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Prior Similar Crimes Test Presents Barrier for Victims of Violent Crimes in Suits Against Landlords

By Paul Becker

Using a strict construction of Court of Appeals' decisions in premises liability cases, the First and Second Departments of the Appellate Division have created a restrictive criterion for foreseeability which makes it difficult to hold businesses civilly liable for initial violent crimes by intruders against their tenants and invitees. As exemplified by these lower courts' 2004 decisions in *Gross v. Empire State Building Associates*[1] and *Johnson v. City of New York*[2], this barrier to plaintiffs in inadequate security litigation, a significant growth area in personal injury lawsuits, could decrease the financial incentives for landlords to establish and maintain security measures to protect their occupants against foreseeable violence. Attorneys representing landlords or victims of violent crimes should be aware of alternative legal views of what the Court of Appeals has said is the correct test in evaluating the civil liability of landlords in these circumstances.

It is well established that a landlord has a duty to exercise reasonable care to maintain his property in a safe condition. This duty includes taking measures to protect against reasonably foreseeable criminal acts of third persons. Rejecting the view that the Court of Appeals created a "totality of the circumstances" approach for foreseeability, these lower courts are using a test which results in judgment for landowners in cases where no recent crimes involving a similar degree of violence occurred in a similar location in the building, regardless of either neighborhood crime statistics or the absence of locks on the building's exterior doors. These decisions profess to follow the Court of Appeals' controlling 1980 *Nallan v. Helmsley-Spear, Inc.*,[3] 1984 *Miller v. State of New York*,[4] and 1993 *Jacqueline S. v. City of New York*[5] decisions.

The alternative interpretation, however, is that the Court of Appeals decided that prior crimes of any type on the premises are relevant but not a prerequisite to a finding that a violent crime against a tenant or guest was foreseeable. They are relevant, certainly, to indicate that security is inadequate to keep out intruders and that the spectrum of crimes, from burglary to violence, is notice to a landlord to reevaluate the security measures' adequacy.

The seminal inadequate security Court of Appeals decision is the 1980 *Nallan* case. Acknowledging that a landowner is only required to protect its occupants against foreseeable crimes, the *Nallan* court adopted the approach of the *Restatement [Second] of Torts* for determining foreseeability. Quoting Section 344, comment f, the court stated:

> The possessor cannot be held to a duty to take protective measures unless it is shown that he either knows or has reason to know from past experience that there is a likelihood of conduct on the part of third persons which is likely to endanger the safety of the visitor.

The Court's subsequent 1984 *Miller* decision did not seem to impose a "prior violent crime inside the building litmus test" but rather allowed the court to consider past crime in the building and surrounding neighborhood, whether the most basic security, such as exterior lights and locks, is provided, and other facts in evaluating foreseeability. In this case, a student was raped by an intruder in the laundry room of her college dormitory at SUNY as the result of the college keeping the exterior doors

unlocked. The court noted that prior to the rape, in the victim's dormitory, "strangers were not uncommon in the hallways and there had been reports to campus security of men being present in the women's bathroom". . . as well as "nonresidents loitering in the dormitory lounges and hallways when they were not accompanied by resident students." The court also noted the school newspaper had previously reported that in some of the university's other nearby 25 dormitories, there had been an armed robbery, burglaries, and a rape. Based on these facts, the court held that the rape was foreseeable and that the defendant had a duty to keep the dormitory doors locked since "it had notice of the likelihood of criminal intrusions."

For those, such as the First and Second Departments of Appellate Divisions, who see the *Miller* decision as consistent with a "prior similar crimes requirement" approach, it should be observed that the only prior crimes in the victim's building were trespassing. The previous rape and other crimes notably occurred in the surrounding neighborhood of the numerous students living in the other freestanding buildings. To interpret *Miller* as finding surrounding neighborhood crime irrelevant, one would need to see the victim's dormitory as virtually physically connected to the other 25 so as to constitute one building. The alternative view is to understand that the trespass in the victim's building put the landlord on notice that security was inadequate and the school newspaper put the university on notice of the seriousness of the crimes occurring in the nearby buildings.

In addition, it is arguably significant that the *Miller* court cited with approval previous New York lower court cases which did not base foreseeability on prior similar crime on the premises, using instead the totality of circumstances approach. For example, the 1981 Court of Claims decision, *Skaria v. State of New York*,[6] cited with approval by *Miller*, involved a rape of a tenant in the elevator of her building whose exterior lock did not work. The only evidence of prior crime was in the surrounding urban neighborhood, which was presented when "a NYC police officer testified that the building is located . . . in a high crime area." In finding the rape foreseeable, the court said that, "there is no doubt that the defendant knew or should have known that because of the neighborhood, the building's tenants were susceptible to injury from outsiders." Also, in the 1980 *Loeser v. Nathan Hale Gardens, Inc.*[7] case, also cited with approval by the *Miller* court, the Appellate Division's First Department did not hesitate to find that a violent assault on tenants in a building's open parking lot was foreseeable when the landlord had left the lot unlit, despite the fact that the premises had not experienced any prior personal injury crimes.

In the 1993 *Jacqueline S.* case, the Court of Appeals reversed the First Department's dismissal of plaintiff's case, holding that there was a triable issue of foreseeability as to the rape of a tenant after being abducted from the lobby. The building was one of 22 apartment buildings in the public housing project run by NYC. The Court of Appeals stated that the absence of prior violent crimes in the victim's building did not prevent their foreseeability. The court explained:

> We have never adopted the restrictive rule urged by defendant and apparently embraced by the Appellate Division: that to establish the foreseeable danger from criminal activity necessary for liability, the operative proof must be limited to crimes actually occurring in the specific building where the attack took place. . . . In Nallan . . . we cast foreseeability more generally—i.e., in terms of "past experience 'that there is a likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor.'" . . . Whether knowledge of criminal activities occurring at various point within a unified public housing complex, such as Wagner Houses, can be sufficient to make injury to a person in one of the buildings foreseeable, must depend on the location, nature and extent of those previous criminal activities and their similarity, proximity, or other relationship to the crime in question. . . . Plaintiffs' submissions showed, among other things, that there was evidence of drug related criminal activity in her building and that vagrants and drug addicts readily gained access to and loitered in the corridors, stairwells and on the roof of plaintiff's building. . . . The Housing Authority police, it appeared, had responded to numerous reports of forcible rapes and robberies in the Wagner houses and Officer Jackson could not recall whether some of these violent crimes had occurred in plaintiff's building. The Housing Authority was aware that neither the doors to the lobbies of the buildings nor the doors to the utility rooms on the roof were equipped with locks. . . . We hold merely that, in the circumstances, given the Authority's conceded failure to supply even the most rudimentary security—e.g., locks for the entrances—it was error to grant summary judgment on the question of foreseeability of danger from a violent crime.

In so ruling, the court thus found that evidence of prior crime nearby the victim's building was relevant in

determining foreseeability, and that prior crimes in the victim's building did not need to be similar to the one at issue to be considered. As in *Miller*, the *Jacqueline S.* case showed that violent crime, such as rape of a tenant, is not unforeseeable when trespassers inside the building are foreseeable, which certainly is so when the landlord doesn't even keep a simple working lock on the entrance to the building.

It could be said that the *Jacqueline S.* case provides additional support for a prior violent crime on the premises to find foreseeability. However, to reach this conclusion, it is necessary to see the 22 buildings involved as practically physically connected. That the court characterized it as a "unified public housing complex" can either be seen as agreeing with this approach or as emphasizing the fact that it had one landlord who was put on actual notice of the violent crimes occurring in the buildings surrounding the victim's apartment. In determining the correct interpretation, it should be noted that the *Jacqueline S.* Court of Appeals decision cited with approval five out-of-state decisions which used a "totality of circumstances approach" and did not require prior similar crimes on the premises to find a violent crime foreseeable.

The Appellate Division's 2004 *Gross* and *Johnson* decisions are examples of the prior similar crimes on premises approach to foreseeability. Reversing the *Gross* trial court, the Appellate Division, First Department, ruled that defendant-landlord, Empire State Building, should receive summary judgment against the victims of a 1997 shooting on the observation deck by a mentally ill visitor. Criticizing the trial court, the court said,

> Nonetheless despite evidence that there had never been a shooting in the 65-year history of the building and only two muggings or assaults from January 1995 to 1997, the court found that violent criminal activity, essentially robberies, in the building's ground level retail stores and on the abutting sidewalks, combined with 20 bomb threats to the building, raise a factual issue as to foreseeability. We disagree.

In outlining the scope of the defendant's duty to protect its invitees, the court said that its foreseeability test is based "on the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question." It seems that the court may have focused on the fact that none of the prior armed robberies or bomb threats led to physical injury and, even if they had, this shooting by a "deranged man" would fall into a 'dissimilar' crime category. Comparison of this case with its previous 2001 decision in *Wayburn v. Madison Land Ltd. Partnership*[8] highlights how this prior violent crimes approach is difficult to apply in a predictable fashion, leaving the mistaken impression of being arbitrary or result-oriented. A totality of circumstances approach would note that the prior crimes show both that criminal trespass had occurred and violent crimes were intended. Perhaps the court should have acknowledged that there was an issue as to the crime's foreseeability and focused instead on the proper standard of care to protect against personal injury from crimes; specifically, whether, in 1997, the landlords could have reasonably been held to a standard of using X-ray machines, metal detectors and scanners together with armed security guards and the inspection of all bags and packages. The court could still pronounce that the security provided was adequate as a matter of law. Even if the adequacy was an issue, proximate cause is still an issue. Thus, the court would examine the multitude of factors which encompass the "proximate cause" decision to determine whether a jury question remains and whether reasonable people could disagree that this inadequate security was a substantial factor in causing the crime. Instead the court said that "obviously, with the benefit of 20-20 hindsight everything is foreseeable."

In the *Wayburn* case, an intruder robbed, beat, and raped a visitor to a business in an office on the building's 20th floor. The court reversed summary judgment in favor of the landlord on foreseeability grounds, finding that this crime was foreseeable in light of the landlord's prior notice of "a total of six criminal or threatening incidents" comprised of two efforts to open the office doors, the theft of an employee's coat and a visitor's wallet and "two incidents in which strangers in the elevator frightened [the office's] employees." It would seem that these prior crimes are completely unlike the violent one at issue in the lawsuit. Unless one were to distinguish *Wayburn* from the *Gross* case by noting that the rape occurred after business hours, it would seem that the result in *Wayburn* was warranted simply because the prior crimes showed that people could or would try to get into the building to commit crimes, just like in *Miller* and *Jacqueline S.*

It should be noted that the First Department initially seemed to interpret the Court of Appeals' 1993 *Jacqueline S.* decision as sanctioning a broader foreseeability test. This first occurred in the 1993 *Splawn v. Lextaj* [9] case when the First Department upheld a jury verdict against a hotel for damages resulting from the rape of a hotel guest. The only prior crimes in evidence were of thefts and burglaries in the hotel. Rejecting the argument that the nonviolence of these crimes made the rape unforeseeable, the court, citing *Jacqueline S.*, pointed out that "burglary is a willful act from which physical injury can reasonably be said to be a probable consequence." Similarly, the next year, the First Department, in the *Rodriguez v. Oak Point Management, Inc.*[10] case, upheld the denial of a building owner's motion for summary judgment when an invitee of a tenant was shot by a trespasser in the building lobby. The court noted that the landlord was aware of the "bro-

ken front door lock and the constant drug dealings in the halls and lobby of the building." Using the same common sense reasoning in *Splawn*, the court rejected the notion that this violence was unforeseeable due to the absence of prior violent crimes. The court explained:

> Unfortunately in the world in which we now live, the drug culture, and its attendant brutality and violence, are part of everyday life. It is rare for a day to pass without some news concerning a shooting over a drug deal gone bad or resulting from the encroachment by one dealer into another dealer's territory and it is often the innocent bystander, including many instances involving children, who is injured or killed. If, in fact, defendant was aware of the constant drug dealings and lack of security in its building and allowed it to continue with impudence, it may be readily foreseeable that an injury to, or the death of, a tenant or invitee would eventually result as such was clear to the ordinarily prudent eye.

