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TORTS, INSURANCE AND COMPENSATION LAW SECTION EXECUTIVE COMMITTEE—2002-2003

COMMITTEE CHAIRS

Automobile Liability
Gary A. Cusano
303 South Broadway, Suite 435
Tarrytown, NY 10591

Aviation Law
Franklin F. Bass
150 East 42nd Street
New York, NY 10017

Business Torts and Employment Litigation
Robert A. Barrer
633 Bradford Parkway
Syracuse, NY 13224

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Buffalo, NY 14202

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Products Liability
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8550 Lamp Post Circle
Manlius, NY 13104

Professional Liability
Susan L. English
20 Hawley Street
P.O. Box 2039
Binghamton, NY 13902

Website
Charles J. Siegel
40 Wall Street, 7th Floor
New York, NY 10005

Michael C. Tromello
Three Huntington Quadrangle
Suite 305 N
P.O. Box 948
Melville, NY 11747

DIVISION CHAIRS

Construction and Surety Law
Henry H. Melchor
One Lincoln Center
Syracuse, NY 13202

Workers' Compensation Law
Susan R. Duffy
1725 Statler Towers
107 Delaware Avenue
Buffalo, NY 14202

NYSBA STAFF LIAISONS

Patricia K. Bucklin
New York State Bar Assoc.
One Elk Street
Albany, NY 12207

Ronald F. Kennedy
New York State Bar Assoc.
One Elk Street
Albany, NY 12207

CLE STAFF LIAISON

Jean Marie Grout
New York State Bar Assoc.
One Elk Street
Albany, NY 12207

YOUNG LAWYERS SECTION LIAISON

Keith A. O'Hara
20 Hawley Street
P.O. Box 2039
Binghamton, NY 13902

TICL JOURNAL

Co-Editors
Paul S. Edelman
100 Park Avenue
New York, NY 10017

David Beekman
100 Park Avenue
New York, NY 10017

Kenneth L. Bobrow
4-6 North Park Row
Clinton, NY 13323

TICL NEWSLETTER *(Cover to Cover)*

Editor
Robert A. Glick
885 Second Avenue
at East 48th St.
New York, NY 10017

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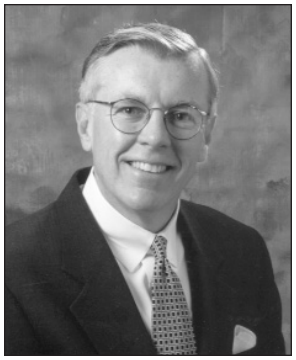
Message from the Section Chair



There is a story told about a famous cardiac surgeon who was about to welcome guests to his home for a dinner party, when he was told by his wife that the downstairs toilet was malfunctioning. He assured her that he would call a plumber and have the problem resolved. Minutes after the surgeon called him, the plumber arrived, and minutes after the plumber's arrival, the surgeon was told that the problem had been repaired. The plumber then presented the famous surgeon with a bill for $5,000.

"$5,000?" the surgeon exclaimed. "You were here for only a few minutes. I am a famous cardiac surgeon, and even I do not make that kind of money." The plumber replied, "I know what you mean. I did not make this kind of money when I was a cardiac surgeon, either."

When I tell the story to most people, even doctors, it gets some laughs. This story can be taken as poking fun at one or both of the professions mentioned. But, in the days of managed care and with it, managed fees, the story can also be taken as a reflection that doctors are actually finding themselves losing ground in terms of compensation relative to other professions, trades and occupations. Often, today's joke can be a reflection of trends which the author Stephen Covey refers to as "a paradigm shift."

As lawyers, we have been experiencing a paradigm shift with respect to our profession and compensation for some time. The business pressures of our profession have become increasingly urgent, and there are significant forces which would seek to impose restrictions on our ability to earn a living and represent our clients. The forces at work are complex and varied, but their net effect is to suppress the earning potential of many lawyers, and otherwise make the practice less enjoyable and fulfilling. Experienced lawyers leave. Bright young people choose other career paths.

One force involved in this process is government regulation of attorneys' fees—direct and indirect. This summer, there was a discussion of a possible restriction on the fees of attorneys representing employers in workers' compensation cases. The concept would require employers' counsel to obtain approval of their fees before they could bill their clients. These approvals would be granted by Workers' Compensation law judges who also fix the fees paid to claimants.

Whether one agrees with it or not, the rationale behind the approval of fees paid by claimants is at least consistent with the legislative scheme. Claimants are unsophisticated, and since workers' compensation is supposed to be a "no-fault" system, fees in connection with the representation of claimants should be reasonable, and the Legislature has a legitimate interest establishing checks and balances in the system to ensure that attorneys are adequately compensated and at the same time claimants receive an appropriate net recovery.

This rationale does not work with respect to approval for the fees of attorneys representing employers. Most often, employers are insured for a workers' compensation liability and therefore insurance companies are responsible for the payment of legal fees. These insurers can hardly be characterized as unsophisticated; in fact, many have already put in place various processes for reviewing legal fees. So, there is no apparent legislative goal which would justify such a procedure given the purposes of the workers' compensation system. The result would be yet another restriction on the ability of lawyers to practice their profession, represent their clients and (perish the thought) earn a decent living.

When the Executive Committee heard that this concept was being discussed, it acted swiftly. Within two days, a letter was delivered to key legislators and the counsel to the governor stating the TICL Section's objection to any such proposal, and urging rejection of any suggestion to include such a provision in the Workers' Compensation Law. Ultimately, no such legislation was enacted. Even at this point, we do not fully understand whether the concept was being seriously urged. We have not been able to find any proposed legislation including such a provision. Hopefully, our objection will be effective in preempting any such proposal in the future.

I think there are several important points to take away from this experience. First, we have a system which was able to identify quickly an important issue which is a significant concern to the membership of the Section. Second, we were able to react quickly and decisively on this issue. More things were accomplished through the fine work of the section's Workers' Compensation Law Division, under the leadership of its Chair, Susan Duffy.

Finally, I believe that this experience illustrates the need for an effective organized bar and demonstrates how it operates to protect not only the interests of its members, but more importantly, society's interest in preserving the integrity of our justice system, which includes all tribunals in which clients' rights are adjudicated, including administrative law proceedings.

Professionals will always be the butt of jokes. However, I think it is important that, as a profession, we do our best to make sure that some of the underlying feelings expressed in these jokes do not later become negative forces which impact upon the integrity and effectiveness of our profession. One of the important goals and functions of the TICL Section is to speak on behalf of its members when these issues are identified.

Dennis R. McCoy

The Opening Statement

By Ben B. Rubinowitz and Evan Torgan

The opening statement is the lawyer's first real opportunity to speak directly to the jury about merits of the case. It is one of the first opportunities to persuade. It presents an immediate chance to leave an indelible impression on the minds of the jury that hopefully will stick with them throughout the trial. The opening statement lays out the general facts of the case and can serve to reinforce its strengths and to diffuse its weaknesses. The opening statement must be viewed as a crucial starting point for persuasion. As with all aspects of the trial, preparation is essential.

Work with the Operative Terms

One of the best places to start your preparation is to begin at the very end of the case. The last thing the jury hears before it deliberates is the court's instruction on the law. To prepare for the opening you must be fluent with the court's charge. It is impossible to properly structure your case, much less your opening statement, without a thorough grasp on that which you must prove in order to win your case. Moreover, you should strive to work the operative terms from the instruction right into your opening. By no means are we suggesting that you recite a lengthy portion of the court's charge in your opening. Rather, we are suggesting that you can work with specific words or phrases to assist you in spelling out your theory of the case.

For example, one of the most common charges on which the jury will be instructed in a personal injury case is the concept of proximate cause. The New York Pattern Jury Instructions (PJI 2:70) define this concept as follows: "An act or omission is regarded as a cause of an injury if it was a substantial factor in bringing about the accident. . ." In your opening, while you should not recite the charge verbatim, you can work the key words into your opening.

Consider, for example, the following statement in an auto case: "Members of the jury, the proof will show that it was the defendant's failure to slow down as he approached the intersection that was a substantial factor in causing the accident."

Consider also the scenario where you are faulting more than one defendant and you want to make clear that each was a proximate cause of the accident: "The proof will show that the carelessness of each defendant was a substantial factor in bringing about the accident."

Even in an intentional tort case the language from the charge must be carefully tracked. Rather than simply reciting the word "intent," by following the language in the charge you can state: "It was the defendant's conscious objective to cause physical injury to (the plaintiff)."

"One of the best places to start your preparation is to begin at the very end of the case. The last thing the jury hears before it deliberates is the court's instruction on the law."

Suppose you represent a plaintiff injured in a fall through a trap door in a store, and hope to prove that a landlord had violated a specific section of the Building Code that requires corridors to be left unobstructed. Assume you are concerned that the jury might not find that the subject area was a "corridor" within the meaning of the statute. This is an ideal situation in which to influence the jury and familiarize it with the words it will come back to during its deliberations:

> Mr. Jones walked into the store, past the shelves, and down a narrow corridor in front of the prepared food container. As he turned to his right and began to proceed down the corridor, a salesperson came back, forcing him to take one step back. The next thing he knew, he was at the bottom of a staircase.

The point is, by using operative terms at this early point in the trial, the jury will become acclimated to the very words the court will charge at the end of the case. If the jury accepts your version of the facts as truthful as the proof comes in, it will likely view the proof through the terms you have introduced in your opening. In other words, the jurors will adopt those terms as their own. If done successfully, the jury will become so familiar with these terms that, at the end of the case when it hears those phrases again in the judge's charge, it may seem as if the judge has tailored his charge to fit your proof, as opposed to the opposite reality.

