d 267) (emphasis added).

i. *Santo v. Scro, et al.*[35]

The plaintiff fell from a scaffold he was using to install lighting fixtures in the ceiling of a house under construction. He testified that he did not use an available extension ladder as it was too flimsy when fully extended and could not be safely used unless someone was available to secure the bottom of the ladder.

The Court reversed the granting of summary judgment on plaintiff's 240(1) claim, citing *Jastrzebski*, among other cases stated, as follows, regarding defendant's recalcitrant worker defense:[36]

> Further, contrary to the contention of MDS, the evidence does not establish a recalcitrant worker defense, which requires proof that a plaintiff disobeyed an "immediate specific instructions to use an actually available safety device [provided by the employer] or to avoid using a particular unsafe device."

How this can be explained in view of the decision in *Cahill*, is anyone's guess and further serves to demonstrate the *ad hoc* approach taken by the Appellate Courts to 240(1) cases.

j. *McCarthy v. Turner Construction, Inc.*[37]

The plaintiff was injured when an unsecured ladder upon which he was standing in order to drill holes in a ceiling tipped over, causing him to fall to the floor. In affirming summary judgment, the Court rejected both the recalcitrant worker and sole proximate cause defenses since the failure to provide a proper safety device was a proximate cause of the accident. Relying on *Stolt*, the Court held with regard to the recalcitrant worker defense:[38]

> The apprentice electrician working with plaintiff is not a safety device contemplated by the statute. Nor even if plaintiff had disobeyed an instruction to have the apprentice hold the ladder steady for him, would the owners' and general contractor's liability for failure to provide adequate safety devices be reduced . . .

Obviously, the law is in a state of flux. It is hoped that the Court will re-examine its holding in *Cahill* and recognize that in order for the recalcitrant worker defense to apply, a deliberate refusal to follow a *direct*, *immediate order* must be established and that appropriate safety devices were available. If it chooses not to do so, it should state that this long-established precedent of the Court is no longer the law.

C. The Sole Proximate Cause Defense

1. *Blake* and the Court of Appeals

a. *Blake v. Neighborhood Housing Services of New York City, Inc.*[39]

The plaintiff in *Blake* "set up an extension ladder, which he owned and used frequently. He acknowledged that the ladder was steady, had rubber shoes and was in proper working condition. When plaintiff began scraping rust from a window, however, the upper portion of the ladder retracted and he suffered an ankle injury."[40] At trial the plaintiff testified he did not know whether he had locked the extension clips in place.

In affirming a defendant's verdict at trial, the Court held:[41]

> In support of his claim, plaintiff argues that comparative negligence is not a defense to absolute liability under the statute. This is true (see *Raquet v. Braun*, 90 N.Y.2d 177, 184, 681 N.E.2d 404, 659 N.Y.S.2d 237 [1997]; *Bland v. Manocherian*, 66 N.Y.2d 452, 461, 488 N.E.2d 810, 497 N.Y.S.2d 880 [1985]). But we are not dealing here with comparative fault, by which a culpable defendant is able to reduce its responsibility upon a finding that the plaintiff was also at fault. That would be impermissible under Section 240(1). Here, there is no comparative culpability. As the jury implicitly found, the fault was entirely plaintiff's. The ladder afforded him proper protection. Plaintiff's conduct (here, his negligence) was the sole proximate cause of the accident.

Although the Court was precluded from reviewing the questions of fact, incredibly, in its discussion of § 240, the Court simply ignored its prior decision in *Haimes*, which was decided on almost identical facts. One would assume that in its review of the law, the Court would not simply neglect to discuss *Haimes*, but indeed it did.

b. *Montgomery v. Federal Express Corp.*[42]

The plaintiff, employed as a helper by an elevator company, and an elevator mechanic were assigned to work in an elevator motor room four feet above the roof level of a building. The stairs which led from the roof to the motor room had been removed. In affirming the grant of defendant's motion for summary judgment, the Court opined:[43]

> Rather than go and get a ladder, plaintiff and Mazzei climbed to the motor room by standing on an inverted bucket. When he left the motor room, plaintiff jumped down to the roof, injuring his knee in the process.

> We agree with the Appellate Division that, since ladders were readily available, plaintiff's "normal and logical response" should have been to go get one. Plaintiff's choice to use a bucket to get up, and then to jump down, was the sole cause of his injury, and he is therefore not entitled to recover under Labor Law §240(1) (*Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 [2003]).

c. *Robinson v. East Medical Center, LP*[44]

Plaintiff was installing pipe hanger systems at the jobsite for approximately two weeks using a 6-foot wooden stepladder. He had to climb the ladder in order to install rods to overhead structural beams. The pipes would then be hung from the rods. At the time of the accident he was doing this work at a location where the steel beams were at a height of 12 to 13 feet from the floor, requiring him to stand on the top of the ladder. The wrench he was using slipped and he lost his balance, causing the ladder to move and causing him to fall about two feet. It was conceded that there were 8-foot ladders available, and plaintiff had told his supervisor he would need one. In affirming the granting of defendant's summary judgment motion, the Court noted that plaintiff could have gotten the 8-foot ladder himself and held plaintiff's actions were the sole proximate cause of the accident.

The Court cited *Montgomery* at length, but again did not make any reference to *Haimes*.