The *Splawn*, *Rodriguez*, and even the *Wayburn* cases are consistent with *Jacqueline S.*, *Miller*, and *Nallan,* in that all of the cases involved the landlord's awareness of trespassers and thus inadequate security. That a violent crime against a tenant would be committed by such intruders was considered arguably foreseeable. Then how to explain the *Gross* decision? The *Gross* decision is better understood as a proximate cause finding by the court that it would not be appropriate to hold the Empire State Building to the post-9/11 security standards for a 1997 incident.

Similarly, in the 2004 *Johnson* decision, the Appellate Division, Second Department, overturned the jury verdict against a landlord for damages resulting from an intruder's rape of a tenant. Noting the absence of any prior crimes in the building, the court ruled that the rape of the apartment tenant due to a broken exterior lock was unforeseeable as a matter of law despite rapes and other prior crimes in the surrounding neighborhood. This ruling is correct under the approach followed by the First Department. However, the totality of circumstances approach would dictate that the combination of surrounding neighborhood crime and a broken exterior lock would make the foreseeability of a criminal intrusion and resulting personal injury an issue for the jury.

Dutifully attempting to follow these lower courts' foreseeability requirement of prior similar crimes in the building, the trial courts have engaged in analyses of the similarity of prior crimes which reveal the inherent drawbacks of this approach. For example, in February 2005, Kings County Supreme Court Justice Knipel ruled, in *Bouraee v. Lutheran Medical Center,*[11] in favor of the defendant hospital in a lawsuit by a doctor employee to recover for personal injuries suffered from an armed robbery in an elevator reserved for staff and patients. The court said that the attack was not foreseeable. The court reached this conclusion by: [1] disregarding a prior recent robbery because it occurred outside the hospital on a nearby street as well as police crime statistics for the neighborhood because it was outside the hospital and [2] a strained analysis of 12 police reports of prior crimes at the hospital. Acknowledging that "most of the prior 12 incidents are classified as assaults," the court then proceeds to parse the details as follows: The court notes that in one incident, "the victim was attacked with a screwdriver, causing injury to the victim's leg." The court attempted to distinguish this incident involving an attack on a hospital employee and the other assaults by pronouncing that they were:

> clearly dissimilar to the ambush style attack involving plaintiff. . . . The other incidents involve either simple theft or minor altercations in which no weapons were used. Further, none of the twelve incidents took place in the hospital elevators and there are no reported incidents in the record where a perpetrator committed a "mugging" or robbery attempt inside the hospital similar to the subject attack on plaintiff.

In distinguishing one of the prior thefts, the court said, it "does not document an assault but rather the theft of a patient's belongings while he was getting X-rays." How the court can say that such a "simple theft" would not foreseeably escalate into a robbery and violence if the patient discovered the thief in the act is hard to understand and hard to reconcile with cases such as *Wayburn*. It is predictable that thefts occurring in the hospital might escalate into violent crimes if the victims catch the criminals in the act. The totality of circumstances approach would be to realize that in light of this evidence, a triable issue of fact arose regarding foreseeability of personal injury from crimes. Then the court would have focused on two other relevant inquiries in such cases: whether the security provided was reasonable and was a substantial factor [proximate cause] in causing the crime.

Similarly, in July 2005, Kings County Supreme Court Justice Harkavy ruled, in *Yuen v. 267 Canal Street Corp.,*[12] in favor of a defendant landlord on the issue of foreseeability using the *Gross* court's approach. The plaintiff, a business tenant, was hurt in an attempted robbery. The plaintiff showed that prior to this crime, vagrants were frequently able to get inside the building. The judge dismissed such prior premises crime, saying "there is no evidence that these vagrants ever threatened tenants or their employees. . . ." The court also dismissed evidence that

the building was located in a high crime area, claiming that "ambient neighborhood crime is insufficient to establish foreseeability." The totality of circumstances approach would have been to recognize that proof of easy unauthorized access to the building in a high crime neighborhood makes a violent crime rather foreseeable. The inquiry would then shift to the proper standards of care for security.

The First and Second Appellate Divisions' 2004 *Gross* and *Johnson* rulings limiting finding a violent crime foreseeable only with a prior similar incident on those premises leads to results which may not only be an incorrect interpretation of the Court of Appeals but also lead to results not in the public interest. First, such a rule may have the effect of discouraging landowners from taking adequate measures to protect premises which they know are dangerous. Moreover, the type of personal injury suffered by victims in many cases has so frequently resulted from the same type of negligence, not providing security locks on doors and windows to prevent unauthorized entry of criminals, that in the field of human experience the same type of result may be expected again. This approach also may automatically absolve the landlord from liability just because the violence of a crime is of a greater degree than previous ones. Second, a rule which limits evidence of foreseeability to prior similar criminal acts may lead to arbitrary results and distinctions. Under this rule, there is an inherent subjectivity, and thus uncertainty and unpredictability as to how "similar" the prior incidents may be to satisfy the rule. The rule raises a number of other troubling questions. For example, how close in time do the prior incidents have to be? How similar do the personal injuries in the crimes have to be? Is an armed robbery that didn't lead to personal injury sufficient to indicate that the next one might end in the victim's death? Is a stabbing similar to a shooting? How near in location must they be? Courts attempting in good faith to implement such an approach will often devolve into the type of analysis exemplified by Justice Knipel's recent 2005 ruling. Third, the rule equates foreseeability of a particular act with previous occurrences of similar acts; however, the mere fact that a particular kind of accident has not happened before does not show that such accident is one which might not reasonably have been anticipated. The fortuitous absence of prior injury should not justify relieving a defendant from responsibility for the foreseeable consequences of its acts. Finally, the mechanical prior similar incidents rule pressures judges to remove foreseeable injuries from the jury's consideration. Foreseeability should be determined in light of all the circumstances and not an application of a mechanical rule. What is required to be foreseeable is the general character of the event or harm, not its precise nature or manner of occurrence. Prior similar incidents are helpful to judges and juries to determine foreseeability but they should not be a litmus test.

That businesses are not "insurers of tenants' safety" is true although it should not mean that businesses are not required to put a working lock on a building's exterior door. The lower courts may be confusing the question of foreseeability that the crime will occur with the adequacy of the security which should be undertaken to protect against such risk. As pointed out by the Court of Appeals in *Nallan*, the judge or jury, "in assessing the reasonableness of the landowner's conduct, . . . might take into account such variables as the seriousness of the risk and the cost of the various available safety measures." The granting of summary judgment to landlords on the adequacy of security issue was recently sanctioned by the Court of Appeals in its 2003 *James v. Jamie Towers Housing Co., Inc.*[13] decision in which the court stated that the First Department had "correctly ruled that by providing locking doors, an intercom service and 24-security, Jamie Towers discharged its common law duty to take minimal security precautions against reasonably foreseeable criminal acts by third parties."

While the lower courts' prior recent similar crimes test ostensibly offers a bright-line test, that line may defy good faith efforts to implement it as well as redefine the traditional standard of reasonableness that has long been the touchstone of the law of negligence, cutting off consideration of other factors that have previously been found by the Court of Appeals to be relevant to foreseeability. The First and Second Departments' test, in short, arguably modifies the test for foreseeability from what is reasonably to be perceived to what effectively is limited to what is actually foreseen, and thus circumscribes the standard of care normally due any tenant or invitee: reasonable care under the circumstances.

Endnotes

1. 4 A.D.3d 45, 773, N.Y.S.2d 354 (1st Dep't 2004).
2. 7 A.D.3d 577, 777 N.Y.S.2d 135 (2d Dep't 2004).
3. 50 N.Y.2d 507, 429 N.Y.S.2d 606, 407 N.E.2d 451 (1980).
4. 62 N.Y.2d 506, 478 N.Y.S.2d 829, 467 N.E. 2d 493 (1984).
5. 81 N.Y.2d 288, 598 N.Y.S.2d 160, 614 N.E.2d 723 (1993).
6. 110 Misc. 2d 711, 442 N.Y.S.2d 838 (Ct. Cl. 1981).
7. 73 A.D.2d 187, 425 N.Y.S.2d 104 (1st Dep't 1980).
8. 282 A.D.2d 301, 724 N.Y.S.2d 34 (1st Dep't 2001).
9. 197 A.D. 479, 603 N.Y.S.2d 41 (1st Dep't 1993).
10. 205 A.D.2d 224, 618 N.Y.S.2d 772 (1st Dep't 1994), *rev'd on other grounds,* 87 N.Y.2d 931, 640 N.Y.S.2d 868, 663 N.E.2d 909 (1996).
11. 6 Misc. 3d 1027A, 800 N.Y.S.2d 343 (Table), 2005 N.Y. slip. op. 50218U (Sup. Ct., Kings Co. 2005).
12. 9 Misc. 3d 494, 802 N.Y.S.2d 306, 2005 N.Y. slip. op. 25289 (Sup. Ct., Kings Co. 2005).
13. 99 N.Y.2d 639, 760 N.Y.S.2d 718, 790 N.E.2d 1147 (2003).

Paul E. Becker, Esq. is an attorney in private practice in New York City. He can be reached at beckeresquire@yahoo.com.

2004 Appellate Decisions

By Steven B. Prystowsky

APPEAL AND ERROR—APPORTIONMENT—WEIGHT OF THE CREDIBLE EVIDENCE

The jury's award finding the New York City Transit Authority 80 percent responsible for the vicious beating of decedent by drug addicts on a New York subway platform while the Transit Authority's token booth clerk slept at his post with the beating displayed on the monitor and the non-party tortfeasor 20 percent liable was against the weight of the credible evidence. The matter was remanded for a new trial only on apportionment unless plaintiff stipulated to apportion liability 20 percent against the Transit Authority and 80 percent against the non-party tortfeasors:

> The apportionment reached by the jury cannot stand because it ignores the evidence. As the jury heard, the perpetrators of the heinous crime underlying this lawsuit threw the decedent from the platform, and one of them then chased him from the local to the express tracks where he continued to pummel him and battered his head against a pole, leaving the decedent, bleeding and dazed, to stagger back onto the local tracks and into the path of an approaching train. However blameworthy its sleeping clerk may have been, defendant's share of the responsibility cannot approach the degree of culpability of decedent's attackers. The apportionment is against the weight of the evidence to the extent indicated.

Roseboro v. New York City Transit Authority, 10 A.D.3d 524, 782 N.Y.S.2d 23 (1st Dep't 2004).

[EDITOR'S NOTE: In *Cabrera v. Hirth*, 8 A.D.3d 196, 779 N.Y.S.2d 471 (1st Dep't 2004), the court held that the issue of apportionment of fault between the defendant landlord and the defendant tortfeasor/tenant was for the jury to decide.

Plaintiff, a repairman who worked on the premises, was assaulted and robbed by the non-appealing defendant, a tenant in the building. Plaintiff alleged that the property owner was negligent in failing to evict the perpetrator and members of his family based on his criminal history and reputation as a drug dealer. The jury found both the landlord and the tenant equally liable. The IAS court rejected the jury's 50-50 apportionment of fault and conditionally ordered a new trial unless plaintiff stipulated to apportion liability of the landlord at 33-1/3 percent. In reinstating the apportionment, the court held:

> It is well settled that negligence and apportionment of liability are generally matters for the factfinder's determination, and a jury's apportionment of fault should not be disturbed where, as here, it is based on a fair interpretation of the evidence.]

APPEAL AND ERROR—NEW TRIAL—CONFLICTING TESTIMONY

The trial judge in a medical malpractice action erred in ordering a new trial on liability and damages because he found plaintiff's expert's opinion was undermined on cross examination and that his circumstantially derived-at conclusions as to the post-operative edema in decedent's eye were not supported by any fair interpretation of the evidence:

> "[I]n the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict." Thus, "the overturning of the jury's resolution of a sharply disputed factual issue may be an abuse of discretion if there is any way to conclude that the verdict is a fair reflection of the evidence." The weight to be accorded the conflicting testimony of experts is "a matter 'peculiarly with the province of the jury.'" We cannot find here that the jury could not have reached its verdict on any fair interpretation of the evidence.