Understatement Versus Overstatement

One of the most difficult issues confronting the attorney preparing an opening is how much to say. The answer is found in the following two guidelines: 1) If you can't prove it, don't say it and 2) Promises made

must be kept. You must resist the temptation to say anything but that which you can prove. By overstating the case, not only will you lose credibility with the jury but you will open up a fertile area of attack for your adversary. Imagine the scenario where you open by stating that you will prove three specific facts. In actuality, at the end of the case you have been successful in proving only two of the three. Clearly your adversary now has an advantage. If she is shrewd she will have ordered a daily copy of your opening and remind the jury of your unfulfilled promise during her summation. Your credibility has been hurt. To avoid discrediting yourself and hurting your case we suggest it is always better to understate the case than run the risk of overstating it.

Exaggeration, even in the smallest degree, can come back to haunt you. Suppose you represent a plaintiff in a medical malpractice case in which the claim is negligence during surgery in injuring a structure outside the operative field. Your adversary delivers an opening that includes a phrase such as "my client, Dr. Smith, took *all* available precautions and did *everything he could* to avoid this result." You have been granted an opportunity, in summation, to focus not only on the anticipated court's charge, i.e., reasonable precautions, but instead, to emphasize your opponent's exaggeration to lower the burden of proof and attack the overall credibility of your adversary: "Defense counsel told you in his opening statement that his client took all available precautions. We know, however, that he didn't. We know he didn't utilize all diagnostic tests and studies before beginning the surgery. We know he didn't call for a consult during the procedure and we know he didn't perform all available intraoperative studies. So when his lawyer stood here and told you at the start of the case that he had done everything possible to avoid this injury, he told you something that simply was less than the truth."

Dealing with Weaknesses

Rare indeed are the perfect cases. Invariably, you will be presented with weakness ranging from mild (your client was walking just outside the crosswalk when he was run over by a turning vehicle) to severe (your client was convicted of fraud and perjury several years earlier). The weaknesses that must be dealt with in the opening statement are those that scare you. The question, is what are you going to say about your client's past problems or difficulties with liability? The attorney who thinks he is better off not saying anything at all and not divulging these facts in his opening is sorely mistaken. By shying away from these difficult issues and failing to mention them in your opening you are giving your adversary a tremendous advantage. You are not only allowing him to paint a bad picture of your client but, more importantly, are allowing him to discredit you by revealing your failure to deal with these facts. True, there are ways of dealing with such weaknesses prior to the opening such as a motion *in limine*; however, you must be prepared to deal with the issue if the court rules against you.

With regard to personal issues, such as a prior conviction, the so-called "confessional approach" often works the best: "I'll tell you right now, so that you understand both the good and the bad, that my client has had some trouble in his life. He was convicted of perjury seven years ago and served six months in jail. It is our position that that past misdeed has nothing to do with the events that bring us here today. It doesn't make this accident any less the defendant's fault, nor does it make my client's suffering any less real. But we bring it to your attention, so that you can evaluate all the facts."

"The attorney who grabs hold of the jury's interest and captures its attention from the outset by letting the jury see the lawyer as a believable source of information is well on his way to winning the case."

By approaching a problem this way, not only will the jury appreciate your candor, but, with any luck, may resent your adversary from injecting such an issue into the trial if the jury believes it to be irrelevant.

The Impact Opening

The actual delivery of the opening is as important as its substance. The attorney who grabs hold of the jury's interest and captures its attention from the outset by letting the jury see the lawyer as a believable source of information is well on his way to winning the case.

One way of grabbing the jury's attention immediately is to deliver an "impact" opening statement. The impact opening forces the jury to focus immediately on the issues and, if done correctly, influences the way in which the jury interprets the facts throughout the trial. It relies on the psychological theories of "primacy and recency." In other words, that which a jury hears first and last will be remembered more clearly and readily than that which is lost in the middle. Simply put, take advantage of the opportunity to leave a good and lasting first impression.

Consider the chronology of events prior to the time that you stand up to deliver your opening. You have already selected your jury. You are in the courtroom. Generally, the trial judge begins with a preliminary

instruction. That instruction makes clear that what you and your adversary say in the opening statement is not evidence and that it is merely an outline or road map of the proof which counsel intends to offer. Moreover, the judge will usually instruct the jurors that they are not to make up their minds until the end of the case after the court has given its instructions.

The notion that the jurors will sit through days and even weeks of testimony and will somehow suspend their judgments and impressions until the end of the trial is unrealistic. Jury studies have shown again and again that jurors often make up their minds about ultimate issues based largely on whatever is said during the opening statements.

"The most persuasive speakers are those who do not rely on crutches such as notes."

Because the opening is the first opportunity to teach and persuade it is rarely, if ever, appropriate to waive the opening statement. Moreover, if you represent the plaintiff, it is a time when you can start carrying your burden of proof. Because no single witness can tell the whole story as effectively as the attorney, it is flat-out wrong to start with a disclaimer like this: "Ladies and Gentlemen, it is important that you remember that what I say to you is not evidence. It is important that you remember that what my adversary says is not evidence. The proof will come from the lips of the witnesses and the exhibits that are offered in evidence."

Here, the attorney has done a disservice to his client. He has wasted everyone's time by reciting the court's preliminary instruction. More importantly, the jury has been told the wrong message. The lawyer has said in essence: "Don't listen to me. I have nothing of value to tell you."

The trial lawyer should take advantage of the initial opportunity to speak by painting a clear picture of the facts for the jury. The most persuasive speakers are those who can tell a compelling story. The most persuasive speakers are those who do not rely on crutches such as notes. The trial lawyer must have a command of the entire case and be prepared to deliver the opening without reading it from notes.

Suppose, for example, you represent an individual who was injured at a work site. Rather than simply reciting the court's preliminary charge by stating that you now have an opportunity to deliver a road map or table of contents, get right to the heart of the matter by immediately leaving a forceful impact on the jury. Contrast the injury with the defendant's negligent acts and omissions. Stand up without notes and look at each juror and then begin:

> Members of the jury, on January 9, 1998, David Royce was severely injured. What he did not know when he started working that day, was that a site inspection had not been conducted. What he did not know is that the grounds were left in a dangerous condition. What he did not know, was that no one would remove the hazards from that work site. What David now knows is that he was severely injured. What David now knows is that he will never work again. What David Royce now knows is that he will never walk again. Ladies and gentlemen, I represent David Royce, the man seated at the back of the courtroom. . .

Obviously, at this point you have to take the jury back in time and fill in the details of who your client is and was and spell out the details of the negligence. However, by delivering an impact opening the jury has a good understanding immediately of what the case is about.

The impact opening is a device that can be used in almost any type of case. Consider for example, delivering an opening statement in a drunk driving case. Here you should begin with a slow delivery and continue by raising your voice with each progressive sentence:

> Ladies and gentlemen, on May 1, 1996, a man made a conscious decision to drink and drive. As a result of that decision Dierdre Johnson lost her husband. As a result of that decision, Dierdre Johnson's hip was fractured. As a result of that decision, Dierdre Johnson's arm was fractured. The man who made that decision to drink; the man who made that decision to drive after drinking; the man who took his keys from his pocket and put them in his car; the man who took the life of one man and severely injured a woman is the defendant. The man seated right over here (pointing) . . .

Here not only does the jury get the gist of your case but, if delivered correctly, it will allow the jury to become angered by the conduct of the defendant.

Consider a medical malpractice case in which a young boy suffered brain damage as a result of an anes-

thesiologist's malpractice. Once again, the impact opening statement serves to capture the jury's attention immediately:

> On November 11, 1995, Marty Truss went to Memorial Hospital for surgery. What his parents did not know is that his anesthesiologist had left the operating room. What his parents did not know is that a nurse had been substituted in place of the anesthesiologist. What his parents did not know is that no one would be monitoring Marty's oxygen saturation levels. What his parents now know is that their son cannot speak; what his parents now know is that their son cannot see; what his parents now know is that their son was terribly brain-damaged that day.

Once again, the portable nature of this type of impact statement serves a twofold purpose: to grab the jury's attention and to persuade from the outset.

There are different methods of delivering the impact opening. Some methods have been referred to as the "Dark and Stormy Night" approach. With this approach the lawyer stands up, again without notes, and begins:

> Ladies and gentlemen, if you were to go to the intersection of 60th and York in New York City you would find a building. The building has 12 floors. On the 12th floor there is a room and in the room is a bed. On that bed is a man. Every day at 12 noon a woman goes to that building and goes up those 12 floors. She goes over to the bed. She takes hold of the hand of the man who is on that bed. He does not feel it. She combs his hair. He never moves. She speaks to him. He never responds. Who is this man? And why is he there? That, members of the jury, is what this case is all about. I have the privilege of representing that man and that woman.

Conclusion

Your ability to capture the jury's attention, gain respect and credibility, downplay your weaknesses, and structure the case in your terms at its outset will often dictate the final result. Your opening statement, like all aspects of your case, should be delivered with an eye toward summation. By strategically planning your opening, in accord with what you know the court will charge, you will maximize your chances for success.

Evidentiary Issues in Connection with Expert Medical Testimony

By Hon. Thomas Polizzi

I want to thank the NYSBA and the Trial Lawyers' Section for the honor of inviting me to write about evidentiary issues in connection with expert medical testimony and tactical errors made by plaintiffs' and defendants' attorneys in presenting expert testimony (i.e., from the court's perspective).