With regard to *Montgomery*, it is important to note that in reversing the Supreme Court's granting of plaintiff's motion for summary judgment, the Appellate Division ruled that:

> Plaintiff's jump from the motor room to the roof under the circumstances presented was not reasonably foreseeable and, thus, was an intervening act which constituted a superseding cause for the knee injury he sustained as he landed (see *Egan v. A.J. Constr. Corp.*, 94 N.Y.2d 839, 702 N.Y.S.2d 574, 724 N.E.2d 366 [1999]); 307 A.D.2d 865, 763 N.Y.S.2d 600 (1st Dep't 2003)).

Hence, if there are concurrent causes of the accident, the plaintiff's conduct obviously cannot be the sole proximate cause. This was recognized by the Court in *Blake*.

d. *Miraglia v. H & L Holding, Corp.*[45]

The Court affirmed the granting of a directed verdict for plaintiff on his § 240 cause of action. The plaintiff, while walking on a plank across a trench, fell and was impaled on a steel bar. The Court first held that in view of the trial testimony that workers were permitted to walk on the planks across the trench so long as they doubled the planks the recalcitrant worker defense was not applicable, despite the fact that the plaintiff did not double the planks, since plaintiff's failure to do so would at most constitute negligence:[46]

> Since the planking was insufficient to protect plaintiff from the elevation-related hazard that caused his harm, liability pursuant to Labor Law § 240(1) was established; plaintiff was not, under any view of the evidence, the sole proximate cause of his injuries (see *Osario v. BRF*, 23 A.D.3d 202, 803 N.Y.S.2d 525 [2005]; *Lajqi v. New York City Tr. Auth.*, 23 A.D.3d 159, 805 N.Y.S.2d 5 [2005]; cf. *Blake v. Neighborhood Hous.*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 [2003]). At most, plaintiff's failure to double the planks would constitute negligence. However, the doctrine of comparative negligence is not available to diminish a defendant's liability under Labor Law § 240(1) (see e.g. *Morales v. Spring Scaffolding*, 24 A.D.3d 42, 49, 802 N.Y.S.2d 41 [2005]; *Orellano v. 29 E. 37th Realty Corp.*, 292 A.D.2d 289, 291, 740 N.Y.S.2d 16 [2002]).

This is consistent with the Court's decision in *Blake*, in which the Court stated[47] that

> a defendant is not liable under Labor Law § 40(1) where there is no evidence of violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident. Under Labor Law § 240(1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation.

e. *Allen v. New York City Transit Authority*[48]

The Court in reversing a denial of plaintiff's motion for summary judgment addressed both the recalcitrant worker and sole proximate cause defenses. The plaintiff was working on a platform which did not have a gate. The plaintiff, thus, had to climb over a wooden railing which surrounded the platform in order to access an eight-foot-high ladder that led down to the ground. While climbing over the railing, the platform shook and the top rail broke, causing plaintiff to fall to the ground. While actually

engaged in his work the plaintiff wore a safety harness attached to a safety line which he affixed to an I-beam on the structure he was working on. He was wearing the harness at the time of the accident but was not using the safety line. In rejecting both the recalcitrant worker and sole proximate cause defenses, the Court stated:[49]

> Plaintiff testified that he was instructed by his employer to attach the line to the structure he was working on when he reached working height, and there is no evidence that he was instructed differently. Nevertheless, the municipal defendants assert that before alighting the platform, plaintiff should have attached the two or three foot safety line 'to something', although they do not say what, and that his failure to do so was the sole proximate cause of the accident. This conclusory argument fails to raise a bona fide issue of fact as to whether plaintiff disregarded instructions to use the harness while alighting from the platform (cf. *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39, 823 N.E.2d 439, 790 N.Y.S.2d 74[2004]). Nor does it raise a bona fide issue of fact as to whether the harness could have been so placed and operated as to give proper protection to a worker alighting from this platform (cf. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290, 803 N.E.2d 757, 771 N.Y.S.2d 484 [2003]). On this record, it is clear that any negligence in plaintiff's use of the harness was not the sole proximate cause of the accident.

It is, thus, clear as stated by the Court in *Blake*, *supra*, that once a plaintiff has established that a violation of § 240 was a proximate cause of plaintiff's accident, the worker's conduct cannot be found to be solely to blame for it since such conduct would at most constitute contributory negligence which is still not a defense to a § 240 claim. In these circumstances it is submitted that plaintiff's summary judgment motion must be granted. *See Valensisi v. Greens at Half Hollow, LLC.*,[50] holding that a worker's motion for summary judgment should have been granted. Where "a violation of Labor Law §240(1) is a proximate cause of an accident, the worker's conduct cannot be deemed solely to blame for it."[51]

Conversely, where the plaintiff has not conclusively established a § 240 violation and proximate cause and the defendant similarly has not established that the plaintiff's actions were the sole proximate cause of the accident, Courts have denied both sides' motions on the grounds that there are questions of fact or that the record is inconclusive.

See, for example, *Bonilla v. State of New York*[52] (claimant injured while sandblasting the underside of a bridge. Although he had been given a safety harness and lanyard that could be affixed to a safety cable or other stationary object, he did not wear the harness because there were no safety cables at this work area. Defendant argued that he could have affixed his lanyard to the bridge iron. The Court found the record inconclusive and denied both sides' motions.)

f. *Beharry v. Public Storage, Inc.*[53]

The plaintiff was injured while walking up a flight of stairs when he stepped on metal decking between two floors and "went straight through" to the first floor.