Torricelli v. Pisacano, 9 A.D.3d 291, 780 N.Y.S.2d 137 (1st Dep't 2004).

DAMAGES—BLINDNESS—$3,000,000 (ONE EYE)

Award of $3,000,000, reduced from $10,000,000, for pain and suffering to 15-year-old student who was struck in the eye by a broken bungee cord, resulting in his sustaining a blunt trauma to his right eye, blindness and cosmetic deformity, was not excessive:

> The damage award, as reduced, did not deviate materially from what is reasonable compensation under the circumstances.

Sanchez v. Project Adventure, Inc., 12 A.D.3d 208, 785 N.Y.S.2d 46 (1st Dep't 2004).

DAMAGES—COMMINUTED FRACTURE/ TIBIA AND FIBULA—$375,000

Awards of $2,500,000 for past pain and suffering and $3,000,000 for future pain and suffering to plaintiff, a 47-year-old man who fell from a ladder and suffered a comminuted fracture of his tibia and fibula, were excessive and trial court's reduction of the awards to $300,000 each was inadequate:

> We agree with the trial court that the awards for past and future pain and suffering were excessive. In our view, however, for a comminuted fracture of the tibia and fibula that required several surgical procedures during a two-month hospital stay and extensive physical therapy thereafter, and resulted in a partial permanent disability to a 47-year-old man, the sum of $375,000 for each of past and future pain and suffering is a more appropriate award.

Orellano v. 29 East 37th Street Realty Corp., 4 A.D.3d 247, 772 N.Y.S.2d 659 (1st Dep't 2004).

[EDITOR'S NOTE: The Appellate Division also affirmed the trial court's vacating plaintiff's award of $500,000 for past and future lost earnings:

> Plaintiff's testimony as to his past earnings was unsubstantiated by tax returns, W-2 forms or other relevant documents, and thus insufficient as a matter of law to show any loss of earnings.]

DAMAGES—LAMINECTOMY/SPINAL FUSION— FAILURE TO AWARD FUTURE DAMAGES

The trial court correctly conditionally granted plaintiff's motion for additur of $250,000 for future pain and suffering since the jury's failure to award future pain and suffering deviated materially from what is reasonable compensation:

> The court's additur of $250,000 to the jury's award for future pain and suffering was warranted, given the testimony of plaintiff's treating physician as well as defendant's expert. That evidence established that plaintiff, who suffered a herniated disc, underwent two surgical procedures, a failed laminectomy and a subsequent spinal fusion that required a bone graft and the placement of surgical screws, resulting in a permanent partial disability accompanied by pain in his lower back, groin, buttocks and left leg, as well as limitation in movement, knee problems and an irregular gait. In light of this evidence, as well as testimony regarding permanent limitations on plaintiff's physical activities and restriction to sedentary work, the jury's failure to award any damages for future pain and suffering deviated materially from what is reasonable compensation.

Kane v. Coundorous, 11 A.D.3d 304, 783 N.Y.S.2d 530 (1st Dep't 2004).

[EDITOR'S NOTE: The jury awarded plaintiff, who was 25 years old at the time of his injury [see 1997 WL 832069], the principal sum of $1,008,328.03, of which $208,000 was for past lost earnings. The court refused to reduce plaintiff's award for lost earnings:

> While the lost earnings award was based solely on plaintiff's testimony without supporting documentation, defendants expressly declined to challenge such testimony by the use of the W-2 forms in their possession. The evidence of plaintiff's earnings immediately preceding his accident was sufficient to support the jury's modest award of $208,000 for past lost earnings.]

DAMAGES—LOSS OF EARNINGS—$4,264,578

An award of $4,264,578 for loss of future income to a 22-year-old satellite communication equipment installer was not speculative since an expert may assess damages based upon future probabilities:

> Here, in assessing lost future earnings, plaintiff's economist relied upon plaintiff's age and income level at the time of the accident, the normal work-life expectancy for an individual in plaintiff's profession, plaintiff's work experience and track record as a hard worker, his extensive training in electronic communications while in the Army, a letter from his employer regarding plaintiff's employment prospects, his acceptance into the union at the third highest electrical union rating, testimony from a rehabilitation counselor that plaintiff would have reached "journeyman status" in the union, and the projected salary of a journeyman electrician with a 4% increase per year for inflation. The economist concluded that plaintiff's

> loss of future income was approximately $5 million. Given the economist's testimony, the evidence upon which he relied and the reasonable assumptions which he drew from that evidence, we cannot say that the jury's award of $4,264,578 for future loss of income "deviates materially from what would be reasonable compensation." (CPLR 5501[c]).

Tassone v. Mid-Valley Oil Company, Inc., 5 A.D.3d 931, 773 N.Y.S.2d 744 (3d Dep't 2004).

[EDITOR'S NOTE: The court also affirmed the IAS Court's using 5.15% as a discount rate in determining the present value of the required annuity contract that will provide payment of a portion of the future damages in periodic installments (5041[e]).]

DAMAGES—UNDOCUMENTED ALIEN—IMMIGRATION REFORM AND CONTROL ACT (IRCA)

Plaintiff, an undocumented alien, was not entitled to the jury award of $96,000 for lost earnings since it violated the Federal Immigration Reform and Control Act of 1986 (IRCA) and *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002).

The court ordered a new trial on lost earnings damages limited to proof of the employment opportunities available to plaintiff, and of plaintiff's mitigation efforts, in his home country:

> *Hoffman* establishes that an award of compensation or wages that an alien, but for some violation of his rights, would have earned illegally in the United States "runs counter to," and "unduly trench[es] upon," the federal immigration policies in IRCA (535 U.S. at 149, 151). Stated otherwise, any such award—including the lost earnings damages at issue here—would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in enacting IRCA.]" Since a state law that so "frustrate[s] the accomplishment of a federal objective" is preempted by virtue of the Supremacy Clause, it follows ineluctably from *Hoffman* that New York law, to the extent it would permit plaintiff to recover the wages he would have earned illegally in the United States, is preempted by IRCA.
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> * * *
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> While we vacate plaintiff's existing award for lost earnings, we remand for a new trial to afford plaintiff an opportunity to prove the wages that, but for his injuries, he would have been able to earn in his home country.

Sanango v. 200 East 16th Street Housing Corporation, 15 A.D.3d 36, 788 N.Y.S.2d 314 (1st Dep't 2004).

[EDITOR'S NOTE: The Appellate Division, Second Department, in *Majlinger v. Cassino Contracting Corp.*, __ A.D.3d __, 802 N.Y.S.2d 56, (2d Dep't 2005), disagreed and held that defendants could not avoid liability for lost wages by virtue of worker's status as undocumented alien.]

DAMAGES—VERTEBRA COMPRESSION FRACTURE—$1 MILLION

Trial judge erred in conditionally reducing plaintiff's awards for past and future pain and suffering from $1.5 million and $1 million respectively to $450,000 for past pain and suffering and $150,000 for future pain and suffering. The court conditionally increased the amounts to which plaintiff must stipulate to avoid a new trial to $600,000 for past pain and suffering and $400,000 for future pain and suffering.

Kindelan v. Society of New York Hospital, 7 A.D.3d 294, 776 N.Y.S.2d 786 (1st Dep't 2004).

[EDITOR'S NOTE: Plaintiff, a 26-year-old female attorney suffered complications in the bone set of a vertebra compression fracture known as kyphosis, requiring fusion at T-12 through L-2 with grafting and a compression plate approximately 2 years after she was transported to the emergency room at the defendant hospital. See 2002 WL 32374292.]

EVIDENCE—BEST EVIDENCE/EXPERT TESTIMONY

Plaintiff is entitled to a new trial where the court allowed defendant's expert to testify, over plaintiff's objection, that an injection of antibiotics immediately after surgery, "would not have made any demonstrable difference" because "there are . . . essentially no properly done randomized or controlled comparison studies of the ethicacy [sic] of any of these preventive approaches in the literature":

> Although opinion in a publication which an expert deems authoritative may be used to impeach an expert on cross-examination, introduction of such testimony on direct examination constitutes impermissible hearsay. In any event, the expert testified on cross examination that he did not consider

> any books or articles in the field of infectious diseases "authoritative."

Lipschitz v. Stein, 10 A.D.3d 634, 781 N.Y.S.2d 773 (2d Dep't 2004).

[EDITOR'S NOTE: The court also found error for allowing defendant's receptionist to testify that plaintiff arrived at approximately 10:00 a.m. based upon the order of the names in the patient log where the patient log was never produced or introduced in evidence:

> The patient log was never produced or introduced in evidence notwithstanding that it was subpoenaed by the plaintiffs.
>
> Since the defendant's receptionist acknowledged that she had no independent recollection of when Mr. Lipschitz arrived at the office and her claim that he arrived at 10:00 A.M. was based upon a document never produced and which was not in evidence, the plaintiff's objection to her testimony should have been sustained. Her description of a document not in evidence and the conclusions she drew therefrom should have been stricken.]

INDEMNITY—GOL § 5-322.1—MAINTENANCE—VOID

Lessor of 12-inch wood chipper, used by plaintiff's employer to assist in disposing of branches from trees at apartment complex, is not entitled to contractual indemnity. The hold harmless clause in the rental agreement violated General Obligations Law § 5-322.1, which applies to contracts relative to the "construction, alteration, repair, or maintenance of a building":

> Plaintiff indicated that a week prior to the chipper rental, he had removed various tree branches at Lake Katrine which impeded walkways, hung over roofs and blocked windows. We agree with Supreme Court's finding that this activity relates to building maintenance under General Obligations Law § 5-322.1(1) and conclude that the statute voids the hold harmless agreement. Therefore, we conclude that the third-party complaint was properly dismissed.

Litts v. Best Kingston General Rental, 7 A.D.3d 949, 777 N.Y.S.2d 556 (3d Dep't 2004).

INDEMNITY—GOL § 5-322.1—SPECIFIC LANGUAGE

Indemnity agreement between promisor and promisee that included phrase that the obligation was "to the fullest extent permitted by law," removes the hold harmless agreement from the proscriptive ambit of General Obligations Law § 5-322.1:

> The indemnification agreement between defendants and third-party defendant did not violate General Obligations Law § 5-322.1, in that the obligation was "[t]o the fullest extent permitted by law," and should be read to give the provision effect, rather than in a manner that would render it void.

Murphy v. Columbia University, 4 A.D.3d 200, 774 N.Y.S.2d 10 (1st Dep't 2004).

[EDITOR'S NOTE: However, in a subsequent case, *Cavanaugh v. 4518 Associates*, 9 A.D.3d 14, 776 N.Y.S.2d 260 (1st Dep't 2004), the court voided the hold harmless agreement notwithstanding the phrase "to the fullest extent permitted by law" because the promisor also agreed to indemnify the promisee for its own negligence. The hold harmless agreement, contained in a purchase order, read as follows:

> "[T]o the fullest extent permitted by law," S & H shall "indemnify and hold harmless" Ambassador against "all claims, damages, losses, and expenses, including, but not limited to attorney's fees, arising out of or resulting from the performance of the [w]ork" attributable to bodily injury or to property damage and, caused, in whole or in part, by any negligent act or omission of S & H, "regardless of whether or not it is caused in part by a party indemnified hereunder."

The court also held that the fact that there was an insurance procurement provision in the contract did not save it from GOL § 5-322.1 because the indemnification and insurance procurement provisions are separate and distinct. The two provisions are not to be coupled.]