There are many texts and numerous decisions from which we, as attorneys, learned the basic rules of admissibility of evidence, e.g.—Prince, *Richardson on Evidence*; John Henry Wigmore, *Evidence in Trials at Common Law*; Robert A. Barker and Vincent C. Alexander, *Evidence in New York State and Federal Courts*; *People v. Sugden, Borden v. Brady* and *Hambsch v. N.Y.C. Transit Authority*, to cite a few.

My approach will be to focus not only on the evidentiary rules which are familiar to us, specifically with reference to expert medical testimony, but also to suggest changes in existing rules to reach a more fair and just resolution of the issues. By this approach I believe we can best review the evidentiary issues in connection with expert medical testimony.

In 1974, the Court of Appeals recognized two limited exceptions to the hearsay rule which prohibited an expert from expressing an opinion based upon material not in evidence. In *People v. Sugden*,[1] the Court held that an expert may rely on out-of-court material if ". . . it is reliable in forming a professional opinion"[2] or if it ". . . comes from a witness subject to full cross-examination on the trial."[3] In order to qualify for the professional reliability exception, the reliability of the out-of-court material must be proven. It must be "of a kind accepted in the profession as reliable in forming a professional opinion" and "there must be evidence establishing the reliability of the out-of-court material."[4] The material must not be the principal basis for the expert's opinion but should be ". . . merely a link in the chain of data upon which the expert relied."[5]

It has been held that a treating physician may testify about the plaintiff needing future surgery based upon the report of a consulting surgeon which is part of the treating physician's record. Since the surgeon's report confirmed the treating physician's diagnosis, testimony based on the report is admissible assuming the report is reliable and that the plaintiff was referred to the surgeon for treatment and not an opinion.[6]

On the other hand, in a medical malpractice action, if plaintiff was referred to a surgeon to render an opinion as to whether surgery is required as a result of the alleged malpractice, then the treating physician's testimony based upon the report is inadmissible since the consulting surgeon's report goes to the issue of whether or to what extent there was malpractice.

I refer you to a recent decision on that issue, *Wagman v. Bradshaw*.[7] In that action, plaintiff suffered injuries to his neck and back when the car he was driving collided with an automobile owned and operated by the defendant. Plaintiff's treating chiropractor sent him for magnetic resonance imaging (MRI) scans of his back. The chiropractor did not see or interpret the films but reviewed the written report prepared by another health care professional, which contained an interpretation of the MRI films. At trial the chiropractor testified that he relied on the report to form his diagnosis and was allowed, over objection, to testify as to the "results of the MRI." The Appellate Division reversed.

> It is well settled that, to be admissible, opinion evidence must be based on one of the following: first, personal knowledge of the facts upon which the opinion rests; second, where the expert does not have personal knowledge of the facts upon which the opinion rests, the opinion may be based upon facts and material in evidence, real or testimonial; third, material not in evidence provided that the out-of-court material is derived from a witness subject to full cross-examination; and fourth, material not in evidence provided the out-of-court material is of the kind accepted in the profession as a basis in forming an opinion and the out-of-court material is accompanied by evidence establishing its reliability.
>
> It is this fourth basis for positing an opinion, commonly known as the "professional reliability" basis, which is implicated in this matter, and which has resulted in confusion with respect to the use of secondary evidence in this department (cites omitted). Reemphasis of the rule stated by the Court of

> Appeals is required to eliminate any confusion in its application.
>
> Expert opinion, based on unreliable secondary evidence, is nothing more than conjecture if the only factual foundation, as in this case, is another healthcare provider's interpretation of what an unproduced MRI film purports to exhibit. Admission into evidence of a written report prepared by a non-testifying healthcare provider would violate the rule against hearsay and the best evidence rule. Inasmuch as such a written report in inadmissible, logic dictates that testimony as to its contents is also barred from admission into evidence.[8]

The court ruled that it was reversible error to permit the treating chiropractor to testify as to the interpretation of MRI films set forth in a written report of a non-testifying health care professional for the truth of the matters asserted in the report, and to permit that expert to state his diagnosis, which was at least partially based upon the written MRI report, without first establishing the reliability of the report.

On June 4, 2002, within 3 months after the *Wagman* decision, Judge Straniere, Civil Court, Richmond County, rendered a decision predicated upon the issues raised in *Wagman*.[9] In that case, *Bako v. DeCaro*, defendant moved to preclude the testimony of plaintiff's chiropractor as to the contents of reports not in evidence. A hearing was ordered wherein a *voir dire* was conducted to determine the professional reliability of the reports and the use made of the reports by the treating chiropractor. It was held that the chiropractor could testify before the jury inasmuch as the reports were reliable and were used to confirm his diagnosis.

In *Weinstein v. New York Hospital*,[10] defendant appellant argued that certain materials relied on by plaintiff's experts in reaching a conclusion were never admitted into evidence. In affirming a verdict for plaintiff, the First Department held that the materials used by plaintiff's experts merely confirmed a conclusion that plaintiff's experts had already reached based on their examination of plaintiff and based on their study of a properly admitted hospital record. In addition, the First Department cited *Ferrantello v. St. Charles*, which referred to the concept of non-evidentiary materials which would generally be accepted in the profession as reliable for the purpose of forming a professional opinion, such as "certified hospital records, a second physician's medical records, a Magnetic Resonance Imaging (hereinafter MRI) report and X-rays. . . ."[11]

In the past there often was difficulty in introducing medical materials into evidence. The Legislature amended the CPLR to provide simplified procedure for the admissibility of ". . . .a graphic, numerical, symbolic or pictorial representation of the results of a medical or diagnostic procedure or test taken of a patient by a medical practitioner or medical facility . . . ." in a personal injury action.[12]

What about the *Physicians Desk Reference* (*PDR*) and its admissibility into evidence? (The *PDR* is a text put out by the drug companies which contains information about the appropriate indications and dosing recommendations for FDA-approved drugs. The *PDR* also contains a list of risks and side effects associated with the particular drug in question.) The leading case is *Spensieri v. Lasky*.[13] In *Spensieri* a 29-year-old woman suffered a stroke, rendering her a quadriplegic. Plaintiff alleged that the stroke was caused by birth control pills improperly prescribed by defendant Lasky. Plaintiff tried to introduce the *Physician's Desk Reference* into evidence. The Court of Appeals ruled that the *Physician's Desk Reference* is hearsay, and cannot, by itself, establish the standard of care for a physician in prescribing and monitoring a drug during treatment of the patient; rather, expert testimony is necessary to interpret whether the drug in question presented an unacceptable risk for the patient, in either its administration or the monitoring of its use, i.e., an expert witness may refer to and rely on the *PDR* in testimony so as to justify the expert's opinion that there was compliance or noncompliance with relevant standards applicable to the use of medications.

We cannot leave the subject of expert testimony without a discussion of the New York rule which adopted the rule promulgated in *Frye v. U.S.*[14] *Frye* was first applied in New York in 1938 when the results of a lie detector test were found to be inadmissible.[15] The rule was once again accepted by the Court of Appeals in 1994, in *People v. Wesley*.[16] It was reaffirmed in 1996 in *People v. Wernick*: "This court has often endorsed and applied the well-recognized rule of *Frye*."[17] The rule imposes ". . . the requirement that the expert rely on tests or procedures generally accepted as reliable by the relevant scientific community . . . it is not whether it is generally accepted as reliable."[18]

There has been criticism of the *Frye* rule of late, that it is too rigid and not as liberal as the *Daubert*[19] rule. In that decision the Supreme Court held that *Frye* had been superseded by the Federal Rules of Evidence (FRE) 702. It held that "nothing in the test of this rule (702) establishes 'general acceptance' as an absolute prerequisite to admissibility" which would be "at odds with the liberal thrust of the Federal Rules." Judge Kaye, in her opinion concurring with the result of the majority opinion (or shall it be called a dissent), wrote, "The *Frye* test emphasizes counting scientists' votes,

rather than on verifying the soundness of scientific conclusion."[20]

Daubert has made some inroads in New York. In *Wahl v. American Honda Motor Co.*,[21] Justice Oshrin held that where "the evidence is not scientific or novel, the *Frye* analysis is not applicable." Expert testimony was that of an engineer who testified about design defects involving the center of gravity of three-wheel all-terrain vehicles. Inasmuch as the testimony was based on a mathematical and physical engineering principle it was therefore admissible under *Daubert*.

Two more recent decisions were rendered by Justice Oshrin, *Giangrasso* I, (*I*) and *Giangrasso* II, (*II*).[22] In *I*, a *Daubert* hearing was ordered to determine whether to allow an expert to testify about the hiring, screening and training of bus drivers, as well as the safety and supervision of mentally retarded adults on buses. Following the hearing, the court, in II, precluded the testimony as unreliable.

"The doctor is chosen by the defendant, reports to the defendant, is paid by the defendant and will testify on behalf of the defendant. Independent Medical Examination is a misnomer, a mischaracterization."

A recent decision in Supreme Court, New York County, precluded a plaintiff's expert's testimony after a *Frye* hearing. The issue presented was whether the infant plaintiff's injury, cerebral palsy, was caused by the expert's novel "slow bleed" theory.[23]

For the reader to more fully understand my approach, I must explain the progress of an action once it is commenced. Upon the filing of a Request for Judicial Intervention, (RJI), the action is assigned to a judge. All pre-trial discovery is supervised by and within the control of the assigned IAS Part and a discovery schedule is directed in the Preliminary Conference Order. Subsequently, a compliance conference is held to insure that discovery has been completed and to direct a filing of the note of issue. The action is thereafter placed on the trial calendar and ultimately sent out for trial.