In rejecting the sole proximate cause defense the Court stated:[54]

> Contrary to the defendants' contention, the injured plaintiff's conduct was not the sole proximate cause of his injuries, because he neither engaged in unforeseeable, reckless activities nor misused a safety device that was provided to him (see *Montgomery v. Federal Express Corp.*, 4 N.Y.3d 805, 806, 828 N.E.2d 592, 795 N.Y.S.2d 490; *Urias v. Orange County Agric. Socy.*, 7 A.D.3d 515, 776 N.Y.S.2d 92; *Weingarten v. Windsor Owners Corp.*, 5 A.D.3d 684, 677, 774 N.Y.S.2d 537).

g. *Lo Verde v. 8 Prince Street Associates, LLC*[55]

The Court affirmed the grant of plaintiff's summary judgment motion where the plaintiff fell from a scaffold while he was demolishing the ceiling of a building. The defendants' argument that plaintiff's conduct in assembling the scaffold without affixing available safety railing was the sole proximate cause of the accident was rejected by the Court.[56]

> We further conclude that defendants failed to establish in support of that part of their cross motion with respect to the Labor Law §240(1) causes of action that plaintiff chose to assemble the scaffolding without affixing available safety railings and thus that his own conduct was the sole proximate cause of the accident, and they also failed to raise a triable issue of fact in that respect, to defeat plaintiff's cross motion (cf. *Robinson v. East Med. Ctr., LP*, 6 N.Y.3d 550, 555, 847 N.E.2d 1162, 814 N.Y.S.2d 589; *Blake v. Neighborhood Hous. Servs. Of N.Y. City, Inc.*, 1 N.Y.3d 280, 290, 803 N.E.2d 757, 771 N.Y.S.2d 484). Moreover, because the absence of a safety railing or any other device to prevent plaintiff's fall constituted a violation

of Labor Law §240(1), plaintiff's alleged conduct in attempting to move the scaffold without first unlocking the wheel brakes would amount only to comparative fault and thus cannot bar recovery under the statute (see *Blake*, 1 N.Y.3d at 289-290; *Bland v. Manocherian*, 66 N.Y.2d 452, 461, 488 N.E.2d 810, 497 N.Y.S.2d 880).

h. *Egan v. Monadnock Construction, Inc.*[57]

The Court affirmed the granting of defendant's cross-motion for summary judgment dismissing plaintiff's 240(1) claim. The plaintiff erected a scaffold which covered the staircase that provided the only means of access to the basement. When the plaintiff realized he needed further materials from the basement, 10 feet below, he used a too-short 6-foot A-frame ladder which could not be fully opened so as to lock its braces in place. Although plaintiff was able to get down to the basement, the ladder slid out from under him, causing him to fall to the floor.

The Court, relying primarily on *Montgomery*, reasoned that plaintiff chose to use the A-frame ladder on his own and did not ask for one of the taller straight ladders on the jobsite. The Court conceded that, as in *Montgomery*, there was no evidence that plaintiff knew that other ladders were available.

i. *Torres v. Mazzone Administrative Group, Inc.*[58]

The plaintiff was performing work on a sprinkler system in a ceiling when the ladder he was using collapsed. The Court affirmed the dismissal of plaintiff's 240(1) claim because the ladder which plaintiff was using was not the one given to him by his supervisor. The plaintiff had decided to use a smaller wooden ladder because it was easier to maneuver. The Court held that plaintiff's conduct in opting to use a piece of equipment out of convenience instead of the ladder provided to him was the sole proximate cause of the accident.

j. *Kwang Ho Kim, et al. v. D & W Shin Realty Corp.*[59]

The Court reversed the dismissal of plaintiff's 240(1) claim. The plaintiff was standing on the fifth or sixth rung of an unsecured 12-foot ladder when it slipped, causing him to fall to the ground. The president of defendant, ACP, alleged that he had asked or told the plaintiff to stop working because he was alone and it was raining.

Relying on, among other cases, *Gordon* and *Stolt*, the Court held that defendant failed to satisfy its burden that plaintiff's actions were the sole proximate cause of his accident. Interestingly, the Court held defendant did not establish, as a matter of law, that plaintiff's ignoring of defendant's instructions to stop working was the sole proximate cause of his injuries.

Why not, you may ask? Why wasn't plaintiff a recalcitrant worker? Because, as to sole proximate cause, if there are concurrent causes of the accident, the plaintiff's conduct cannot be the sole proximate cause. The Court obviously analyzed the facts on a *Blake* sole proximate cause analysis. The conduct of the plaintiff in ignoring the request or instruction constituted only comparative negligence which is not a defense to a 240(1) claim, since there was evidence that the failure to secure the ladder contributed to his fall. There was no instruction not to use the ladder because it wasn't safe or to use a safer available device.

k. *Szpakowski v. Shelby Realty, LLC, et al.*[60]

The Court affirmed summary judgment for the plaintiff on his 240(1) claim where defective wood planking on a scaffold collapsed. The Court rejected defendant's sole proximate cause defense despite the fact that the plaintiff was a crew supervisor and knew the scaffold was defective. The Court reasoned that defendants had been informed of the defective condition long before the accident and failed to cure it and took no steps to prevent the plaintiff form working on it.

l. *Rookwood v. New Hyde Park Owners Corp., et al.*[61]

The plaintiff sustained injuries while installing an oil tank in the basement of defendant's building. The accident took place when the plaintiff, who was standing on a landing of a permanent staircase leading to the basement, was affixing a 5-foot-by-10-foot metal plate that weighed 700 pounds to a chainfall in order to lower the plate into the basement. The plaintiff testified that he had removed an iron handrail welded to the left side of the stairway in order to have enough space to lower the plate to the basement. The accident occurred when the plate was resting on the landing and being held by three of plaintiff's coworkers when it slipped, knocking the plaintiff off the side of the staircase from which he had removed the railing.