INDEMNITY—OWNER'S AGENT—CONSTRUCTION MANAGER

Indemnity clause in owner's/subcontractor's contract to hold harmless owner's agents did not include construction manager. The court accepted subcontractor's argument that the agreement uses the terms

"agent" and "construction manager" as separate classifications:

> In the case before us, as in *Hooper [Assoc. AGS Computers*, 74 N.Y.2d 487, 549 N.Y.S.2d 365 (1989)], the language of the parties is not clear enough to enforce an obligation to indemnity, and we are unwilling to rewrite the contract and supply a specific obligation the parties themselves did not spell out. If the parties intended to cover Bovis [construction manager] as a potential indemnitee, they had only to say so unambiguously.

Tonking v. Port Authority of New York and New Jersey, 3 N.Y.23 486, 787 N.Y.S.2d 708 (2004).

INSURANCE—COVERAGE/CERTIFICATE OF INSURANCE

Where the insurance policy did not list owner as an additional insured, owner was not covered notwithstanding that a certificate of insurance, issued by the general contractor's broker, stated that owner was insured:

> The certificate of insurance in this case [does not] confer coverage. A certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists.
>
> ***
>
> Insofar as the claim fell outside of the policy's coverage, the carrier was not required to disclaim as to coverage that did not exist.

Tribeca Broadway Associates, LLC v. Mount Vernon Fire Insurance Company, 5 A.D.3d 198, 774 N.Y.S.2d 11 (1st Dep't 2004).

INSURANCE—DECLARATORY JUDGMENT—ATTORNEYS' FEES

An insured who prevails in a declaratory judgment action commenced by an insurer that it has no duty to defend or indemnify the insured may recover attorneys' fees in defending the declaratory judgment action even if the insurer provided a defense for the insured:

> An insured who is "cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations," and who prevails on the merits, may recover attorneys' fees incurred in defending against the insurer's action.
>
> * * *
>
> We hold that under *Mighty Midgets, Inc. v. [Centennial Ins. Co.*, 47 N.Y.2d 12, 416 N.Y.S.2d 559 (1979)], an insured who prevails in an action brought by an insurance company seeking a declaratory judgment that it has no duty to defend or indemnify the insured may recover attorneys' fees regardless of whether the insurer provided a defense to the insured. Given that the expenses incurred by Shelby [the insured] in defending against the declaratory judgment action arose as a direct consequence of U.S. Underwriters' unsuccessful attempt to free itself of its policy obligations, Shelby is entitled to recover those expenses from the insurer. In other words, Shelby's recovery of attorneys' fees is incidental to the insurer's contractual duty to defend.

U.S. Underwriters Ins. Co. v. City Club Hotel, LLC, 3 N.Y.3d 592, 789 N.Y.S.2d 470 (2004).

INSURANCE—DIRECT SUIT/INSURANCE COMPANY—INSURANCE LAW § 3420

An injured party may not bring a declaratory judgment action against an insurance company before securing a judgment against the tortfeasor—a judgment is a statutory condition precedent to a direct suit against a tortfeasor's insurer:

> Having failed to fulfill the condition precedent to suit, plaintiff could not pursue a direct action against Hanover and the Appellate Division properly granted Hanover's motion to dismiss the complaint.
>
> * * *
>
> Plaintiff has no common-law right to seek relief directly from a tortfeasor's insurer, and the statutory right created in Insurance Law § 3420 arises only after plaintiff has obtained a judgment in the underlying personal injury action.

Lang v. Hanover Insurance Company, 3 N.Y.3d 350, 787 N.Y.S.2d 211 (2004).

[EDITOR'S NOTE: The court held that a year after the incident, plaintiff commenced a personal injury action against tortfeasor Richard Bachman, a house guest where the injury took place, for his negligent conduct. After serving the complaint, plaintiff learned that Bachman had filed a Chapter 7 Bankruptcy petition, which was discharged in April 2002. The court noted that Bachman's obtaining a discharge in bankruptcy does not change the court's analysis since the statute states that bankruptcy does not relieve the insurance company of its obligation to pay damages for injuries or losses covered by an existing policy under Insurance Law § 3420(a)(1).

The court also noted that where there has been a discharge of bankruptcy, federal courts have held that the permanent injunction that follows does not bar plaintiff in a personal injury action for the limited purpose of pursuing payment from the defendant's insurance company. Moreover, even if the potential personal liability judgment was listed in Bachman's bankruptcy petition, a discharge would not prevent plaintiff from obtaining a judgment against Bachman thereby satisfying § 3420's condition precedent.

The court also pointed out that where an insurance company disclaims in a situation where coverage may be arguable, the insurance company should seek a declaratory judgment concerning the duty to defend or indemnify the purported insured. If the insurance company disclaims and declines to defend in the underlying lawsuit without having commenced a declaratory judgment action, it takes the risk that the injured party will obtain a judgment against the purported insured and then seek payment pursuant to Insurance Law § 3420. Under these circumstances, the carrier may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment since it chose not to participate in the underlying lawsuit.]

INSURANCE—LATE NOTICE (FOUR MONTHS) DISCLAIMER—PREJUDICE

Trial court correctly denied the insurance company's motion for summary judgment and declaring that it was not required to defend and indemnify plaintiff because of late notice. There is a triable issue of fact whether the insurance company, Seneca, was prejudiced by plaintiff's four-months late notice.

The court, in a three to two vote, departed from the general rule that absent a valid excuse, failure to timely notify the insurer vitiates the policy and the insurer need not show prejudice before it can assert the defense of non-compliance:

> It would appear that the time has come for New York, too, to adopt that principle [the egregious imbalance between insurer and insured needs to be corrected] in furtherance of the foregoing positive public policy goals.
>
> * * *
>
> Ultimately, we see no reason to extend the "no-prejudice" exception to allow insurers to disclaim coverage on the basis of late notice of claim where "lateness" is an arbitrary temporal standard applied to a lapse between occurrence and notice, and where contractual rights favor just one party, the insurer.

Great Canal Realty Corp. v. Seneca Insurance Company, Inc., 13 A.D.3d 227, 787 N.Y.S.2d 22 (1st Dep't 2004).

[EDITOR'S NOTE: The Court of Appeals unanimously reversed, stating:

> Where a policy of liability insurance requires that notice of an occurrence be given "as soon as practicable," such notice must be accorded the carrier within a reasonable period of time. The insured's failure to satisfy the notice of requirement constitutes "a failure to comply with a condition precedent which, as a matter of law, vitiates the contract." Hence, the carrier need not show prejudice before disclaiming based on the insured's failure to timely notify it of an occurrence (5 N.Y.3d 742, 800 N.Y.S.2d 521 (2005))].

INSURANCE—REINSURANCE—"FOLLOW THE SETTLEMENTS" CLAUSE

Reinsurer's payments are limited to the indemnification amount stated in the reinsurance policy, which includes payments for loss adjustment expenses.

> We agree with the reinsurers and hold that they cannot be required to pay loss adjustment expenses in excess of the stated limit in the reinsurance policy. Once the reinsurers have paid the maximum amount stated in the policy, they have no further obligation to pay Factory Mutual any costs related to loss adjustment expenses.
>
> * * *

> The parties negotiated an indemnity limit of $7 million per occurrence. Thus, any obligation on the part of the reinsurers to reimburse Factory Mutual, whether it be for settling the original insurance claim with Bull Data or for the loss adjustment expenses incurred in the protracted litigation that ensued, must be capped by the negotiated limit under the policy. Otherwise, the reinsurers would be subject to limitless liability.
>
> * * *
>
> The limit clause in the policy is intended to cap the reinsurers' total risk exposure.

Excess Insurance Company Ltd. v. Factory Mutual Insurance Company, 3 N.Y.3d 577, 789 N.Y.S.2d 461 (2004).

INSURANCE—SEXUAL ASSAULT—ACCIDENT

Insurer is obligated to defend and indemnify its insured, a beauty salon/health spa, in an action commenced against its insured for an alleged sexual assault by the spa's employee:

> We hold that the alleged assault was an "accident" within the meaning of the policy, and that the policy's exclusions for injuries expected or intended from the standpoint of the insured and for bodily injury arising out of body massage do not apply.

RJC Realty Holding Corp. v. Republic Franklin Insurance Company, 2 N.Y.3d 158, 777 N.Y.S.2d 4 (2004).

[EDITOR'S NOTE: In reversing the Appellate Division and finding coverage, the Court of Appeals relied on its earlier decision in *Agoado Realty Corp. v. United Int'l Ins. Co.*, 95 N.Y.2d 141, 711 N.Y.S.2d 141 (2000). The policy issued to RJC Realty defined occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy excluded coverage for (a) "'bodily injury' . . . expected or intended from the standpoint of the insured" or (b) "'bodily injury' . . . arising out of . . . body massage other than facial massage."

The court held that the masseur's expectation and intention in committing the assault should not be attributed to his employer, RJC Realty:

> Since the masseur's actions here were not RJC's actions for purposes of the respondeat superior doctrine, they were "unexpected, unusual and unforeseen" from RJC's point of view, and were not "expected or intended" by RJC. Accordingly, they were an "accident," within the coverage of the policy, and were not excluded by the "expected or intended" clause.

The court also found that the second exclusion was inapplicable because:

> the words of the exclusion are most plausibly read to refer to a bruise or similar injury inflicted on the customer by a massage itself, not to the emotional or physical injury resulting from a sexual assault by a masseur.]

INSURANCE—UMBRELLA POLICY—FAMILY MEMBER

Defendant Kevin Hart was not insured under his father's umbrella policy because the primary policy did not contain liability limits required by the umbrella policy:

> The [umbrella] policy explicitly stated that to be an "insured" under the policy a "family member" of the named insured also had to be insured under one or more primary insurance policies for not less than the applicable deductible amount for an occurrence.
>
> * * *
>
> Although Hart was a "family member" of the named insured under the terms of the policy, he was not an "insured" as clearly defined in the umbrella policy because at the time of the occurrence he maintained an automobile insurance policy with liability limits below the umbrella policy's applicable deductible.

Jacofsky v. Travelers Insurance Company, 5 A.D.3d 557, 773 N.Y.S.2d 446 (2d Dep't 2004).

MOTIONS—SUMMARY JUDGMENT—BURDEN OF PROOF—GAPS IN PROOF

Defendant was not entitled to summary judgment dismissing the Labor Law and common-law negligence action of plaintiff, who was struck by a large piece of concrete that fell from a mezzanine in a storage area, where defendant failed to establish that its nine workers who were working on the day of the accident were not on the mezzanine from which the concrete fell or that those workers could not have caused the concrete to fall:

> [Defendant's] contention [that a jury could not find it liable except by speculating] lacks merit because "[a] moving party must affirmatively establish the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof."

Giangrosso v. Kummer Development Corporation, 8 A.D.3d 1037, 778 N.Y.S.2d 332 (4th Dep't 2004).

MOTIONS—SUMMARY JUDGMENT—LATE—NO EXCUSE

Defendant City of New York's motion for summary judgment—although meritorious—should not have been granted where it failed to give an explanation for filing the motion after the 120-day limit in CPLR 3212(a):

> We conclude that "good cause" in CPLR 3212(a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, non-prejudicial filings, however tardy. . . . No excuse at all, or a perfunctory excuse, cannot be "good cause."
>
> Here, it is undisputed that the City did not file its motion within the requisite 120 days specified by the statute, and it did not submit any reason for the delay. Thus, there was no "leave of court on good cause shown," as required by CPLR 3212(a).

Brill v. City of New York, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004).

NEGLIGENCE—ASSUMPTION OF RISK—SPECTATOR/BALL GAME

Plaintiff, who was watching her son's T-ball game at Field 61 and was struck by a foul ball from Field 39, an adjacent field where a baseball game was being played, is precluded from suing for injuries because she assumed the risk:

> That doctrine [assumption of risk] is applicable where a plaintiff has placed himself or herself in close proximity to a ball field, particularly where the record shows that the plaintiff has viable alternatives to her own location. The conclusory affidavit of the plaintiffs' expert that the design of Field 39 was negligent was insufficient to raise a triable issue of fact as to whether the defendant unreasonably increased the inherent risks of injury to a spectator at a ballfield complex with more than one field upon which children were simultaneously practicing or playing baseball.