When the attorneys first appear before me I confer with them with a view towards settling the case. Unless, by coincidence, I have had the assigned trial as part of my pre-note action inventory, I am totally unfamiliar with the facts of the case. It is in this posture that I also garner information about the action. I request not only the marked pleadings but also copies of exchanged medical reports. If unsuccessful in settling the case I then proceed to set the trial schedule, including the selection of a jury if one has not already been selected when the action was first assigned to me for trial. A schedule for the appearance of witnesses will be arranged, including those witnesses to be taken out of order because of scheduling conflicts.

Disclosure sets the tone, pace and trial strategy for both plaintiffs and defendants, and CPLR article 31 is the major preparation tool. By availing themselves of this article, especially 3101, attorneys will be more intimately informed of their adversary's position. This now leads me to discuss changes which would not only lead to a more expeditious and efficient trial of the issues but more importantly fulfill that obligation which we, the legal system, have—to reach a fair and just resolution of the issues.

First let's dispense with, once and for all, the fiction of an Independent Medical Examination (IME).

During the discovery phase the defendant is given the opportunity of conducting a physical examination of the plaintiff by a physician of his or her own choosing, to determine whether the plaintiff was injured and to what extent. If a physical examination of the plaintiff is conducted, the defendant shall exchange the examining physician's report with plaintiff's attorney.[24]

Can we at least agree that the defendant's Independent Medical Examination is not an independent examination? The doctor is chosen by the defendant, reports to the defendant, is paid by the defendant and will testify on behalf of the defendant. Independent Medical Examination is a misnomer, a mischaracterization.

It is universally accepted that medicine is not an exact science, and physicians may frequently not concur with a colleague's diagnosis or prognosis as to any given patient. The nature of the injuries sustained, their cause, the after-effects, their permanence, if any, cannot be computed by a calculator. It follows, logically, that a treating physician would refer a patient to a specialist for an opinion. The consultation would be sought from a physician whose specialty is within the scope of the diagnosed illness or disability. That logic is not applied when it pertains to expert medical testimony. "A physician need not be a specialist in a particular field in order to be considered a medical expert."[25] A physician, a neurologist, although not a psychiatrist, could testify to a mental condition.[26] In a Second Department decision, a neurologist was found qualified to testify as to departures of an orthopedic surgeon.[27] The physicians' specialty would go to the weight of his testimony, not to its competency or admissibility.[28]

Recently, I was assigned the trial of a negligence action wherein plaintiff claimed he sustained electrical

burn scars on his wrists and forearms while working in and around an allegedly defective circuit breaker panel box in the defendant's building. The plaintiff served a CPLR 3101(d)(1)(i) medical response wherein the defense was advised he expected to call an otolaryngologist (ENT), a specialist in ear, nose and throat, as his medical expert. Fortunately, the action settled. I was sorely tempted to preclude the testimony and test the waters for a change in the law.

It is respectfully submitted that the law should be changed, and the only permissible medical expert testimony should be from a licensed physician who practices medicine and is a specialist or has a sub-specialty in the particular field of the alleged injury or injuries sustained by the plaintiff.

Returning to CPLR 3101(d)1:[29]

As Professor Siegel says:

> Subparagraph (i) is an innovation in New York. It provides that "upon request" by one side, the other is required to identify "each person whom the party expects to call as an expert witness at the trial" and to disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.
>
> It starts off with this big bang and then tones down considerably.[30]

The expert disclosure rules apply in all actions, but with one difference in medical, dental and podiatric malpractice actions, which Professor Siegel collectively refers to as "medical" categories. Everything the provision requires must be forthcoming, including a statement of the qualifications of the expert, but in the medical categories the identity of the expert can be withheld. This was designed to avoid peer pressure sometimes brought to discourage the expert from testifying against a fellow professional in the medical categories."[31]

The peer pressure would come from the local medical community which is a result of the *rigid locality standard*. The locality standard has been the linchpin of medical malpractice cases and is reflected in the suggested malpractice-physician charge in the Pattern Jury Instructions.[32] However, the trend to present expert medical testimony from physicians nationwide has eroded the rigid locality standard. This, coupled with the database physician's information contained in computers, has rendered CPLR 3101(d)(1)(i) virtually obsolete. Once the expert's medical school, year of graduation, medical specialty, hospital affiliations and especially board certification are supplied, the computer will furnish the name and all pertinent data on the so-called unnamed physician. It is very rare indeed when adversaries are unaware of the identity of the opposing adversary's expert.

"It is very rare indeed when adversaries are unaware of the identity of the opposing adversary's expert. "

One of these rare occasions occurred before me when a non-board certified physician was called by plaintiff to testify as an expert, and the expert's anonymity resulted in a mistrial. When plaintiff's expert took the stand and gave his name and address, one of the defense counsel requested a short recess and, *in camera*, in the presence of all counsel, advised that he represented the expert witness, as a defendant, in two medical malpractice actions pending in Queens County. Because of this conflict of interest I was compelled to declare a mistrial and allow plaintiff's attorney a reasonable time to retain and produce an expert. Had his name been exchanged this would never have occurred. The potential of the same situation recurring increases incrementally with the increase of medical malpractice litigation.

I propose an amendment to CPLR 3101(d)(1)(i) which will strike that portion allowing anonymity of the medical expert in medical, dental or podiatric malpractice actions.

CPLR 3101(d)(1)(ii) and (iii) should also be amended to permit examination of the medical expert, by oral deposition, as a matter of course.

> . . . The fact that the substance of the facts and opinions of the expert must be furnished under subparagraph (i) of CPLR 3101(d)(1) does not by itself authorize the deposing of the expert. But "upon a showing of special circumstances," subparagraph (iii) permits the court to order such further disclosure as it deems warranted in the situation and that would presumably include a deposition of the expert especially where the party has delayed so long in retaining the expert that the extra disclosure is deemed necessary to compensate for the delay and facilitate the requester's preparation for trial.[33]

Depositions not only may facilitate settlements but would narrow the medical issues and afford the attorneys an opportunity to more efficiently prepare for the presentation and/or defense of the action. I must emphasize and make it perfectly clear that disclosure by deposition must be conducted within the applicable rules. The court should not allow obstructionism. I was confronted with that issue in June 2001 and rendered a decision setting forth the parameters of deposition discovery which was published in the *New York Law Journal* on June 29, 2001.[34]

The most frustrating moments, for me, come with testimony of medical experts. I will touch upon the issue of authoritative texts, articles or periodicals. The present rules are my pet peeve and perhaps my obsession.

"If an expert cannot be challenged by sources which set forth the standards of the medical profession, a jury will decide the fact issues on the basis of which of the experts makes a better impression, or is more charming, personable and smooth in expressing medical opinions."

In New York, for more than 100 years, the rule remains that the use of scientific literature at trial is limited to cross-examination, and then only if the witness being examined acknowledges the source to be authoritative.[35]

The use of texts, etc., as evidence in chief has historically been described as clearly hearsay. It is an out-of-court statement and the proponent is not subject to cross-examination. The hearsay rule was adopted to prevent a fact finder from basing a determination on unreliable information.[36] It was never intended to permit a party to hide behind unreliable information such as an expert's opinion based on nothing but his credentials.[37] If an expert cannot be challenged by sources which set forth the standards of the medical profession, a jury will decide the fact issues on the basis of which of the experts makes a better impression, or is more charming, personable and smooth in expressing medical opinions. In 1949, Supreme Court Justice Black wrote: ". . . it certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books."[38]

It is respectfully submitted that the rule should be changed. I suggest that no later than 90 days before trial, the attorneys for all parties exchange a list of no more than five (5) materials, texts, articles and periodicals, which each intend to use as evidence *in chief* or in *cross-examination*. Any party disputing the authoritativeness of any of the material exchanged can request a pretrial hearing by the court for a determination.

Tactical Errors Made by Plaintiffs' and Defendants' Attorneys in Presenting Expert Testimony

Errors are in the eyes of the beholder. That which I may consider a tactical error may have been a strategic move by the attorney during the trial. My observations in the past few years on the bench can best by synopsized as a difference in approach. I strongly recommend the following:

1. In jury selection, as well as in your opening statement, don't use, or should I say abuse, medical terminology without defining the terms and simplifying the issues for the jury. Not only will you keep the jurors' attention but you will maintain their interest throughout the trial.
2. Do not cross swords with the medical expert—question him or her firmly, with confidence and proper respect. Let the arrogance or pomposity, if any, come from the witness stand. Do not abuse the witness inasmuch as this will generate sympathy for him or her and will afford the expert the opportunity to charm the jury.
3. Maintain control; do not let the witness use the courtroom as a lecture hall or classroom. I am sure you have noticed how the experienced expert turns the witness chair to face the jury and talk to them when answering the questions posed on direct examination. When you cross-examine the expert, move the podium slowly and subtly, to your left or right, away from the jury. This will compel the witness to either turn or twist his neck to face you or turn his chair away from facing the jury.
4. Use demonstrative models and blow-ups. Spend some money and you will reap financial rewards.
    a. Use the models to explain anatomy, whether it be the shoulder, spine, pelvis, knee or ankle. Educating the jury by explaining the injury via the models is extremely helpful to the jurors' understanding and assessment not only of the injury but its cause and permanency as well.

b. Blow-ups of hospital records, doctor's notes, nurses notes, fetal heart rate monitor strips and other medical records have a great impact on the jury. The jurors can immediately couple the testimony with the blow-up and not wait for an 8 ½"-by-11" sheet of paper to be published and passed around, from juror to juror.