The Court reversed the granting of summary judgment to the defendants, holding that the record showed the existence of a triable issue of fact as to whether the plaintiff's actions were the sole proximate cause of the accident because he had no choice as to the way in which he performed his work.

m. *Ferluckaj v. Goldman Sachs & Co.*[62]

The plaintiff was cleaning windows in an office building. In order to clean the top of a window, the plaintiff got on top of a desk adjacent to the window. While cleaning the window, she fell off the desk, sustaining injuries. Plaintiff testified at her deposition that she knew at the time of the accident that there was a stool with two steps in a supply closet, but she never asked for it. She was not asked at her deposition how high the stool was. The

Court, in reversing the dismissal of plaintiff's 240(1) claim, held that defendants failed to raise a triable issue of fact regarding sole proximate cause. There was no proof that a step stool would have been provided to plaintiff had she asked. Further, defendants failed to set forth any evidence regarding the availability of the step stool and, even if it was available, whether it would have constituted an adequate safety device. See the importance of depositions, *infra*.

n. *Hernandez v. Bethel United Methodist Church of New York*[63]

In a 3-2 decision, the Court granted plaintiff summary judgment on his 240(1) claim.

The plaintiff was standing on an A-frame ladder in order to install fireproofing material on a new duct at a building. He was using a nail gun to install the insulation. At the time of the accident, plaintiff was holding the nail gun in his right hand and the insulation in his left. When the plaintiff leaned to his left to affix the insulation with the nail gun, the feet of the ladder on the right came off the ground and he started to fall. He attempted to grab the ladder with his left arm to stop the fall while still holding the nail gun in his right hand. He fell to the first step of the ladder, the nail gun discharged and a nail penetrated his right eye. He was not wearing eye protection. The majority rejected the sole proximate cause of defense since plaintiff established that the defendant failed to provide proper safety devices or to properly secure the ladder.

The dissent argued that the issue of sole proximate cause was a question of fact in that plaintiff could have repositioned the ladder prior to the accident or could have directed another member of his crew to stabilize the ladder. It is our view that the dissent ignored the holding in *Blake* that, if there are concurrent causes of the accident (failure to properly secure the ladder), the plaintiff's conduct cannot be the sole proximate cause of the accident. Here, we believe, that plaintiff's action constituted, at most, culpable conduct.

D. Preparation of the Case

Whether you represent a defendant or a plaintiff, a thorough investigation must be conducted immediately upon your being advised of the accident. The following are items which must be obtained:

1. Official Reports
    a. OSHA investigations including prior citations
    b. Department of Buildings records (including permits and permit applications)
    c. Police reports
    d. Department of Buildings violations/citations
2. Injured Worker's Records
    a. Ambulance call report
    b. Hospital records
    c. Physicians'/rehabilitation records
    d. Autopsy/death certificate
    e. Workers' compensation file
    f. Prior workers' compensation claims and prior medical
    g. Union records
    h. Employment records
    i. Income tax records for five years prior to accident
3. Witness Statements

    In view of the holdings in *Blake*, *supra,* and *Cahill, supra*, witness statements are more important than ever and should be obtained at the earliest opportunity. If necessary, get affidavits from witnesses immediately, before their stories change, they stop talking or they disappear.
4. Photographs of Scene
5. Copies of All Contracts
6. Identity of All Contractors on Job
    a. Who supervised job?
    b. Who was in charge of safety?
    c. Was duty to control and supervise work which gave rise to accident specifically delegated to a sub-contractor?
7. Insurance Policies, Including All Endorsements
8. Job Documents
    a. Safety memos and inspection records
    b. Records of safety meetings
    c. Work permits
    d. Progress sheets
    e. Daily logs
    f. Progress photographs
    g. Department of Buildings inspections
    h. Determine who owned and controlled all equipment involved in accident
    i. Records regarding safety equipment at the jobsite

E. Practice Tips

1. Read the statute. When you get the case, make sure it fits within the parameters of Labor Law § 240(1):

a. Was the injured worker engaged in a § 240 activity (construction, demolition, etc.)?

b. Was the injured worker working on a building or structure?

c. Was there the failure or absence of an *enumerated* safety device?

2. Preparation—investigation must be complete and thorough.

3. Depositions

a. The plaintiff's deposition—the plaintiff must tell a Labor Law § 240 story.

For the plaintiff's attorney—you must anticipate recalcitrant worker/sole proximate cause defenses and handle them within the confines of the case law; i.e., no specific instructions, no other available safety devices, etc.

For the defense attorney—you must ask questions of the plaintiff to evaluate/establish the recalcitrant worker/sole proximate cause defenses and support them given the state of the current case law; i.e., plaintiff's presence at safety meetings, instructions, jobsite safety manuals, other available safety equipment, plaintiff's own personal safety equipment, etc.

b. The defendants' deposition—eliminate/establish the defenses.

For the plaintiff's attorney—again, you must anticipate recalcitrant worker/sole proximate cause defenses and handle them within the confines of the case law. You must also take as many defendant depositions as necessary of those important people at the jobsite because you do not want to get an affidavit as part of a summary judgment motion of a key witness you did not depose.