Koenig v. Town of Huntington, 10 A.D.3d 632, 782 N.Y.S.2d 92 (2d Dep't 2004).

NEGLIGENCE—DOG BITE—VICIOUS PROPENSITIES

Owners of Cecil, a beagle-collie-rottweiler mixed breed dog, were not liable to 12 year-old boy who, when he approached Cecil, the dog lunged and bit his face because there was no proof in the record that Cecil had vicious propensities:

> Cecil was kept as a family pet, not as a guard dog. Although the dog was restricted to the kitchen area, uncontroverted deposition testimony indicated that he was confined only because he would bark when guests were at the house. There was no evidence that Cecil was confined because the owners feared he would do any harm to their visitors. There was no evidence that the dog's behavior was ever threatening or menacing. Indeed, the dog's actions—barking and running around—are consistent with normal canine behavior. Barking and running around are what dogs do.

Collier v. Zambito, 1 N.Y.3d 444, 775 N.Y.S.2d 205 (2004).

[EDITOR'S NOTE: The court, however, cautioned that this

> disposition does not entitle dog owners to an automatic "one free bite." There could certainly be circumstances where, although a dog has not yet bitten a person, its vicious nature is apparent. In that situation, the owner's success in keeping the dog confined or restrained in the past would not insulate the owner from liability. The behavior exhibited by Cecil in this particular case simply does not rise to that level and summary judgment was properly granted dismissing the complaint.]

NEGLIGENCE—DUTY—ELEVATOR REPAIRER

Elevator repairer, Otis, who contracted with the College of Mount Saint Vincent to service its elevators

in a type of agreement commonly known as an "oil, grease and survey" contract, did not owe a duty to plaintiff, a college janitor, who was injured when he fell down an elevator shaft in one of the college dormitories while he was attempting to close a hoistway door in the shaft of the second floor of the building:

> The definition of the existence and scope of an alleged tortfeasor's duty is a question of law for the courts, involving consideration of matters including public policy and contractual assumptions of responsibility.
>
> * * *
>
> None of those exceptions [in *Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002)] applies to these facts. First, there is no evidence that Otis created or exacerbated any risk to plaintiff by failing to adequately perform its obligations under its service contract with the college. . . . Otis submitted evidence showing that it complied with the terms of the contract, that it recommended modernization of the elevator systems, and that it repeatedly advised the college that the RPR had to be replaced. The contract did not allow Otis to replace the RPR without the college's authorization, which was not given in time to prevent plaintiff's accident.
>
> * * *
>
> The second and third exceptions are similarly inapplicable. With respect to the second exception, plaintiff has made no claim that he was injured as a result of reasonable reliance upon Otis' performance under the contract. As to the third exception, the terms and conditions of the contract were not a comprehensive assumption of all of the college's safety-related obligations with respect to the elevator from which the plaintiff fell.

Fernandez v. Otis Elevator Company, 4 A.D.3d 69, 772 N.Y.S.2d 14 (1st Dep't 2004).

NEGLIGENCE—EMOTIONAL DISTRESS—STILLBIRTH—NO PHYSICAL INJURY

A mother may recover damages for emotional harm when medical malpractice causes a miscarriage or stillbirth even though she does not suffer any physical injury:

> In treating a pregnancy, medical professionals owe a duty of care to the developing fetus (as we impliedly recognized in *Woods v. Lancet*, 303 N.Y.340 [1951]), they surely owe a duty of reasonable care to the expectant mother, who is, after all, the patient. Because the health of the mother and fetus are linked, we will not force them into legalistic pigeonholes. We therefore hold that, even in the absence of an independent injury, medical malpractice resulting in miscarriage or stillbirth should be construed as a violation of a duty of care to the expectant mother, entitling her to damages for emotional distress.

Broadnax v. Gonzalez, 2 N.Y.3d 148, 777 N.Y.S.2d 416 (2004).

[EDITOR'S NOTE: The Court of Appeals reversed the court's earlier ruling in *Tebbutt v. Virostek*, 65 N.Y.2d 931, 493 N.Y.S.2d 1010 (1985), which held that a mother could not recover for emotional injuries when medical malpractice caused a stillbirth or miscarriage absent a showing that she suffered a physical injury that was both distinct from that suffered by the fetus and not a normal incident of childbirth. The court noted:

> While we are well aware of the importance of precedent, *Tebbutt* has failed to withstand the cold light of logic and experience. To be sure, line drawing is often an inevitable element of the common law process, but the imperative to define the scope of duty—the need to draw difficult distinctions—does not justify our clinging to a line that has proved indefensible.]

NEGLIGENCE—LABOR LAW § 240(1)—LADDER/FAILURE TO SECURE

Plaintiff, who while standing on A-frame ladder, dislocated his right shoulder and sustained a torn rotator cuff when an object he was holding to attach to duct work came loose from his grasp and fell, hitting him and the ladder, has a Labor Law § 240(1) claim even though he did not fall off the ladder. Plaintiff's injury resulted when he extended his right arm to break his fall after he was thrown forward following the object hitting the ladder and causing it to shake:

> Plaintiffs did not rely on a "falling object" theory of liability, but rather alleged that [the general contractor] Petrocelli's failure to properly secure the ladder by having someone hold it

> or by the provision of some other safety device led to its unsteadiness, and ultimately, to his injury. Contrary to the suggestion of the motion court, plaintiffs were not required to show that the ladder on which he was standing was defective or that plaintiff fell completely off the ladder to the floor.
>
> * * *
>
> It is sufficient for purposes of liability under section 240(1) that adequate safety devices to prevent the ladder from slipping or to protect himself from falling were absent.

Montalvo v. Petrocelli Construction, Inc., 8 A.D.3d 173, 780 N.Y.S.2d 558 (1st Dep't 2004).

NEGLIGENCE—LABOR LAW § 240(1)—REPAIR WORK—PROTECTED ACTIVITY

Plaintiff, who was injured while retrieving serial or model numbers from the unit and conducting a post repair inspection, cannot invoke Labor Law § 240(1):

> The statute does not cover an injury occurring after an enumerated activity is complete. We will not "isolate the moment of injury," but here, as in *Martinez [v. City of New York*, 93 N.Y.2d 322, 690 N.Y.S.2d 523 (1999)], there is a bright line separating the enumerated and nonenumerated work.

Beehner v. Eckerd Corp., 3 N.Y.3d 751, 788 N.Y.S.2d 637 (2004).

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

Plaintiff, who was called to repair a malfunctioning cable box, was performing routine maintenance:

> We also agree with the Appellate Division that plaintiff, at the time of his accident, was involved in "the routine maintenance of a malfunctioning cable box and [the work] did not constitute 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building' so as to fall within the protective ambit of Labor Law § 240(1)."
>
> * * *
>
> Here, plaintiff determined that the cause of the defective signal was water in the tap, a common problem caused by rain water accumulating in junction boxes affixed to building exteriors. The remedy would have been to loosen a few screws and drain the water from the tap and, if worn out, replace the tap. These activities constitute routine maintenance and not repair as contemplated by Labor Law § 240(1).

Abbatiello v. Lancaster Studio Associates, 3 N.Y.3d 46, 781 N.Y.S.2d 477 (2004).

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

Plaintiff, who was injured while removing, repairing and reinstalling a single window screen at an apartment complex, was not protected under Labor Law § 240(1):

> Unlike the situation in *Prats v. Port Auth. of N.Y. & N.J.* [100 N.Y.2d 878, 768 N.Y.S.2d 178 (2003)], here plaintiff was replacing a torn window screen at the time of his injury, an activity that constituted "routine maintenance" rather than "repair" or "alteration" of a building or structure.

Chizh v. Hillside Campus Meadows Associates, LLC, 3 N.Y.3d 664, 784 N.Y.S.2d 2 (2004).

[EDITOR'S NOTE: In affirming the majority, the Court of Appeals in effect rejected the Appellate Division dissenters' argument that plaintiff is entitled to the protection afforded by § 240(1). The dissenting justices maintained:

> First, plaintiff was hired to work at the job site as a construction worker and was not a handyman or person accustomed to performing routine repairs or maintenance. The work undertaken by plaintiff involved an enumerated activity, i.e., working at a great height on a ladder. Finally, plaintiff's duties as a construction worker were part of an overall construction contract, and routinely involved working at heights. Consequently, we believe that the provisions of section 240(1) should apply.
>
> In any event, we do not believe that the removal, repair and replacement of a broken screen constitutes "routine maintenance" rather than "altering or repairing" of a structure. This Court has held that the removal, repair and replacement of the blower motor of a ventilation system falls within the ambit of Labor Law § 240(1), as does

> the repair of a broken door-closing mechanism and the replacement of beverage supply lines at a restaurant. In each of those cases, we determined that the work the plaintiffs were doing was in the nature of "altering" or "repairing" rather than routine maintenance.

The Court of Appeals distinguished this case from *Prats*. In *Prats*, plaintiff was injured when the ladder slid from under him and bounced off the floor striking him in the face before he fell to the ground. The court held he was covered under Labor Law § 240(1) even though at the time he was only readying air-handling units for inspection because (a) the inspections were ongoing and contemporaneous with other work that formed part of a single contract and (b) plaintiff's company was performing construction and alteration work pursuant to a contract.]

NEGLIGENCE—PREMISES—ADJOINING PROPERTY—DUTY

Landowner (Clark) did not have duty to warn occupant of car parked in his driveway of danger posed by tree on adjoining property that was leaning after storm even though he was aware that the tilt of the tree had increased and was concerned that it might one day damage his property:

> However, as a general matter, an owner owes no duty to warn or to protect others from a defective or dangerous condition on neighboring premises, unless the owner had created or contributed to it. The reason for such a rule is obvious—a person who lacks ownership or control of property cannot fairly be held accountable for injuries resulting from a hazard on the property. We hold that this rule requires dismissal of plaintiff's claim against Clark.
>
> * * *
>
> We agree with the Appellate Division that as a general matter, it would create an "unreasonably onerous" burden to require a landowner to evaluate and warn others about a danger caused by a condition existing on neighboring land. We do not exclude the possibility that some dangers from neighboring property might be so clearly known to the landowner, though not open or obvious to others, that a duty to warn would arise. Here, there was no such danger.

Galindo v. Town of Clarkstown, 2 N.Y.3d 633, 781 N.Y.S.2d 249 (2004).

NEGLIGENCE—PREMISES—CRIMINAL ATTACK—INTRUDER

Administratrix for estate of tenant who was robbed and shot in front of his apartment door cannot recover against the landlord based upon its failure to repair a broken lock on the building's front door where defendant submitted uncontroverted affidavits of two tenants that just before plaintiff's decedent was shot, two young men, who were never identified, followed him inside and walked with decedent to the building's elevator:

> In order to defeat a motion for summary judgment in a negligent security case, plaintiff is not obligated to conclusively establish that the assailant was an intruder, but must raise triable issues of fact concerning whether it was "'more likely or more reasonable than not' that the assailants were intruders 'who gained access to the premises through a negligently maintained entrance.'"
>
> In the matter before us, the uncontroverted eyewitness evidence submitted by defendant establishes that the assailants obtained access to the building from the decedent, in that they followed decedent into the building after he used his key to gain entry. Accordingly, plaintiff has failed to raise an issue of fact as to whether it was more likely or reasonable than not that the intruders gained access as a result of defendant's negligence.

Raghu v. 24 Realty Co., 7 A.D.3d 455, 777 N.Y.S.2d 487 (1st Dep't 2004).