5. Always stand when the judge enters, the jury enters and when you address the court. Show respect not only for the court but to your adversary as well.

6. Don't don your client's mantle and assume his or her emotions, which will most assuredly result in the loss of your objectivity and professionalism. You have a duty to your client, who is best served by maintaining your composure.

7. Most important—get to know the style of the judge presiding over the trial. Ask other attorneys about the judge. What are his or her idiosyncrasies? Is he or she a control freak? Will you be given latitude in your questioning? Will you be permitted to try your case or will the judge interject himself or herself in the proceedings? What does he or she expect from you when the case is first assigned for trial besides marked pleadings? When will the judge expect your requests to charge? Will the judge expect both plaintiffs' and defendants' exhibits to be premarked into evidence? All of this will determine your trial strategy and how to proceed.

I hope this article has been of interest and will assist you in the presentation of your case, whether plaintiff or defendant.

Endnotes

1. 35 N.Y.2d 453, 363 N.Y.S.2d 923.
2. *Id.* at 460.
3. *Id.* at 461.
4. *Hambsch v. N.Y.C. Transit Auth.*, 63 N.Y.2d 723, 726, 480 N.Y.S.2d 195, 196.
5. *Borden v. Brady*, 92 A.D.2d 983, 461 N.Y.S.2d 497 (3d Dep't 1983).
6. *Serra v. City of New York*, 215 A.D.2d 643, 627 N.Y.S.2d 699 (2d Dep't 1995).
7. *Wagman v. Bradshaw*, 292 A.D.2d 84, 739 N.Y.S.2d 421 (2d Dep't 2002).
8. *Wagman*, 292 A.D.2d at 86, 87.
9. *Bako v. DeCaro*, N.Y.L.J., June 4, 2002, at 22, col. 6.
10. 280 A.D.2d 333, 720 N.Y.S.2d 475 (1st Dep't 2001).
11. *Ferrantello v. St. Charles Hospital and Rehabilitation Center*, 275 A.D.2d 387, 388, 712 N.Y.S.2d 615, 616 (2d Dep't 2000).
12. CPLR 4532-a.
13. *Spensieri v. Lasky*, 94 N.Y.2d 231, 701 N.Y.S.2d 689.
14. *Frye v. US*, 293 F. 1013 (CADC 1923).
15. *People v. Forte*, 167 Misc. 868, 4 N.Y.S.2d 913 (Co. Ct. 1938), *aff'd*, 279 NY 204 (1938).
16. *People v. Wesley*, 83 N.Y.2d 417, 611 N.Y.S.2d 97 (concurring opinion).
17. *People v. Wernick*, 89 N.Y.2d 111, 115, 651 N.Y.S.2d 392, 394 (1996).
18. Prince, Richardson on Evidence § 7-311 at 475 (Richard T. Farrell, ed., 11th ed. 1995).
19. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993).
20. *Wesley*, 83 N.Y.2d at 439.
21. *Wahl v. American Honda Motor Co.*, 181 Misc. 2d 396, 693 N.Y.S.2d 875 (Sup. Ct., Suffolk Co. 1999).
22. *Giangrasso v. Association For Help of Retarded Children*, N.Y.L.J., Mar. 19, 2001, at 33, col. 2 (Sup. Ct., Suffolk Co.) (*Giangrasso* I); *Giangrasso v. Association for Help of Retarded Children*, N.Y.L.J., July 31, 2001, at 24, col. 1 (Sup. Ct., Suffolk Co.) (*Giangrasso* II).
23. *Lara v. New York City Health & Hosps. Corp.*, N.Y.L.J., Oct. 4, 2000 at 26, col. 6.
24. CPLR 3121; McKinney's 2002 New York Rules of Court § 202.17 (N.Y. Comp. Codes R. & Regs. tit. 22, § 202.17).
25. *Humphrey v. Jewish Hosp. & Med. Ctr.*, 172 A.D.2d 494, 567 N.Y.S.2d 737 (2d Dep't 1991).
26. *Fuller v. Preis*, 35 N.Y.2d 425, 363 N.Y.S.2d 568.
27. *Julien v. Physician's Hosp.*, 231 A.D.2d 678, 647 N.Y.S.2d 831 (2d Dep't 1996).
28. *Fuller*, 35 N.Y.2d 425.
29. CPLR 3101.
30. Siegel, N.Y. Prac. § 348A at 538 (3d ed.) (hereinafter "Siegel").
31. *Id.* at 539.
32. PJI 2:150 West Group, 3d Ed. (2002) provides in pertinent part: ". . . A doctor who renders medical service to a patient is obligated to have that reasonable degree of knowledge and skill that is expected of an (average doctor, average specialist) who (performs, provides) that (operation, treatment, medical service) in the medical community in which the doctor practices. . ."
33. Siegel, at 539, 540.
34. *Lewis v. Brunswick Hosp.*, N.Y.L.J., June 29, 2001, at 22, col. 4.
35. Prince, Richardson on Evidence § 7-313 at 478–479 (Richard T. Farrell, ed., 11th ed. 1995).
36. Wigmore, 5 Evidence in Trials at Common Law, at 3–10.
37. *Id.* at 3–7.
38. *Reilly v. Pincus*, 338 US 269, 275.

Thomas Polizzi is a Supreme Court Judge in Queens County.

Cross-Examination of Medical Witnesses

By Peter C. Kopff

I. Preparation and Pre-Trial Research

Success at trial is 99 percent perspiration and 1 percent inspiration.[1] Effective preparation enhances your prospects for success in cross-examination of the medical expert witness. Time spent in preparing for your cross-examination should provide you with more options for a skillful cross-examination.

A. CPLR 3101(d)

Serve a demand for disclosure of expert witnesses information pursuant to CPLR 3101(d). In a general liability case you can demand the identity of your opponent's expert witnesses. The name may be omitted in a medical, dental or podiatric malpractice action. Demand from your opposing counsel:

(a) The testimony which your opponent's medical witness will give at trial;

(b) The qualifications: educational background and medical specialty of the expert witness;

(c) National board certification or fellowship training of the witness;

(d) The basis of the expert's testimony, including the facts or documents upon which the witness will rely.

B. Rule 701

Where your case is pending in the United States District Court, Federal Rules of Civil Procedure 701 governs expert witness testimony. Your opponent must provide a "report" authored by the expert witness. This report should outline in detail the testimony said witness will give at trial. The federal judge will commonly permit a deposition of the expert witness. The party seeking the deposition must bear the cost of the expert's appearance fee for the pre-trial deposition. Such depositions can provide valuable information for cross-examination at trial. Where you have the opportunity to depose the expert witness prior to trial, you should not only seize that opportunity, but thoroughly question the witness as to the basis of any opinion, treatises which may be relied upon and any relevant publications authored by the witness. At trial federal judges will not permit the expert witness to deviate from the opinions stated in the witness's report or deposition.

In contrast, in the state courts, one cannot effectively cross-examine an expert witness with an attorney's CPLR 3101(d) Expert Witness Disclosure unless the witness will acknowledge participation in its composition or contribution to its content. Many witnesses sidestep such interrogation by denying knowledge of the document. It is difficult, if not futile, to attempt such questioning with your opponent's Expert Witness Disclosure in state trials. In federal court, the expert can be vigorously cross-examined on the substance, and even nuances, of their own report.

C. Treating Physicians

Where the plaintiff's attorney or defendant's attorney intends to call a treating physician, the records of treatment must be obtained and thoroughly scrutinized. Treating records can prove a fertile ground for cross-examination, particularly if the witness's notations of history, physical findings, complaints, impressions or diagnoses differ from the testimony offered at trial. The witness can also be cross-examined on omissions from the chart, i.e., the patient not making certain complaints, or that the doctor did not document certain tests or examinations.

D. Publications

You must check publications, articles, textbook chapters or even newsletters authored by the witness. In some instances doctors will have patient newsletter or office brochures that contain interesting information. An expert witness can be contradicted when his testimony at trial is in conflict with the patient newsletter provided to patients in his office.

E. Transcripts of Prior Testimony

Transcripts of prior testimony from trial or deposition can prove effective tools for cross-examination where the prior testimony contains a contradiction. Unless you can obtain such testimony through trial lawyer, professional association or insurance company archives, you will need to obtain such testimony from the attorneys. Several plaintiff's and defendant's law firms maintain extensive archives of testimony of witnesses who testify frequently. One can consult the *New York Jury Verdict Reporter* by telephone at (800) 832-1900, or contact their Web site at www.moranlaw.com, to identify cases in which the prospective medical witness has testified. Their reports identify the trial attorney and law firms on each case in which the witness testi-

fied. You can obtain copies of the testimony from the attorney who represented a party in the case, or from the court reporter. Obtaining transcripts can be time-consuming, but the value of a transcript at trial can be significant. Most attorneys give priority to obtaining testimony from trials or depositions with allegations or facts similar to the case on trial. The New York State Trial Lawyers Association maintains trial transcript archives. Defense Research Institute, telephone (312) 795-1101 or e-mail at dri@dri.org, can also be helpful, particularly identifying depositions taken by attorneys in other states. Transcripts should be carefully reviewed for statements the witness has made which are favorable to your contentions, or which contradict the witness's expected testimony in your case.