The following is a brief deposition checklist for the plaintiff's attorney:

(1) Identify the contracts in place—do they have any paragraphs concerning site safety?

(2) The presence/absence of safety meeting minutes, site safety plan, progress notes, progress photos, and any other document which could potentially memorialize any specific instructions.

(3) List of all safety equipment present at the jobsite and their usage/locations. Were they nearby? In use? Appropriate for plaintiff's job?

(4) Identify each important person at the jobsite (especially those with supervisory authority) and their job function.

(5) Identify all persons present on the day of the accident—Who was supervising? What was the plaintiff doing? At what point in the job was the plaintiff?

(6) The defective safety device—Where is it? Who owned it? What happened to it? Anyone inspect it following the accident? Findings? Photos?

(7) Safety instructions. Who gave? When given? Who present? Reduced to writing? Were the instructions in English? Spanish? IMPORTANT: Ask the defendant witness if the plaintiff acknowledged that he heard *and* understood the instructions.

(8) Witnesses to accident? Witnesses to conditions prior to accident? Witnesses who saw plaintiff working in a similar manner prior to accident? Did anyone tell him to stop? Did anyone give other directions or warnings?

(9) Post-accident investigation—accident reports, workers' compensation reports, OSHA's, defendant's, anyone else's report—areas of agreement/disagreement. Meetings, conversations.

(10) Cause of accident—Any determination made as to cause of accident? By whom? What was determined?

For the defense attorney—you must prepare your witness to evaluate/establish the recalcitrant worker/sole proximate cause defenses and support them given the state of the current case law; i.e., plaintiff's presence at safety meetings, instructions, jobsite safety manuals, other available safety equipment, plaintiff's own personal safety equipment, etc. In this regard, see *Ferluckaj*, *supra*, where it appears defendant may have had a viable sole proximate cause/recalcitrant worker defense had the record been fully established at depositions.

c. Non-party witnesses—depositions must be taken to evaluate/establish the recalcitrant worker/sole proximate cause defenses and distinguish/support them given the state of the current case law.

F. Plaintiff's Initial Notice for Discovery and Inspection

PLEASE TAKE NOTICE that pursuant to the plaintiff's demand, defendant, is requested to produce and permit discovery by the plaintiff, her attorneys or another acting on her behalf, the following documents and things for inspection, copying or photocopying:

1. Copies of contracts (including policies of insurance, endorsements and declarations) between owner and general contractor with regard to the construction project located at _____ on and prior to date of accident.
2. A copy of the written contract entered into by the general contractor/construction manager in connection with the construction project located at _____ prior to the date of the accident.
3. Copies of contracts entered into between the general contractor/construction manager and any sub-contractor involved in the work being performed by the plaintiff's decedent at the time of the occurrence.
4. Copies of contracts (including policies of insurance, endorsements and declarations) between the general contractor/construction manager and plaintiff's employer with regard to the construction project located at in effect on and prior to the date of the accident.
5. Any and all photographs or videotapes concerning the subject equipment and/or materials involved in the occurrence.
6. Daily and/or weekly job reports, foreman's reports, superintendents reports, logbooks, progress reports, and manpower reports maintained by the defendant, general contractor/construction manager, for the subject construction site for one (1) month prior to and including the date of the occurrence.
7. Job meeting/safety meeting records in the defendants' possession for the subject construction site, as well as the names and addresses of the individuals who participated in those meetings for three (3) months prior to and including the date of the occurrence.
8. Any and all progress photographs or videotapes concerning the area in which the occurrence took place for one (1) month prior to and including the date of the occurrence.
9. Names and addresses of the general contractors' project superintendent, assistant superintendent and person(s) in charge of the site and whether they are still employed by defendant.
10. The job files maintained by the defendants for the subject construction site.
11. Records of any prior complaints regarding the area or the defects involved in the subject construction accident at the construction site.
12. Copies of the defendants' written safety rules in effect at the time of the accident and/or safety program policy.
13. Copies of the defendants' OSHA file for the subject construction site.
14. All documents filed by the defendants with OSHA regarding the subject construction site, as well as with the local building and/or the New York State Labor Department.
15. Prints of photographs, at plaintiff's expense, of the scene of the occurrence and the instrumentality involved in the occurrence, taken by the defendants.
16. State whether defendant, general contractor/construction manager had a site safety team at the jobsite, giving the names and job titles of members of the team, and whether said individuals are still employed by defendant.
17. A copy of all incident/accident reports, documents, memos and notes created by any employee of defendant general contractor/construction manager with respect to the subject accident and the complete accident file created at the accident site.
18. Provide documentation or copies of any documentation regarding the type of accident investigation procedure, including information to be acquired, how a report is to be prepared and completed, and procedures for reviewing the submitted report.
19. The last set of progress photographs of the building under construction taken by defendant general contractor/construction manager its agents, servants and/or employees prior to and including the date of the accident.
20. Payroll records of the general contractor/construction manager for the date of accident for all employees working at the jobsite on said date.

Said discovery is to be produced on the ___day of _____, 200_, at 2:00 p.m., 34th Floor, 80 Pine Street, New York, NY.

PLEASE TAKE FURTHER NOTICE that a written communication enclosing the aforerequested information may be sent prior to the abovementioned time in lieu of a personal appearance on the above date.