NEGLIGENCE—PREMISES—LABOR LAW § 240(1)—OWNER'S LIABILITY/CABLE TELEVISION TECHNICIAN INJURY

Television technician, called by a building tenant to the premises because of cable reception problems, cannot sue the building's owner under Labor Law § 240(1) for injuries sustained where the tenant (a) was not acting as the owner's agent and (b) the owner did not otherwise authorize the work:

> Common to *Celestine [v. City of New York*, 86 A.D.2d 592, 446 N.Y.S.2d 131 (2d Dep't 1982), *aff'd.*, 59 N.Y.2d 938,

466 N.Y.S.2d 319 (1983)]; *Gordon [v. Eastern Ry. Supply*, 82 N.Y.2d 555, 606 N.Y.S.2d 127 (1993)] and *Coleman [v. City of New York*, 91 N.Y.2d 821, 661 N.Y.S.2d 553 (1997)]—and to all cases imposing Labor Law § 240(1) liability on an out-of-possession owner—is some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest. Here, however, no such nexus exists. The injured plaintiff was on the owner's premises not by reason of any action of the owner but by reason of provisions of the Public Service Law.

* * *

Lancaster [owner] is powerless to determine which cable company is entitled to operate, repair or maintain the cable facilities on its property, since such decision lies with the municipality—the franchisor. The City of New York gave Paragon the franchise, and the right to install its cable facilities. This included the right to maintain the premises free from interference after installation.

* * *

Lancaster cannot be charged with the duty of providing the safe working conditions contemplated by Labor Law § 240(1) for cable television repair people of whom it is wholly unaware. Supreme Court correctly noted that, but for Public Service Law § 228, plaintiff would be a trespasser upon Lancaster's property and Lancaster would neither owe a duty to plaintiff nor incur liability. Any permission to work on the premises was granted upon compulsion and no relationship existed between Lancaster and Paragon or the plaintiff.

Abbatiello v. Lancaster Studio Associates, 3 N.Y.3d 46, 781 N.Y.S.2d 477 (2004).

[EDITOR'S NOTE: The court affirmed the First Department holding that Labor Law § 240(1) did not apply and in effect reversed *Otero v. Cablevision of New York*, 297 A.D.2d 632, 747 N.Y.S.2d 46 (2d Dep't 2002) and affirmed *Marchese v. Grossarth*, 232 A.D.2d 924, 648 N.Y.S.2d 810 (3d Dep't 1996)].

NEGLIGENCE—LABOR LAW § 240(1)—RECALCITRANT WORKER

Where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240(1) for injuries caused solely by his violation of those instructions, even though the instructions were given several weeks before the accident occurred:

> The word "recalcitrant" fits plaintiff in this case well. He received specific instructions to use a safety line while climbing, and chose to disregard those instructions. He was not the less recalcitrant because there was a lapse of weeks between the instructions and his disobedience of them. The controlling question, however, is not whether plaintiff was "recalcitrant," but whether a jury could have found that his own conduct, rather than any violation of Labor Law § 240(1), was the sole proximate cause of his accident.
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> * * *
>
> Here, a jury could have found that plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured. Those factual findings would lead to the conclusion that defendant has no liability under Labor Law § 240(1), and therefore summary judgment should not have been granted in plaintiff's favor.

Cahill v. Triborough Bridge and Tunnel Authority, 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004).

NEGLIGENCE—PREMISES—NON-APPLICABLE BUILDING CODE—DUTY TO SAFELY MAINTAIN PROPERTY

Defendant, who established that its building was not subject to the New York State Fire Prevention and Building Code since it was built more than 50 years before the Code was enacted, nevertheless, had continuing duties, as an owner and a possessor, respectively, to maintain the property in a reasonably safe manner:

> Under the circumstances of this case, questions of fact exist as to whether, among other things, the absence of

> handrails and the presence of steps of unequal height contributed to the plaintiff's accident and whether WSK (lessor) and Beneficial (lessee) were negligent in failing to correct those conditions.

Swerdlow v. WSK Properties Corp., 5 A.D.3d 587, 772 N.Y.S.2d 864 (2d Dep't 2004).

[EDITOR'S NOTE: This case states for the first time that even if a Code is not applicable because, for example, the building was erected before the Code was enacted, the owner still has a duty to maintain the property in a reasonable safe manner that may include making the changes required by the Code. In previous decisions, courts merely granted a new trial because it was error to submit into evidence an expert's opinion that the Administrative Code applied to a building when it did not. See *Marquart v. Yeshiva Machezikel Torah D'Chasidel Belz of New York*, 53 A.D.2d 2d 688, 385 N.Y.S.2d 319 (2d Dep't 1976) and *Ross v. Manhattan Chelsea Associates*, 194 A.D.2d 332, 598 N.Y.S.2d 502 (1st Dep't 1993). None of the cases cited above discussed the owner's common-law duty.]

NEGLIGENCE—PREMISES—"OPEN AND OBVIOUS"

It was error for the IAS court to conclude as a matter of law that a box, 2-1/2 feet long by 1-1/2 feet wide by 10-12 inches high, that a customer happened upon as she rounded a corner into an aisle in defendant's supermarket, was "open and obvious." Moreover, the:

> nature of this alleged hazard simply does not compel the conclusion as a matter of law that the claimed hazard was so obvious that it would *necessarily* be noticed by any careful observer, so as to make any warning superfluous. (Emphasis in original).

The First Department also held that even if the hazard were open and obvious as a matter of law, summary judgment is not warranted:

> The open and obvious nature of a hazard may obviate a claim that the property owner violated the duty to warn of, or place barriers to protect against, dangers on the premises, but does not eliminate a claim that the presence of the hazardous condition constituted a violation of the property owner's duty to maintain the premises in a reasonably safe condition.

The court also found that the presence of a box in the aisle was a dangerous condition. The store manager testified that:

> an unopened single box in an aisle constituted a "tripping hazard" because it was not readily visible to customers walking through the aisles. A lone 10 to 12 inch-high box in a supermarket aisle is, by definition, easily overlooked, creating a hazard which can, and ought to, be removed.

Westbrook v. WR Activities-Cabrera Markets, 5 A.D.3d 69, 773 N.Y.S.2d 38 (1st Dep't 2004).

[EDITOR'S NOTE: Justices Buckley and Marlow concurred but disagreed with the majority's ruling that the open and obvious doctrine negates only a duty to warn of conditions and permits recovery under a theory of violation of a duty to maintain premises in a reasonably safe condition:

> Such a rule effectively eliminates the open and obvious doctrine, invites potentially limitless actions of questionable societal value, and exposes landowners to insurer-like liability.

The Appellate Division, First Department, joined the other Departments in ruling that hazards that are "open and obvious" do not relieve a defendant of its duty to maintain its property in a safe manner. In *Cupo v. Karfunkel*, 1 A.D.3d 48, 767 N.Y.S.2d 40 (2d Dep't 2003), the Second Department held that:

> proof that a dangerous condition is open and obvious does not preclude a finding of liability against the landowner for the failure to maintain a property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence.

The court, however, noted that if the condition complained of was both open and obvious *and*, *as a matter of law, was not inherently dangerous*, a court is not precluded from granting the premises owner summary judgment (emphasis in original).

In *MacDonald v. City of Schenectady*, 308 A.D.2d 125, 761 N.Y.S.2d 752 (3d Dep't 2003), the Third Department, for the first time, held:

> The extent that a danger is obvious is a factor which, like the status of the plaintiff on the property, will impact the foreseeability of an accident and the comparative negligence of the injured

> party, but will not, as a matter of law, relieve a landowner of all duty to maintain his or her premises. Here, although the defect was open and obvious and plaintiff was aware of the condition of the premises, we cannot state that no duty of care existed.

In *Tenebruso v. Toys "R" Us-Nytex, Inc.*, 256 A.D.2d 1236, 682 N.Y.S.2d 795 (4th Dep't 1998), the court held:

> Even if the dangerous condition [clutter in the aisle including boxes, shopping carts and a ladder] was readily observable to plaintiffs' son, that would be relevant on the issue of his comparative negligence but would not negate the duty of defendant to keep its premises safe.]

NEGLIGENCE—PREMISES—RECURRING CONDITION

Testimony that defendant's superintendent knew that tenants often left refuse on the steps in the interior staircase of the building and that notices had been sent to specific tenants about this recurring condition is sufficient to raise a question of fact. The First Department reversed the IAS Court, which granted defendant summary judgment because the evidence established the specific condition did not exist on the night before the fall and that the stairs were cleaned each morning:

> Since defendant's superintendent admitted actual knowledge that particular tenants frequently left refuse and garbage on the stairs, liability may exist based on a recurring condition. Plaintiff is not required to prove that defendant had, or should have had, actual knowledge of the exact item of debris which caused plaintiff to fall. Moreover, the instant case is not one of a mere general awareness that litter might be present. Rather, defendant's superintendent admitted specific knowledge of a recurring dangerous condition, namely, that tenants and their guests "constantly" "partied" in the stairway, the only means of egress from the building, during the course of which they spilled liquid and left bottles, the very condition that allegedly caused plaintiff's fall. Under such circumstances, a defendant's summary judgment motion must be denied.

Rivera v. 2160 Realty Co., L.L.C., 10 A.D.3d. 503, 781 N.Y.S.2d 645 (1st Dep't 2004).

[EDITOR'S NOTE: The Court of Appeals reversed at 4 N.Y.3d 837, 797 N.Y.S.2d 369 (2005) because it concluded that the landlord had no constructive notice on any theory of a dangerous condition in the stairwell:

> "[O]n the evidence presented, the [beer bottle] that caused plaintiff's fall could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation."]

NEGLIGENCE—PREMISES LIABILITY—FORESEEABILITY—CRIMINAL ACT/ MUSIC FESTIVAL

Plaintiff, who was assaulted without provocation in the parking lot at a music concert by four unidentified hoodlums, cannot recover against the City and the concert producer because the brutal attack "was not a foreseeable result of any security breach":

> The types of crimes committed at past Lollapalooza concerts are of a lesser degree than a criminal assault, and thus would not lead defendants to predict that such an attack would occur or could be prevented. By all accounts, defendants took reasonable measures to deal with issues of crowd control and other forms of disorderliness short of unprovoked criminal acts. A random criminal attack of this nature is not a predictable result of the gathering of a large group of people.

The court further found that even if there were a lapse in the security in the parking lot, plaintiff's injuries were not the result of any such lapse, but were caused by an independent intervening criminal act:

> Here, as an independent act far removed from defendants' conduct, the criminal assault broke the causal nexus. The attack was extraordinary and not foreseeable or preventable in the normal course of events.

Finally, the court noted that the scope of the defendant's duty here

> 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," citing *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 429 N.Y.S.2d 606 (1980).

Maheshwari v. City of New York, 2 N.Y.3d 288, 778 N.Y.S.2d 442 (2004).

[EDITOR'S NOTE: The court rejected the arguments made by two dissenting justices in the Appellate Division at 307 A.D.2d 797, 763 N.Y.S.2d 287 (1st Dep't 2003). Justice Saxe, in his dissent, pointed to the criminal activity at other Lollapalooza events and maintained that the prior incidents need not be of the same sort on the premises for proving that there is reason to know of the likelihood of such an incident. Justice Saxe also noted:

> However, the testimony of New York Police Captain Neil Spadaro supports a possible finding that this specific type of incident was actually foreseen. In his deposition, he stated that at the all-agency review meeting planning for the concert, he raised the need for security covering the ball fields where the cars would be parked, "to make sure that there was no tailgating or drinking or using drugs going on . . . before or during [the concert]." Particularly because the bands performing at this concert were predominately heavy metal, which he would expect to attract an especially large proportion of young men, he was concerned that attendees who became intoxicated would get into fights, presenting a danger to other patrons.]

PLEADINGS—AFFIRMATIVE DEFENSE—LACK OF CAPACITY TO SUE

Bankrupt's failure to list its cause of action for work, labor, and services performed on schedules of assets in bankruptcy court bars its action in state court:

> [Plaintiff's] failure to list this cause of action as an asset in its bankruptcy petition precluded it from pursuing this cause of action on its own behalf.

Tri-State Sol-Aire Corporation v. Martin Associates, Inc., 7 A.D.3d 514, 776 N.Y.S.2d 99 (2d Dep't 2004).