F. Consult Attorneys

Verdict Search by *Jury Verdict Reporter* identifies testimonial history of expert witnesses. The law firms that retained and cross-examined the witness are excellent sources of firsthand data. Speak with an attorney who has cross-examined the medical witness. An attorney may provide insights or ideas that cannot be obtained from reading a trial transcript or reading the doctor's notes of treatment.

G. Internet Search

Web sites can provide interesting material for cross-examination. Physicians who have Web sites may provide you with helpful information. Joel Evans, M.D., an obstetrician in Connecticut, maintains a Web site. He practices holistic medicine. His Web site prominently features the holistic nature of his practice. In his direct testimony, he may omit mention of his reliance on holistic medicine and herbs. It can be amusing to confront him with data on his Web site concerning the medical benefits of tree bark.

William J. Morton, M.D., a urologist from Canton, Georgia, testifies as a board-certified urologist. He lacks academic affiliations: "I'm just a plain old urologist." His Web site lists curriculum vitae as a physician and as a lawyer. A jury may well impute bias as he is a plaintiff's malpractice attorney. He admits he has advertised his urologic practice on billboards in Atlanta that suggested vasectomy: "Fertilize your lawn, not your wife," and "Not Your Usual Clip Joint." You may obtain valuable serious or comic information from a medical witness's Web site.

H. Records of Treatment of This Patient

An effective cross-examination will focus on the medical issues of the case. Facts in the hospital records or records of treatment, which favor your client's position at trial, should be marshaled for cross-examination at trial.

II. Cross-Examination at Trial

A. Goals

The goals on cross-examination:

1. Obtain favorable admissions on issues of liability, injury and damages;
2. Question the competence, credibility, experience, capacity of the witness or integrity of your opponent's case. Effective cross-examination may well undercut the weight that the jury will give this witness's testimony;
3. Obtain a basis for you to persuade the jury to disregard this witness's testimony or otherwise find for your client at the conclusion of this case.

B. Listen and Carefully Assess the Witness During Direct Testimony

At trial, during direct testimony of a medical witness, you must listen carefully. Note key points that you can successfully challenge. Note exaggerations made by the witness with which you can confront the witness on cross-examination.

Use a checklist of points to cover on cross-examination. You should beware of being tied to a script as your notes may distract you from listening carefully to the witness. You must be alert to how the witness responds to your questions and seize upon responses, which you can exploit to score points for your client. Sometimes the witness may use an analogy or a phrase, which you can exploit to your client's advantage. Do so.

C. Pursue Admissions Prior to Impeachment

Certain medical witnesses may be honest enough to give you favorable admissions on cross-examination. Test the witness's credibility by asking the witness to concede certain facts. Some witnesses will be reasonable. Others will fence as advocates for their side.

Exploit favorable admissions:

1. The records of treatment contain entries by the nurses, which support your contentions at trial.
2. Where there is a factual dispute, ask the witness to admit he has assumed one version of the facts. It is not the expert's role to determine facts. Thus, if two factual positions are equally credible, why did the witness assume one over the other? You may raise a persuasive question as to the witness's integrity or objectivity. Ask the witness if objectivity is a pre-requisite for a medical expert witness to be credible.

3. Underscore any unreasonable exaggeration. When the witness makes a statement the jury can see is unreasonable, challenge the witness.

4. If the witness has a poor temperament, such as easily showing anger, exploit that weakness. "Doctor, you seem a little agitated, are you emotionally involved in this case?" Jurors rarely look favorably on an angry or testy witness.

D. Credentials

Where the witness may be generally qualified, contrast any weaknesses in experience or publications, particularly if your medical expert witness has strong experience, research or publications. Where your opponent's expert is not fully qualified to render the opinion offered, question the credentials. What is the witness's specific experience with the subject matter in issue? This is not the time for discovery. Only ask questions when you have material to impeach the witness, such as curriculum vitae or prior testimony from trial or deposition.

E. Explore What Witness Has Reviewed

Are there records that the witness has never reviewed? Has the witness reviewed depositions? If the witness has not reviewed a particular deposition, why not? Does the witness's failure to review a deposition or document show bias or failure to be properly prepared? Has the witness overlooked important history in the record?

F. Witness's Notes, Correspondence and Chronology

Demand notes previously undisclosed, correspondence or reports in the witness's possession. Use the lunch break or recess to review the notes to see what the witness may have highlighted. Some witnesses will note weak points or strong points for your case. Has the witness omitted certain events from his notes or chronology? Some witnesses have generated reports, which identify the weaknesses in the case of the attorney that called him. This can be very potent on cross-examination.

G. Records of Treatment

Review any notes of the witness's examination or treatment. Their records and reports are excellent sources of statements and findings for cross-examination.

H. Witness's Report

The report of an examining physician must be exchanged. Focus on points which favor your case.

I. Depositions

Particularly with a medical witness who is testifying on the issue of liability, the witness's lack of familiarity with the testimony of the party witnesses or fact witnesses may undercut the witness's capacity to give objective and persuasive testimony. The credibility of the witness may be undercut by lack of preparation. Did the witness ask to be provided with depositions of the parties or fact witnesses? Incidentally, pursuant to CPLR 3117a(4), the deposition of a physician may be read by any party at trial without showing unavailability or special circumstances.

A critical assumption by the witness may show a misunderstanding of the definition of a departure from accepted medical practice. Some experts testify they would have handled a patient differently. The fact that doctors have a different opinion as to the method of treatment does not mean another method is outside the standards of accepted medical practice.

J. Prior Testimony

A large number of medical expert witnesses have testified in court on multiple occasions. Deposition testimony is routinely available from attorneys in New Jersey and jurisdictions that permit or require pre-trial depositions of expert witnesses. Absent special circumstances, our state discovery does not routinely permit depositions of non-party medical witnesses. Depositions in federal court cases are commonplace. Confrontation with a witness's inconsistent statement at a prior trial can rattle the witness and raise serious questions as to his credibility.[2]

K. Medical Textbooks

Medical textbooks or learned treatises can be used to contradict a medical witness as a foundation. The witness must acknowledge that the textbook or treatise is "authoritative." Witnesses commonly refuse to acknowledge textbooks or medical journals as authoritative. They do so at the risk of appearing evasive, disingenuous or ignorant of publications in their own field.

Many lawyers write their quotations on paper when initially questioning the medical witness. This procedure avoids objections to your reading from the text before you have laid the proper foundation. It is also helpful to ensure all medical terms contained in the quotation are defined prior to reading the statement you wish to read.

The latitude with which you can question a witness about the textbook is at the discretion of the trial judge. Some judges allow more latitude in interrogating about a text or treatise.[3] Is the text used at the medical school at which the witness teaches? Why is the text in the

30th edition if not accepted as a valuable resource for physicians?

If the publication has been edited by a faculty member of the medical school at which the witness studied, or a particularly reputed institution such as Harvard or Johns Hopkins, the witness's denial that the text is authoritative may undercut his credibility.

If the witness does not acknowledge a study from the *New England Journal of Medicine*, is it because the witness does not keep abreast of research and studies in the relevant field?

If another medical witness has acknowledged a text or journal as authoritative, their credibility may be enhanced in the jury's eyes when a subsequent witness refuses to acknowledge the same text or journal.

It has been said that impeachment with a textbook or journal article goes solely to the credibility of the witness. Statements read from the textbook or journal article are not read for the medical truth stated but solely to challenge the witness. If the witness agrees with the statement, it is evidence. Where the witness disagrees with a statement in an authoritative text, the distinction that his disagreement goes only to his credibility is subtle. The implication affects precisely what you can say in your summation. While a text cannot be used to bolster a witness's testimony, reading from an authoritative text may strengthen the cross-examiner's case by giving credibility to his medical contentions while ostensibly attacking the credibility of the witness.

Textbooks and learned journals cannot be read purely to bolster. However, where a witness has been confronted with a statement taken out of context, other portions of the text or article may be read to show the proper context.

L. Witness's Own Publications

Where the witness has edited a textbook or authored journal articles, significant time should be expended in pretrial preparation looking for quotations to contradict the witness.[4]

M. Factual Assumptions of the Witness

Is the witness's direct testimony based on assumptions, which demonstrate bias? Has the witness assumed a version of the facts which favors one side in the case?

N. Style of Cross-Examination

1. **Be opportunistic**: Focus on the points that favor your case.
2. **Magnify misstatements**. When the witness says something erroneous, hold his feet to the fire. Slowly emphasize the error and ask the witness to acknowledge he was wrong.
3. **Control the testimony**. If the witness is not responsive, demand "yes" or "no" responses. You must control the witness in cross-examination.
4. **Flexible approach.** There are attorneys whose only style of attack is bellicose. Sometimes you get more with sugar than vinegar. In the *Huber*[5] case, I confronted neuroradiologist J. Robert Kirkwood with a contradictory statement from his own textbook on neuroradiology.[6] In a more recent case, while I carried his textbook to the podium, as a potential tool for cross-examination, I first attempted to gain favorable admissions with a direct and courteous cross-examination. The witness conceded that from a neuroradiologic standpoint, my contentions in the case were plausible, and in fact were consistent with his interpretation of the CT scans and MRIs. Furthermore, Dr. Kirkwood testified that the theory expounded by the attorney who had called him would be "speculation" based on his reading of the radiographic test, CT scans and MRIs. It would be impossible for me to have obtained better testimony from my opponent's expert witness. His testimony supported my medical contention and weakened my adversary's claims, which were based on "speculation." I had the benefit of expert testimony from a neuroradiologist and I did not have to pay him a fee. I used this witness's testimony to confront my opponent's other expert witnesses, each time reminding the jury that my opponent's expert agreed with my claims. Sometimes a brief conciliatory cross-examination that gains favorable admissions is more effective than a long, drawn-out confrontation. Why attack a witness who has helped your case?