Dated: New York, New York
November 21, 2008

G. Request for OSHA Records

1. Form Letter Requesting OSHA Records

November 21, 2008

O.S.H.A.
201 Varick Street, Room 670
New York, NY 10014

Re: D/A:
Employer:
Place of Occurrence:

Gentlemen:

We are writing to you on behalf of _____ who was injured in an accident on _____, 200_, at the location indicated above.

Pursuant to the Freedom of Information Act, we would appreciate if you would furnish us with copies of all investigation reports, photographs and videos, relating to this accident.

Should you have any questions or require additional information, please contact the undersigned immediately.

Thank you for your cooperation in this matter.

Very truly yours,
GAIR, GAIR, CONASON,
STEIGMAN & MACKAUF

2. OSHA—Freedom of Information Appeal

Solicitor of Labor, U.S. Department of Labor
Room N-2428
200 Constitution Avenue
N.W. Washington, D.C., 20210

Re: Freedom of Information Appeal

Gentlemen:

Please consider this letter in furtherance of our recent FOIA request dated _____ concerning XYZ Company. Specifically, this letter should be considered an appeal to the recent withholding by OSHA's Manhattan Divisional Office of vital evidence from plaintiff's counsel who represents the estate of decedent, _____, who died as a result of a construction accident which OSHA investigated.

Pursuant to our FOIA request, we received from OSHA a response on August 1, 2007. Unfortunately, the response served was not complete as three vital pieces of information were excluded. Namely, the items not released were XYZ's safety and accident prevention plan, the compliance officer's diagram sheets and work-related accident and/or disease. These items were withheld under the guise of Exemption 7C which states that certain records may be withheld if they "could reasonably be expected to constitute an invasion of personal privacy." Served herewith is a copy of OSHA's response to our FOIA request.

Clearly, the divisional office abused its discretion under the 7C exemption as withholding this information infringes upon the public policy of encouraging OSHA compliance which grossly outweighs any potential invasion of personal privacy. A closer examination of what is being withheld clearly reveals that the items withheld do not infringe upon any such privacy.

An accident prevention plan, if in existence at this work site, should be divulged. An accident prevention plan, if divulged, would encourage compliance with the OSHA regulations and, therefore, is in line with public policy of insuring safe work sites. There can be no invasion of privacy if same is disclosed.

The compliance officer's diagram sheets would also be beneficial and critical to the prosecution of the case as it would provide a map of the work site which has long since been substantially altered since the date of accident. This is clearly in line with public policy of insuring compliance with OSHA guidelines as it provides evidence of whether or not the work site was in fact compliant at the time of the accident. Again, there can be no invasion of privacy if same is disclosed.

Lastly, work-related accident or disease would be vital as counsel should know if there were other similar accidents or an outbreak of work-related disease affected the decedent's ability to perform his job to full capacity. If any such work-related illness or disease existed, then plaintiff's counsel is entitled to know what, if anything, was done or could or should have been done once known. All of the aforementioned items would not truly constitute "an invasion of personal privacy." The items sought merely constitute a request to obtain XYZ's general internal monitoring and supervision of the work site and its employees. Clearly the public interest to obtain such documents encourages compliance with OSHA and outweighs any so called "invasion of privacy."

In a case directly on point entitled *Tenaska Washington partners, II, L.P. v. U.S. Dept. of Energy*, 1997 U.S. Dist. Lexis 23744 it was been held : "[T]he exemption of 7C does not apply to records compiled for . . . internal monitoring of its own employees to insure (OSHA) compliance" (parentheses added). General 7 C withholding of evidence will not be tolerated by the Courts, see also *Cooper Cameron Corporation v. OSHA*, 280 F. 3 539 (U.S. Ct. of App., 5th Circuit 2002) [the withholding of documents under the 7 C exemption must be reasonable, there must be a balance between the public interest to divulge the documents and the company's ability to protect the privacy of individual names]).

In closing, it cannot be argued with any real conviction, that the items sought and discussed herein could constitute an unreasonable invasion of privacy.

Very truly yours,

Conclusion

For the plaintiff's attorney it should be a given that in every § 240 case the defendant(s) will seek to prove that plaintiff's conduct was the sole proximate cause of the accident and/or the plaintiff was a recalcitrant worker. It is, thus, imperative that the initial interview with the plaintiff be in depth and not cursory, and the above defenses be anticipated. All available witnesses must be located, and statements obtained. Should there be any questions as to whether the plaintiff's own actions caused the accident and/or the plaintiff was recalcitrant, the plaintiff must at least be able to show that, at most, the plaintiff's actions were a concurrent cause.

Given the numerous cases in which the Courts have held there to be questions of fact precluding both the plaintiff's and defendant's motions for summary judgment, depositions are of paramount importance. It is obviously no longer enough for a plaintiff to take a cursory deposition establishing only the bare facts of the accident. Plaintiff must attempt to establish that appropriate safety devices were not available. This requires an in-depth knowledge of the appropriate safety devices and detailed questions as to whether they are available and if so, where on the jobsite they were located. Further, the defendants must be questioned in depth as to safety instructions allegedly given to plaintiff. These questions should include who gave them, when they were given and who was present at the time and whether they were reduced to writing such as in written safety sheets. The plaintiff who fails to anticipate the recalcitrant worker and sole proximate cause defense when taking depositions will be in for a rude surprise. Similarly, the defendant must question the plaintiff and all witnesses and fellow employees as to the instructions given. In order to conduct effective depositions, both sides must be fully familiar with the evolving law in this area, the nature of the work being done and the safety devices required.