[EDITOR'S NOTE: In *Robinson v. J.A. Wiertel Construction*, 185 A.D.2d 664, 586 N.Y.S.2d 59 (4th Dep't 1992), plaintiff's personal injury action was dismissed because he failed to list it as an asset on his schedule of assets in his bankruptcy petition.]

PRODUCTS LIABILITY—DESIGN DEFECT—WASTE COMPACTOR—SUBSTANTIAL MODIFICATION

A question of fact was raised whether waste compactor baler was defective and responsible for the death of third-party defendant's employee, who fell from a service platform—attempting to clear a jam—into the baler and was crushed. The baler was not deactivated and was apparently triggered when decedent fell.

The stairs leading up to the platform, the platform and conveyor belt were installed by third-party defendant employer and were not part of defendant's baler when sold.

The Supreme Court's denial of defendant-manufacturer's motion for summary judgment was affirmed on appeal:

> Where, as here, products liability and negligence claims are premised on a product's defective design, it must be established that the marketed product in question was designed in such a way that it is not reasonably safe and that the alleged design defect was a substantial factor in causing the decedent's injuries. "A cause of action for negligent design additionally requires proof that the manufacturer acted unreasonably in designing the product." Indeed, in design defect cases very little difference exists between prima facie cases in negligence and in strict liability, and a finding of questions of fact with regard to one "inevitably raises material questions of fact" as to the other.

Blandin v. Marathon Equipment Company, 9 A.D.3d 574, 780 N.Y.S.2d 190 (3d Dep't 2004).

[EDITOR'S NOTE: In moving for summary judgment, defendant claimed there was a substantial modification which entitled it to summary judgment under *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 426 N.Y.S.2d 717 (1980).

The court disagreed:

> Here, however, the use of a service platform was not only contemplated by defendant, but was actually encouraged—the baler's operations manual specifically instructs maintenance workers to "use a service platform" when checking the baler's operation. Given that [plaintiff's expert] Gailor's observation that the baler was essentially the same as when it was manufactured, a question of fact exists as to whether the addition of the platform was a substantial modification of the baler.]

PRODUCTS LIABILITY—FAILURE TO WARN—COMMERCIAL FRYER

Manufacturer of fryer is not liable under a failure to warn theory to plaintiff, who sustained burn injuries when he slipped and fell in a Burger King parking lot while he and his co-worker were carrying an open container of recently drained hot shortening from defendant's fryer to a disposable receptacle:

> *The service manual for the fryer contained warnings, inter alia, advising users to allow shortening to cool below 100 Fahrenheit before transporting it for disposal, and that a covered container should be used. In addition, the warning label located on the inside front door of the fryer advised users that procedures for the disposal of shortening provided in the service manual for the fryer should be followed*. The plaintiff ignored both of these warnings. Furthermore, the plaintiff was an experienced fry-cook, who had sustained burns from spattering shortenings in the past, and was aware that the shortening was hot; the dangers to which the plaintiff was exposed were readily apparent. Moreover, Frymaster had no duty to warn the plaintiff of the readily discernible dangers of which he was already aware. (Emphasis in original.)

Warlikowski v. Burger King Corporation, 9 A.D.3d 360, 780 N.Y.S.2d 608 (2d Dep't 2004).

[EDITOR'S NOTE: The court also rejected plaintiff's complaint that the fryer was defectively designed and unfit for its intended use because it failed to include, as standard equipment, an optional disposal unit for the safe transportation of hot shortening:

> Frymaster established that the defendant Burger King Corporation (hereinafter BKC) and its franchisee were aware of and eschewed the use of the optional, wheeled, hot-shortening disposal equipment it offered, and that the fryer was reasonably safe for the purpose for which it was designed without the use of the optional shortening disposal unit. Frymaster demonstrated that BKC and its franchisee were in the best position to weigh the benefits of using specialty products for the transporting of hot shortening. Accordingly, the plaintiff's design defect claims must fail.]

SETTLEMENT—INFANT—INFANT'S COMPROMISE

Although plaintiff's attorney was clothed with apparent authority to enter into a settlement, and infant plaintiff's father, who opposed settlement, is bound by the settlement, the court erred in failing to follow CPLR 1207 and 1208 (infant's compromise). In addition, the appointment of a new guardian ad litem to represent the infant plaintiff is warranted:

> The motion to settle the case was not made by the infant plaintiff's guardian, Edionwe, and was not supported by affidavits from Edionwe, as guardian, and counsel setting forth the required information. Further, no medical or hospital reports were offered, there was no hearing, and the Supreme Court did not purport to approve the settlement after scrutinizing it to assure that it was fair and reasonable and in the infant plaintiff's best interests . . . There is no evidence of the nature and extent of the damages sustained by the infant plaintiff and his present physical condition, or the terms and proposed distribution of an approved settlement which takes into account any need for immediate medical treatment and its attendant costs.
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> * * *
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> Similarly, counsel for plaintiffs did not explain his reasons for recommending the settlement or set forth the services he rendered. Indeed, it does not appear that the infant plaintiff's best interests are being protected . . . Further, although the record indicates that timely medical treatment is needed to assure the proper formation and growth of the infant plaintiff's face, there is no evidence that such treatment has been rendered or scheduled in the almost five years that this case has been pending, or that there has been any precise inquiry into the type, timing, and cost of the medical treatment that will be required. In addition, there is no evidence of any diligent inquiry into the availability of additional insurance or assets against which the infant plaintiff might collect, or concerns about liability if the case is tried.

Edionwe v. Hussain, 7 A.D.3d 751, 777 N.Y.S.2d 520 (2d Dep't 2004).

SPOLIATION—STRIKING ANSWER

Defendant's counsel's misplacing or discarding evidence (brake chamber) that was involved in an explosion causing plaintiff's injury warranted striking defendant's answer:

> Sanctions may be imposed where critical items of evidence are negligently disposed of by a litigant before the opposing party has an opportunity to properly review and inspect them. "[C]ourts will look to the extent that the spoliation of evidence may prejudice a party and whether a dismissal will be necessary as 'a matter of elementary fairness.'" Absent a clear abuse of discretion, that determination will not be disturbed.
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> * * *
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> Recognizing that plaintiff's access to the brake chamber was essential to establish causation, we find that the loss of this critical piece of evidence coupled with defendants' failure to produce the requested photographs support Supreme Court's determination to strike the answer pursuant to CPLR 3126. In so finding, we reject the contention that liability should first have been determined or that the sanction was unduly harsh.

Miller v. Weyerhaeuser Company, 3 A.D.3d 627, 771 N.Y.S.2d 200 (3d Dep't 2004).

SPOLIATION—VERBAL REQUEST/PRESERVE

Plaintiff, an insurance carrier who paid property damage claim after a house was destroyed by a fire originating in a 1999 Chevrolet, has no cause of action for spoliation of evidence against Chevrolet's insurance carrier, Royal, who took possession of the vehicle and disposed of it before a scheduled joint inspection and testing:

> It is clear that Royal had no duty to preserve the vehicle. There is no dispute that Royal owned the vehicle. Moreover, no relationship existed between MetLife and Royal that would give rise to such a duty. Additionally, MetLife made no effort to preserve the evidence by court order or written agreement. Although MetLife verbally requested the preservation of the vehicle, it never placed that request in writing or volunteered to cover the costs associated with preservation. The burden of forcing a party to preserve when it has no notice of an impending lawsuit, and the difficulty of assessing damages militate against establishing a cause of action for spoliation in this case, where there was no duty, court order, contract or special relationship.

MetLife Auto & Home v. Joe Basil Chevrolet, Inc., 1 N.Y.3d 478, 775 N.Y.S.2d 754 (2004).

STIPULATIONS—SETTLEMENT—OUT OF COURT—CPLR 2104

Plaintiff's oral settlement agreement with hospital for $3,000,000 on behalf of her infant daughter—who died after the agreement—was unenforceable even though the settlement was not disputed. The court rejected plaintiff's arguments that (a) there was sufficient writing to show substantial compliance with CPLR 2104 and (b) to apply equitable estoppel finding that the settlement was not reduced to writing in compliance with CPLR 2104:

> The plain language of the statute directs that the agreement itself must be in writing, signed by the party (or attorney) to be bound (CPLR 2104). As we remarked over a century ago, "this rule is of somewhat ancient origin. It grew out of the frequent conflict between attorneys as to agreements made with reference to proceedings in actions, and was intended to relieve the courts from the constant determination of controverted questions of fact with reference to such proceedings."
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> To allow the enforcement of unrecorded oral settlements would invite an endless stream of collateral litigation over the settlement terms.
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> * * *
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> If settlements, once entered, are to be enforced with rigor and without a searching examination into their substance, it becomes all the more important that they be clear, final and the product of mutual accord. These concerns obviously lie at the heart of CPLR 2104, a neutral statute enacted to promote certainty in settlements, which benefits all litigants.

Bonnette v. Long Island College Hospital, 3 N.Y.3d 281, 785 N.Y.S.2d 738 (1994).

TRIAL—APPORTIONMENT—ARTICLE 16

A bankrupt tortfeasor is not exempt from CPLR article 16 notwithstanding that there is an automatic stay resulting from the tortfeasor's bankruptcy:

> A New York State court does not lack jurisdiction over a tortfeasor in bankruptcy. Notwithstanding the automatic stay resulting from bankruptcy, the tortfeasor is not exempt from consideration of damages under CPLR article 16. To the extent that such entity's culpability is 50% or less, exposure for non-economic damages can still be calculated in apportioning liability. The issue of personal jurisdiction over such an entity, under CPLR 1601(1), must be resolved on the facts of each case, and not simply on whether or not the tortfeasor is bankrupt.

Tancredi v. A.C. & S., Inc., 6 A.D.3d 352, 775 N.Y.S.2d 520 (1st Dep't 2004).

TRIAL—JURY RE-ENACTMENT/ COURT SUPERVISION

It is not an abuse of discretion for the trial court to grant a jury's request to look through binoculars, which were in evidence, that police used to observe a drug transaction in order to perceive their degree of magnification:

> The court properly exercised its discretion in granting a request from the deliberating jury to leave the windowless jury room and look out the hallway window using the binoculars. The court provided thorough supervision and cautionary instructions.

People v. Gerard, 10 A.D.3d 579, 782 N.Y.S.2d 90 (1st Dep't 2004).

[EDITOR'S NOTE: Recently, in *People v. Kelly*, 11 A.D.3d 133, 781 N.Y.S.2d 75 (1st Dep't 2004), Justice Sullivan set forth what a jury is and is not allowed to re-enact:

> It is well recognized that jury may conduct a jury room crime reenactment or demonstration provided it involves no more than the "jurors' application of everyday experiences, perceptions and common sense" to the evidence (*People v. Gomez*, 273 A.D.2d 160, 710 N.Y.S.2d 53 [1st Dep't 2000]) [jury properly permitted to "drop" gun, a trial exhibit, to jury room floor, where "sound the weapon would make when dropped" was a trial issue], see also *People v. Maragh*, 94 N.Y.2d 569, 574, 708 N.Y.S.2d 44 (2000). Conversely, demonstrations that entail more than the application of everyday perceptions and common sense are prohibited (*People v. Stanley*, 87 N.Y.2d 1000, 643 N.Y.S.2d 620 [1996]) [jurors' "experiment" during official crime scene visit exceeding scope and manner of consent to demonstration and "pointedly aimed at authenticating the eyewitness's version of the crime" improper]; *People v. Brown*, 48 N.Y.2d 388, 423 N.Y.S.2d 461 (1979) [experiment conducted by one or more jurors outside jury room, results of which later shared with other jurors, found improper]. In the latter instances, the reenactments turned the jurors conducting the experiments into unsworn witnesses, thereby introducing non-record facts into the jurors' deliberations].