O. Contradiction of Other Expert

Obtaining an admission from a witness that contradicts your opponent's other medical expert can be valuable. In *Huber,*[7] Dr. Kirkwood, a neurologist, testified about a stroke or infarction.[8] Later the same day, Leon Charash, M.D., a pediatric neurologist, testified the child sustained a contusion, a black-and-blue mark or bruise.[9] I was so delighted at the second witness's contradiction of the first witness, I had no reason to attack the witness's credibility. In contrast see *Levine*,[10] where a much more vigorous cross-exam was my preference. Where your opponent's experts testify to apparently different theories of injury, you have an excellent basis for an effective summation.

P. Do Not Drag Out a Witness Too Long

An excellent cross-examination can be spoiled by several questions too many. I have seen an excellent cross-exam spoiled by a few too many questions. The jury looked furious. It is always nice to start and end on a strong point; where you score an unexpected home run, sit down.

Q. Use Imagination

Hearing an obstetrician testify that the baby's head puts pressure on the uterine opening during ambulation on direct exam, I started cross by requesting he draw the baby's position in utero. The child was on transverse lie, i.e., sideways so the head was not pressing on the opening. The witness was startled when I asked him to draw. I hoped he would draw the baby in the wrong position, but the sketch was a reminder to the jury that his thesis of pressure from the head did not apply to this case.

R. After Cross-Examination: Prepare for Motion or for Summation

After the cross-exam, always order the transcript of the expert witness. The plaintiff's attorney will need this to show he has proved the elements of a *prima facie* case. The defense attorney will need the testimony to see if the plaintiff has failed to prove a *prima facie* case. Send this testimony to your expert witness.

Endnotes

1. Thomas A. Edison said genius is 99 percent perspiration and 1 percent inspiration.
2. Testimony of Leon Charash, M.D., *Levine* cross exam, pp. 424–454 (Sup. Ct., N.Y. Co., Jan. 30, 2002).
3. Testimony of David Tice, M.D., in *Winant*, pp. 2133–2162 (Sup. Ct., Nassau Co., Nov. 6, 1991), and pp. 2192–2209 (Nov. 7, 1991); *Huber* cross-exam testimonies of J. Robert Kirkwood, M.D., pp. 72–133, and Leon Charash, M.D., pp. 177–199 (Feb. 6, 2001).
4. *Huber* cross-exam testimonies of J. Robert Kirkwood, M.D., pp. 72–133, and Leon Charash, M.D., pp. 177–199 (Feb. 6, 2001).
5. *Id.*
6. *See Huber* testimony, pp. 106–110 (Feb. 6, 2001).
7. *Huber* cross-exam testimonies of J. Robert Kirkwood, M.D., pp. 72–133, and Leon Charash, M.D., pp. 177–199 (Feb. 6, 2001).
8. *Id.* at 86.
9. *Id.* at 185.
10. Testimony of Leon Charash, M.D., *Levine* cross exam, pp. 424–454 (Sup. Ct., N.Y. Co., Jan. 30, 2002).

Peter C. Kopff is a partner in the firm Kopff, Nardelli & Dopf LLP in New York City.

Cross-Examination of the Plaintiff

By Jeffrey Samel

The particular method of cross-examination to be used with regard to a plaintiff in a personal injury case, or for that matter, any witness, must be determined on the basis of the unique circumstances presented in each case. For example, a vigorous cross-examination of a plaintiff might well be appropriate, especially if that plaintiff has told obvious lies in direct examination, but can backfire on defense counsel by garnering undue sympathy for an unsophisticated plaintiff who has been "beaten up" by a crafty lawyer.

Certainly, the cross-examination of a plaintiff should be well thought-out in advance. As a party, the plaintiff will almost certainly have submitted to a deposition, and may have made other statements documented in police reports, hospital records, medical records, and perhaps pre-trial affidavits. Such pre-trial testimony and statements should be carefully reviewed and used as the basis for constructing a logical cross-examination of the plaintiff well before the plaintiff takes the stand at trial. Defense counsel should also rely on irrefutable facts provided by other witnesses or documents to construct the planned cross-examination.

However, defense counsel must then listen carefully to the plaintiff's direct testimony and be capable of immediately changing the direction or format of the planned cross-examination based upon what the plaintiff has testified to on direct. In other words, defense counsel cannot afford to be married to the planned cross-examination when and if the plaintiff's direct testimony at trial mandates a modification of the planned approach.

In conducting the cross-examination itself, it is often wise to begin by getting the plaintiff to agree to those facts that defense counsel knows are irrefutable. By asking a series of concise leading questions, which are actually statements of fact to which defense counsel seeks only the plaintiff's agreement, counsel can establish important elements of the defense with the agreement of the plaintiff and thereby increase defense counsel's own credibility in the eyes of the jurors. If necessary, defense counsel should remind the plaintiff, politely but firmly, that these questions can and should be answered by a simple "yes" or "no," and should enlist the support of the court in this regard if the plaintiff continues to attempt to explain matters rather than to respond with a simple "yes" or "no" to basic questions.

Where questions must be asked to which the plaintiff does disagree, the cross-examination should become more vigorous and utilize the materials described above to confront the plaintiff with seemingly inexplicable inconsistencies. The plaintiff should be confronted with the strongest proof of such inconsistencies both at the beginning and the end of the cross-examination, so as to make an impression on the jurors that the plaintiff's version of events cannot be accepted at face value, and indeed, may not be worthy of any belief whatsoever.

When determining what questions to ask of the plaintiff on cross-examination, defense counsel should determine whether the information elicited would be useful in counsel's eventual summation. In other words, do not ask a question, or a line of questions, unless you feel that the answers would be useful in your summation. By confining the line of questioning to those facts that you believe would be useful on summation, you will avoid delivering a rambling and disjointed cross-examination. Indeed, defense counsel should attempt to make the cross-examination of the plaintiff short and to the point, in order to avoid the appearance of "beating up" on an unsophisticated plaintiff.

Defense counsel should avoid arguing with the plaintiff, if at all possible. If the plaintiff refuses to confine the answers to the questions, counsel should first enlist the support of the court before even considering browbeating the plaintiff. Moreover, a derisive tone in the questioning is almost never appropriate, and only serves to reinforce the jurors' preconceived idea that lawyers are "sharks" looking for a kill. An experienced defense counsel knows that the courtroom is the attorneys' bailiwick, and that this is established by maintaining control, not by being belligerent or belittling.

A smart defense attorney also knows when to end the cross-examination once counsel has achieved his or her objectives, or found that to be unlikely. In other words, do not allow a plaintiff who is making a good impression on the jurors to bask in the limelight of the witness chair longer than is necessary. Similarly, you should not allow a plaintiff, who has been made to look less than credible, to have an opportunity to rehabilitate his or her image by further questioning.

Jeffrey Samel is the senior partner with Jeffrey Samel & Partners in New York City.

ELRAC, Inc. v. Masara: Is the New York Court of Appeals Undermining the Concept of Permissive Use Under the New York Vehicle and Traffic Law?

By Natasha Meyers

I. Introduction

In the 1930s, New York enacted sections 370[1] and 388[2] of the state Vehicle and Traffic Law (VTL). The statute's purpose was to guarantee that insurance coverage would be available to injured parties in as many situations as possible.[3] (This section was passed to establish liability where none existed, not to limit an existing liability. It fixes liability on an absentee owner where his or her car is being operated by another with his or her consent.)

Additionally, the purpose of the statute was to promote the public policy that an injured party would be able to seek redress from a defendant, even if the owner of the vehicle was not the actual person driving the car at the time of the accident.[4] Two sections—370 and 388—specifically extend the spirit of the statute to cover rental companies and their rentees by mandating that the rental company provide coverage to any permissive user of the automobile.[5]

The New York Court of Appeals recently decided *ELRAC, Inc. v. Masara*.[6] This decision now threatens to undermine the statutory intention and the policy behind sections 370 and 388. This decision affects car rental companies as well as rentees; it also affects the rentees' primary insurance company. In effect, *Masara* held if a person is not designated as a "permissive user" on the face of a rental car policy agreement, in the event of an accident the rental company may seek indemnification from the rentee for the full amount of damages caused by the driver's negligence.[7] This decision has narrowed the concept of "permissive use." Thus, rental companies have been completely freed of their statutory obligation to provide insurance to an entire category of drivers. This note will examine case law that has applied VTL §§ 370 and 388 and determine if, in fact, the legislative intent behind the VTL statutes have been undermined by the recent New York Court of Appeals interpretation of the term "permissive use."