Endnotes

1. *Haimes v. New York Telephone Company*, 46 N.Y.2d 132, 412 N.Y.S.2d 863 (1978).
2. *Id.* at 136; *id.* at 865.
3. *Id.* at 136.
4. *Bland v. Manocherian*, 66 N.Y.2d 452, 497 N.Y.S.2d 880 (1985).
5. 298 N.Y. 313, 318-19 (1948).
6. 68 A.D.2d 166, 416 N.Y.S.2d 413 (3d Dep't 1979), *appeal dismissed*, 48 N.Y.2d 776, 423 N.Y.S.2d 921 (1979).
7. 89 A.D.2d 361, 455 N.Y.S.2d 446 (4th Dep't 1982), *appeal dismissed*, 58 N.Y.2d 824 (1983).
8. *Id.* at 366; *id.* at 449.
9. 82 N.Y.2d 555, 606 N.Y.S.2d 127 (1993).
10. *Id.* at 563; *id.* at 131.
11. 81 N.Y.2d 921, 597 N.Y.S.2d 651 (1993).
12. *Id.* at 922-23; *id.* at 653.
13. 81 N.Y.2d 918, 597 N.Y.S.2d 650 (1993).
14. *Id.* at 920; *id.* at 651.
15. 223 A.D.2d 677, 637 N.Y.S.2d 439 (2d Dep't 1996), *aff'd*, 88 N.Y.2d 946, 647 N.Y.S.2d 708 (1996).
16. *Id.* at 679-80; *id.* at 441-52.
17. 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004).
18. 223 A.D.2d at 680, 637 N.Y.S.2d at 441.
19. 38 A.D.3d 454, 834 N.Y.S.2d 36 (1st Dep't 2007).
20. 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).
21. 38 A.D.3d at 445, 834 N.Y.S.2d at 37.
22. 9 N.Y.3d 948, 949, 846 N.Y.S.2d 76 (2007).
23. 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219, 221 (1991).
24. 37 A.D.3d. 655, 657, 831 N.Y.S.2d 441, 443 (2d Dep't 2007).
25. 281 A.D.2d 158, 721 N.Y.S.2d 344, 345 (1st Dep't 2001).
26. 31 A.D.3d 996, 819 N.Y.S.2d 193 (3d Dep't 2006).
27. 15 A.D.3d 461, 790 N.Y.S.2d 185 (2d Dep't 2005).
28. 27 A.D.3d 1197, 812 N.Y.S.2d 729 (4th Dep't 2006).
29. *Id.* at 1198; *id.* at 730.
30. 18 A.D.3d 385, 796 N.Y.S.2d 58 (1st Dep't 2005).
31. 19 A.D.3d 1176, 798 N.Y.S.2d 813 (4th Dep't 2005).
32. *Id.*
33. 33 A.D.3d 758, 822 N.Y.S.2d 635 (2d Dep't 2006).
34. *Id.* at 759; *id.* at 637.
35. 43 A.D.3d, 897, 841 N.Y.S.2d 627 (2d Dep't 2007).
36. *Id.* at 898; *id.* at 628.
37. 52 A.D.3d 333, 859 N.Y.S.2d 648 (1st Dep't 2008).
38. *Id.* at 334; *id.* at 649.
39. 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).
40. *Id.* at 283; *id.* at 485.
41. *Id.* at 289; *id.* at 763.
42. 4 N.Y.3d 805, 795 N.Y.S.2d 490 (2005).
43. *Id.* at 806; *id.* at 491.
44. 6 N.Y.3d 550, 814 N.Y.S.2d 589 (2006).
45. 36 A.D.3d 456, 828 N.Y.S.2d 329 (1st Dep't 2007), *appeal denied*, 10 N.Y.3d 703, 854 N.Y.S.2d 103 (2008).
46. *Id.* at 457; *id.* at 330.
47. 1 N.Y.3d at 290, 727 N.Y.S.2d at 490.
48. 35 A.D.3d 231, 828 N.Y.S.2d 302 (1st Dep't 2006).
49. *Id.* at 232; *id.* at 303.
50. 33 A.D.3d 693, 823 N.Y.S.2d 416 (2d Dep't 2006).
51. *Id.* at 696; *id* at 419.
52. 40 A.D.3d 673, 835 N.Y.S.2d 690 (2d Dep't 2007).
53. 36 A.D.3d 574 828 N.Y.S.2d 458 (2d Dep't 2007).
54. *Id.* at 575; *id.* at 459.
55. 35 A.D.3d 1224, 829 N.Y.S.2d 300 (4th Dep't 2006).
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Anthony H. Gair, Howard S. Hershenhorn and Christopher L. Sallay are members of Gair Gair Conason Steigman & MacKauf.

Section Committees and Chairpersons

The Trial Lawyers Section encourages members to participate in its programs and to contact the Section Officers listed on the back page or the Committee Chairs for further information.