TRIAL—MISTRIAL—SUBPOENAED RECORDS

Trial court did not err in granting defendant a mistrial after the jury returned a verdict for plaintiff on liability after it was disclosed that plaintiff's hospital records, which plaintiff's counsel subpoenaed, (a) had been sent to plaintiff's counsel's office and (b) the records, which were more extensive than the records defense counsel received in response to plaintiff's authorizations, revealed a different version of plaintiff's accident and contrary to her trial testimony:

> When a court has designated a clerk to receive hospital records pursuant to CPLR 2306(b), the records must be delivered to the clerk in a sealed envelope to the court. This ensures that all parties are given "a full opportunity to inspect the materials in advance of their use" and prevents any surprises. Here, this procedure was not followed. Moreover, the records contained a statement which, if proven to be attributable to the plaintiff, would be admissible and would seriously contradict her trial testimony regarding the proximate cause of her fall.

Weinberg v. Remyco, Inc., 9 A.D.3d 425, 780 N.Y.S.2d 625 (2d Dep't 2004).

TRIAL—POST TRIAL MOTIONS—TRIAL JUDGE UNAVAILABLE FOR ADJUDICATION

Where the trial judge was unavailable to adjudicate a post trial CPLR 4404 motion, defendant was not entitled to a new trial notwithstanding that Judiciary Law § 21 states when a trial judge becomes unavailable to adjudicate a post-trial CPLR 4404 motion there must be a new trial:

> We, however, decline to apply Judiciary Law § 21 in so rigid a fashion and find that, under all of the circumstances presented, the perspective of the trial judge was not essential to the proper evaluation of defendant's contentions for post trial relief. We note in particular that the propriety of the motion court's rejection of defendant's request for a new trial based on the unsworn hearsay assertion that plaintiff wife had accused her estranged husband of perjury, could not in any practically significant way have been diminished by the circumstance that the motion court had not presided at the trial. Defendant simply failed to carry its burden on the motion to adduce evidence proving the falsity or likely falsity of plaintiff's testimony.

Gayle v. Port Authority of New York and New Jersey, 6 A.D.3d 183, 775 N.Y.S.2d 2 (1st Dep't 2004).

TRIAL—SPECIAL REFEREE—HEAR AND REPORT—OBJECTION/WAIVER

Where a contractor, Trocom, sued Con Edison for damages and requested a jury trial on all issues, the IAS Court erred, after granting Trocom summary judgment on liability, of referring the issue of the amount of damages to a Special Referee to hear and report:

> At the outset of the hearing, Con Ed asserted that the issues regarding damages, including proximate cause and mitigation, were issues of fact for a jury. Trocom argued that Con Ed should have appealed from or moved to reargue the reference order. The referee rejected Con Ed's objection and took testimony on the issue of damages.
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> * * *
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> We conclude, as Con Ed urges, that the Supreme Court erred in referring the issue of damages to a referee to hear and report, thereby depriving it of its right to a trial by jury. While plaintiff correctly asserts that the reference order is an appealable paper, we reject its contention that Con Ed's failure to appeal from that order precludes our review of Con Ed's continued and consistent claim that it was entitled to a jury trial on the issue of damages.
>
> * * *
>
> We also reject Trocom's further contention that Con Ed waived its right to a jury trial by fully participating in the hearing before the referee. . . . Indeed, a participation in a hearing after objecting, as Con Ed clearly did here, does not constitute a waiver.
>
> Turning to the merits, we find that the court erred in issuing, *sua sponte*, an order of reference, without Con Ed's consent. Plaintiff's assertion that the referee had the authority to report presupposes that the initial reference order was proper. CPLR 4317(b) provides that a court may, without the parties' consent, order a reference to determine "an issue of damages separately triable and not requiring a trial by jury." When, on a motion for summary judgment, only issues of fact remain which relate to the extent and amount of damages, "the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper." This statutory provision "does not vest discretion in the court to require the trial of such issues of fact before any type of fact finder other than would be required were there no motion for summary judgment."

Trocom Construction Corp. v. Consolidated Edison Company of New York, Inc., 7 A.D.3d 434, 777 N.Y.S.2d 454 (1st Dep't 2004).

[EDITOR'S NOTE: Where, however, a party registers no objection to a reference when it was made and participates without reservation in a hearing before a Special Referee, the party waives its objections. In addition, the reference to a Special Referee was appropriate where the action seeks "an accounting and disgorgement of purportedly wrongfully appropriated funds." See *587 Development Inc. v. Pizzuto*, 8 A.D.3d 5, 777 N.Y.S.2d 494 (1st Dep't 2004).]

TRIAL—STATUTORY VIOLATION

Trial court erred in not charging the jury that owner's failure to provide handrail on stairway violated State Uniform Fire Prevention and Building Code where plaintiff's expert testified that a handrail was required pursuant to code and that a handrail would have helped the plaintiff to maintain his balance, rather than pitch forward onto the ground causing his injury:

> A statute or regulation should be charged where there is evidence in the record to support a finding that the statute was violated and the statute or regulation is applicable to the facts presented. The failure to charge a statutory violation warrants reversal where a reasonable view of the evidence could support the finding that such violation was a proximate cause of the accident. In the present case, a reasonable view of the evidence could support the finding that the defendants' failure to provide a handrail on the stairway was a proximate cause of the plaintiff's accident.

Rivera v. Americo, 9 A.D.3d 356, 780 N.Y.S.2d 27 (2nd Dep't 2004).

TRIAL—SURVEILLANCE FILMS—ORIGINAL—FAILURE TO DISCLOSE

The trial court abused its discretion in granting plaintiff's motion to preclude defendant from presenting his surveillance of plaintiff allegedly shoveling snow after the accident because defense counsel sent him a VHS copy of the eight-millimeter surveillance tape:

> Section 3101(i) . . . did not require parties making disclosure of surveillance tapes to be more forthcoming than they would with any ordinary discovery material. In the case of "documents and things"—a term that includes videotapes—a party's obligation is "to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph" the items produced. This section may be satisfied by telling the party seeking the discovery where the materials are and providing a reasonable opportunity for that party to look at them and make copies; but it is often more convenient, and very common, for counsel for the producing party to make copies and send them to the other side. Where that is done, it is understood that the originals must be available for inspection on request.
>
> * * *
>
> Plaintiff has not shown that the difference in format between the eight-millimeter original and the VHS copy was of any significance; but if plaintiff's counsel wanted to see the original, he had only to ask, and he had plenty of time—more than a year—to do so before trial. Defendant thus complied with his obligation to make "full disclosure" of the videotape, and Supreme Court and the Appellate Division erred in holding otherwise.

Zegarelli v. Hughes, 3 N.Y.3d 64, 781 N.Y.S.2d 488 (2004).

[EDITOR'S NOTE: In his opinion, Judge Robert Smith discusses the testimony necessary to authenticate surveillance tape:

> Testimony from the videographer that he took the video, that it correctly reflects what he saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape. Where the videographer is not called "[t]estimony expert or otherwise, may also establish that a videotape 'truly and accurately represents what was before the camera.'" If there was (as Supreme Court suggested) any discrepancy between the tape and the videographer's description in a written report of what he saw, that would have been a proper matter for cross-examination.]

WITNESSES—10-YEAR-OLD

The County Court did not err in allowing 10-year-old to give sworn testimony:

> The decision as to whether a child is competent to testify under oath rests with the trial court, which has the opportunity to view the child's demeanor. The voir dire examination of the complainant reveals that she understood the difference between telling a lie and telling the truth, that she promised to tell the truth, and that she understood that a witness could be punished for lying in court, and that

> God would be upset if she told a lie. Accordingly, she was properly permitted to give sworn testimony.

People v. Gillard, 7 A.D.3d 540, 776 N.Y.S.2d 95 (2d Dep't 2004).

WORKERS' COMPENSATION—GRAVE INJURY

Where plaintiff's acquired injury to the brain results in his no longer being employable in any capacity, he sustained a "grave injury" because he has "permanent total disability" under the statute. The court concluded that defining "permanent total disability" as a vegetative state is too harsh:

> The Legislature in section 11 has itself defined a grave injury to include "loss of multiple fingers," "loss of multiple toes," "loss of nose," "loss of ear," "permanent and severe facial disfigurement" and "loss of an index finger." None of those enumerated grave injuries has the effect of preventing an employee from performing daily life activities. Limitation of permanent total disability to a vegetative state thus is too harsh a test, out of step with the balance of the section.
>
> * * *
>
> Finally, we make clear that the test we adopt for permanent total disability under section 11 is one of unemployability *in any capacity*. "In any capacity" is in keeping with legislative intent and sets a more objectively ascertainable test than equivalent, or competitive employment.

Rubeis v. Aqua Club, Inc., 3 N.Y.3d 408, 788 N.Y.S.2d 292 (2004).

[EDITOR'S NOTE: The Court of Appeals reversed *Rubeis v. Aqua Club, Inc.*, 305 A.D.2d 656, 761 N.Y.S.2d 659 (2d Dep't 2003) and *Largo-Chicaiza v. Westchester Scaffold Equipment Corp.*, 5 A.D.3d 355, 774 N.Y.S.2d 152 (2d Dep't 2004); and affirmed *Knauer v. Anderson*, 2 A.D.3d 1312, 770 N.Y.S.2d 268 (3d Dep't 2003).]

WORKERS' COMPENSATION—INTENTIONAL TORT—CO-EMPLOYEE

An employee who applied for and accepted compensation benefits is not barred from suing a co-employee if the co-employee committed an intentional tort where the alleged misconduct arose from purely personal motives and was not in furtherance of the employer's business. The court relied on *Maines v. Cronomer Valley Fire Dep't*, 50 N.Y.2d 535, 429 N.Y.S.2d 622 (1980), which interpreted Workers' Compensation Law, § 29(6), that compensation benefits shall be the exclusive remedy to an employee when an employee is injured by the negligence or wrong of another in the same employ:

> [T]he words "in the same employ" as used in the Workers' Compensation Law are not satisfied simply because both plaintiff and defendant have the same employer; a defendant, to have the protection of the exclusivity provision, must himself have been acting within the scope of his employment and not have been engaged in a willful or intentional tort.

Hanford v. Plaza Packaging Corp., 2 N.Y.3d 348, 778 N.Y.S.2d 768 (2004).

[EDITOR'S NOTE: The court noted that plaintiff cannot recover twice for the same injuries. To the extent that plaintiff recovers damages from the co-employee, the recovery is subject to recoupment by the Workers' Compensation carrier as with any recovery by a Workers' Compensation claimant against a third party.]

Section Committees & 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.

Committee on Arbitration and Alternatives to Dispute Resolution

John P. Connors, Jr.
766 Castleton Avenue
Staten Island, NY 10310
718/442-1700

Committee on Continuing Legal Education

Thomas P. Valet
113 East 37th Street
New York, NY 10016
212/684-1880

Arlene Zalayet
60 Andover Road
Roslyn Heights, NY 11577
516/528-0687

Committee on Cyberspace

Timothy P. Murphy
1500 MONY Tower I
Syracuse, NY 13202
315/471-3167

Committee on Legal Affairs

Prof. Michael J. Hutter, Jr.
80 New Scotland Avenue
Albany, NY 12208
518/445-2360

Committee on Legislation

John K. Powers
39 North Pearl Street, 2nd Floor
Albany, NY 12207
518/465-5995

Committee on Medical Malpractice

Thomas P. Valet
113 East 37th Street
New York, NY 10016
212/684-1880

Committee to Preserve and Improve the Jury System

James H. Kerr
172 Arnold Drive
Kingston, NY 12401
845/338-2637

Committee on Products Liability, Construction and Motor Vehicle Law

Howard S. Hershenhorn
80 Pine Street, 34th Floor
New York, NY 10005
212/943-1090

Committee on Trial Advocacy Competition

Stephen O'Leary, Jr.
88-14 Sutphin Boulevard
Jamaica, NY 11435
718/657-5757

John P. Connors, Jr.
766 Castleton Avenue
Staten Island, NY 10310
718/442-1700

Committee on *Trial Lawyers Section Digest*

Steven B. Prystowsky
120 Broadway
New York, NY 10271
212/964-6611

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Trial Lawyers Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

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