Appellate Practice
Brian Isaac
Pollack Pollack Isaac & Decicco
225 Broadway, Suite 307
New York, NY 10007-3907
bji@ppid.com

Arbitration and Alternatives to Dispute Resolution
John P. Connors Jr.
Connors & Connors, P.C.
766 Castleton Avenue
Staten Island, NY 10310-1800
jpc@connorslaw.com

Construction Law
Walter G. Breakell
Breakell Law Firm P.C.
10 Airline Drive
Albany, NY 12205-1025
woreauell@breakell-law.com

Construction Law
Howard S. Hershenhorn
Gair, Gair, Conason, Steigman & MacKauf
80 Pine Street, 34th Floor
New York, NY 10005
hsh@gairgair.com

Continuing Legal Education
Arlene Zalayet
60 Andover Road
Roslyn Heights, NY 11577-1802
arlene.zalayet@LibertyMutual.com

Thomas P. Valet
Rheingold, Valet, Rheingold, Shkolnik & McCartney LLP
113 East 37th Street
New York, NY 10016-3042
tvalet@rheingoldlaw.com

Criminal Law
Andrew S. Rendeiro
16 Court Street, Suite 3301
Brooklyn, NY 11241
asrendeiro@yahoo.com

Diversity
Nita Kundanmal
Tower Insurance Company
120 Broadway, 30th Floor
New York, NY 10271-0002
nkundanmal@yahoo.com

Employment Law
James R. Grasso
Phillips Lytle LLP
3400 HSBC Center
Buffalo, NY 14203-2887
jgrasso@phillipslytle.com

Salvatore G. Gangemi
Gangemi Law Firm, PC
82 Wall Street, Suite 300
New York, NY 10005-3686
sgangemi@gangemilaw.com

Family Law
Lara Joy Genovesi
NY State Supreme Court,
Kings County
360 Adams Street
Brooklyn, NY 11201-3712
lgenoves@courts.state.ny.us

Lawyers Professional Liability and Ethics
Ariel Michael Furman
Furman Kornfeld & Brennan LLP
545 Fifth Avenue, Suite 401
New York, NY 10017
mfurman@fkbllp.com

Legal Affairs
Michael J. Hutter Jr.
Albany Law School
80 New Scotland Avenue
Albany, NY 12208-3434
mhutt@albanylaw.edu

Legislation
John K. Powers
Powers & Santola, LLP
39 North Pearl St
Albany, NY 12207-2785
jpowers@powers-santola.com

Medical Malpractice
Thomas P. Valet
Rheingold, Valet, Rheingold, Shkolnik & McCartney LLP
113 East 37th Street
New York, NY 10016-3042
tvalet@rheingoldlaw.com

Membership
Evan M. Goldberg
Trolman Glaser & Lichtman PC
777 3rd Avenue, 35th Floor
New York, NY 10017
egoldberg@tgllaw.com

Edward J. Schwendler III
Law Offices of Eugene C. Tenney
5 Niagara Square
Buffalo, NY 14202
eschwendler@tenneylawoffice.com

Motor Vehicle Law
Angelicque M. Moreno
John K. Avanzino, PC
26 Court Street, Suite 2015
Brooklyn, NY 11242
amoreno@jkavanzino.com

No Fault Law
Ann Wang
Law Offices of Teresa Spina
170 Froehlich Farm Blvd
Woodbury, NY 11797-2932
awang@geico.com

Trial Advocacy Competition
John P. Connors Jr.
Connors & Connors, P.C.
766 Castleton Avenue
Staten Island, NY 10310-1800
jpc@connorslaw.com

Stephen W. O'Leary Jr.
Kanterman O'Leary & Soscia, LLP
88-14 Sutphin Blvd.
Jamaica, NY 11435-3711

Trial Practice
Evan M. Goldberg
Trolman Glaser & Lichtman PC
777 3rd Avenue, 35th Floor
New York, NY 10017
egoldberg@tgllaw.com

Workers Compensation
David Mark Wasserman
Sher Herman Bellone & Tipograph PC
277 Broadway, Suite 1107
New York, NY 10007-2016
dwattorney@yahoo.com

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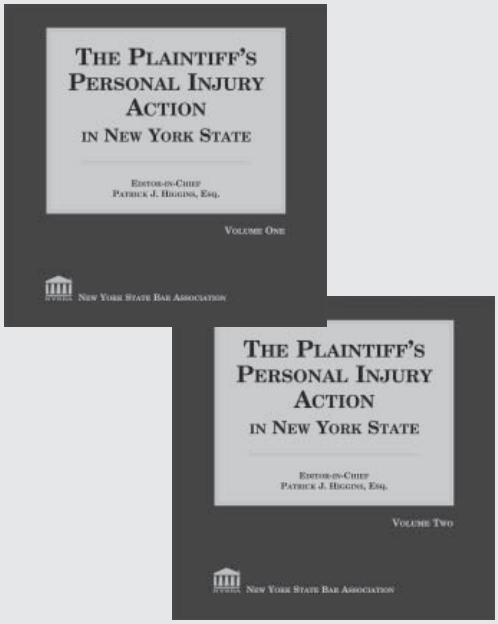

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Steven B. Prystowsky
Lester Schwab Katz and Dwyer
120 Broadway, Floor 38
New York, NY 10271
sprystowsky@lskdnylaw.com

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NEW YORK STATE BAR ASSOCIATION
TRIAL LAWYERS SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

TRIAL LAWYERS SECTION DIGEST

Liaison
Steven B. Prystowsky
Lester Schwab Katz and Dwyer
120 Broadway, Floor 38
New York, NY 10271
sprystowsky@lskdnylaw.com

Contributors
Jonathan A. Dachs
Shayne Dachs Corker Sauer & Dachs LLP
114 Old Country Rd
Mineola, NY 11501
jdachs@shaynedachs.com

Harry Steinberg
Lester Schwab Katz and Dwyer
120 Broadway
New York, NY10271
hsteinberg@lskdnylaw.com

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