II. Statutory History of VTL §§ 370 and 380

At common law, the owner of a motor vehicle who permitted another person to use the vehicle was not liable for that driver's negligence.[8] The only exception to that rule was for a plaintiff to seek recovery from the owner under a theory of *respondeat superior* or agency.[9] (The statutory presumption is that an automobile operated under an insured owner and with consent supports the policy that there should be recourse to financially responsible defendants for the negligent operation of a vehicle, provided they gave permission to the driver, express or implied, to operate the vehicle);[10] VTL § 388 was enacted to change the common-law rule. In fact, VTL § 388 imposes liability on owners of vehicles who allow another person to operate the vehicle.[11]

Regarding the term "permissive user," section 388 has been interpreted by case law to mean that "permissive use" is the same as consent.[12] Case law has also defined that an owner of a vehicle may be liable for death or damages resulting from a driver's negligent use or operation of a vehicle when used with the owner's permission, express or implied.[13] The court examined evidence that the owner of a motor vehicle gave his son unrestricted use of the car. The court held that "permissive use" was established because a short time prior to the actual accident, the son had given his friend implied permission to drive the vehicle when the son told his friend that he could use the car so long as he filled it up with gas.[14]

On the other hand, courts have also found where there is strong evidence that the defendant's automobile was used without permission, there is no "permissive use." Thus, liability resulting from an accident will not be imposed on the owner.[15] (The court held that the defendant's automobile was not being used with his permission because the driver at the time of the accident was only hired to wash the vehicle. The court therefore reasoned that the driver was not given permission to use the automobile as he was on his personal time.) Ironically, these cases have been presented to the court on motions for summary judgment. This seems misplaced. Plaintiff's attorneys want the court to decide these cases based on the statute rather than a fact-specific inquiry into each case. However, prior case law that has interpreted the language of VTL § 388 distinguish questions of facts from questions of law.[16] (The court upheld the granting of a motion to set aside a jury verdict, holding that the issue of permissive use was a material issue of fact and should therefore have been submitted to the trier of fact rather than decided by the trial judge.)

For example, in *Vincinere* the court held that when there is contradictory testimony as to the "permissive use" of an automobile, the question of "permissive use"

is for the jury.[17] In *Leotta v. Plessinger,*[18] the Court reasoned it is "axiomatic that proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied, until there is evidence to the contrary." If contested, it is "presented to the jury for final determination."[19]

III. Public Policy Underlying the New York Statutes

Older New York case law rests on solid public policy and crystallizes the legislative intent which prompted VTL §§ 370 and 388. For example, in *Motor Vehicle Accident Indemnification Corp. v. Continental National American Group,*[20] the Court of Appeals reasoned that restrictions excluding coverage for a permitted driver but not deemed a "permissive user" on the face of the lease agreement violated the public policy of the state.[21] The Court said that car rental agencies are not in the same position as private car owners.[22] In this case, the rentee gave his friend constructive consent to operate the rented vehicle to take his family to a funeral, as he could not leave work.[23] The Court held that restrictions placed on the rentee were against sound public policy and against the intent of section 388.[24] The Court reasoned that the rental company "knew or should have known the probability of the car coming into the hands of another person was exceedingly great."[25] The Court concluded that any other interpretation of the statute would violate sound public policy or would "be placing an unreasonable limitation on the 'permission' contemplated by" VTL § 388.[26] The Court reasoned that constructive consent was appropriate and therefore the statutory requirement was satisfied.[27]

However, in *Utica Mutual Insurance Co. v. Lahey,*[28] the court held that victims of an automobile accident could not recover from the rental company or their insurance carrier if the vehicle was operated without a "permissive user" designated on the rental agreement. The court reasoned that although it is the state's policy to provide an injured party recourse to a financially responsible defendant, there are limitations on public policy.[29] Thus, an innocent accident victim may not recover from a car rental agency if the driver of a rented car was operating the vehicle without the permission of the car rental company.[30] However, the court implied if the rented automobile was being driven with the consent and permission of the rental company, the rental company would be responsible.[31] (In this case, the rentee rented the vehicle for a period of one day. He did not return the vehicle for an additional 21 days. The rental company wrote numerous letters to get the automobile back, instituted criminal charges, had an arrest warrant issued and contacted the rentee's family. The court held that under these circumstances "where the lessee was guilty of unauthorized use of a vehicle for a period of some 21 days beyond the term of his rental agreement and where the lessor/owner took all the necessary steps previously set forth, the victims should not be permitted to recover from the lessor/owner or its insurer.")[32] The court also reasoned that at the time of the accident, "there was no showing that the vehicle was being operated by an individual who had the lessee's permission."[33] The court ultimately held that "permissive use" was not established.[34] Interestingly, regardless of its holding, the court considered the relationship between the rentee and any "permissive users" that were designated.

Motor Vehicle Accident Indemnification Corp v. Continental National American Group and *Utica Mutual Insurance Co. v. Lahey* are not in concert with each other nor is the latter in concert with prior cases that have interpreted VTL §§ 370 and 388. Section 370 also sets forth the responsibility for rental car companies in New York. In kin with the statutory requirements of section 388(1), section 370 requires common carriers, including rental companies, to obtain insurance or file a surety bond for their vehicles. Specifically, the requirements of this statute must "inure to the benefit of any person legally operating the motor vehicle in the business of the owner and with his permission, in the same manner and under the same extent as to the owner."[35] This provision is not defined in later case law.[36] Section 370 requires rental companies to provide minimum coverage for their rentees. Case law has held that rental companies are precluded from enforcing rental agreements to the extent those agreements deny coverage to rentees below the statutory minimum amount imposed by law.[37] There is also a requirement that the rentee indemnify the rental company for liability that falls in excess of the statutory minimum amount.[38] This rationale is consistent with section 3420 of the New York Insurance Law, which requires "automobile insurance policies to cover not only the named insured but also any person operating or using the vehicle with the permission, express or implied, of the named insured."[39] New York case law has recognized the public policy that supports VTL § 388; in fact, this rational has been analogously applied to section 370.[40]

IV. Car Rental Agencies and Liability Insurance

Basic automobile insurance policies have six different types of coverage that can be purchased.[41] Usually, rentees have their own primary insurance. However, if they do not, they can purchase insurance from the rental agency for an additional price. Depending on what type of primary automobile insurance the rentee has, there may be no need to purchase additional automobile insurance from the rental agency. (Specifically, if the driver already has collision and comprehensive coverage, this may be sufficient and no additional insurance may be required. If a driver does not have colli-

sion or comprehensive coverage on his or her primary automobile insurance policy, in the event the rental car is stolen or damaged in an accident, the driver or renter may be liable.)

Courts in New York have held that "no public policy was violated by private contract making rental customer's insurance primary and rentees insurance secondary."[42] For instance, the *Miller* court held the statutory requirements were satisfied.[43] The court reasoned the rentee was free to either bargain for a lower rate with the rental company, rely on his or her own primary insurance coverage or even purchase additional coverage from the rental company for an added amount.

The cost of insurance at the rental agency depends on several factors. The most important factor is the age of the rentee and the state where the car is rented.[44] New York law does not allow car rental companies to sell collision damage waivers on rented passenger cars.[45] In fact, New York "prohibits car rental agencies from, in most circumstances, holding the rentee liable for more than $100 in the event the automobile is stolen or damaged."[46]

V. How Lawsuits Under These Sections Arise

It is well settled in New York that a rental company's insurer can "stand in the shoes" of its insured and bring a third-party claim against a tortfeasor, the rentee, for the amount paid to the insured, provided the insured has been made whole.[47] A rental company is able to seek indemnification from the rentee, sue the rentee directly or sue the rentee's primary insurance company by standing in the shoes of its rentee.[48] Subrogation is an equitable doctrine that entitles an insurer to "stand in the shoes" of its insured to seek indemnification from third parties whose "wrongdoing has caused a loss for which the insurer is bound to re-imburse."[49] The insurer has an equitable right to bring a subrogation action against a third party whose wrongdoing has caused a loss to its insured.[50]

In essence, the rental company can assert the rights of the rentee by bringing forth an action or defending an action on behalf of another person. Generally, an individual brings an action or defends an action in their own representative capacity. The exception to the subrogation rule is the anti-subrogation rule.[51] Under this theory, an "'insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered. . . .'"[52] The purpose of this rule is to prevent an insurer from applying the doctrine of subrogation to avoid its duty to pay under its insurance policy.[53] A recent decision from the New York Court of Appeals reasoned that "'for the purposes of the anti-subrogation rule, there is simply no reason for treating a "permissive user"' who qualifies as an insured under the policy 'differently than a named insured.'"[54] The Court also stated that contrary to the arguments raised by the plaintiff, self-insurers are "not immune from anti-subrogation principles."[55]

VI. New York's Court of Appeals Landmark Decision: *ELRAC, Inc. v. Ward*

The undermining of the term "permissive use" began when the court departed from applying the principles of *Aetna Casualty & Surety Co. v. Santos*.[56] The *Aetna* court held that an automobile insurer must present sufficient evidence to rebut a strong presumption of "permissive use" under section 388 where the driver of the vehicle at the time of the accident was not the actual rentee. In *Aetna*, the driver testified that the owner of the automobile did not permit him to use the vehicle unless an emergency existed. The court reasoned that VTL § 388 did not classify the driver in this situation as being a "permissive user." This is a very tight and narrow reading of the statute. However, it illustrates that courts have examined the relationship between the rentee and the driver of the vehicle. This case also illustrates that section 388 presumes "permissive use" exists unless there is evidence to the contrary presented to the court.

Additionally, the holding of *Morris v. Snappy Car Rental, Inc*.[57] re-affirmed the purpose and public policy behind section 388. The *Morris* court reasoned that the purpose of section 388 was:

> to "remove the hardship which the common-law rule visited upon innocent persons by preventing 'an owner from escaping liability by saying that his car was being used without authority or not in his business'". . . .the "linkage of an owner's vicarious liability to an owner's obligation to maintain adequate insurance coverage suggests that the Legislature's goal was to ensure that owners of vehicles that are subject to regulation in New York 'act responsibly' with regard to those vehicles."[58]

The main case that paved the way for *ELRAC, Inc. v. Ward* and its progeny was *Allstate Insurance Co. v. Snappy Car Rental*.[59] In *Allstate*, the federal district court applying New York law held that contractual provisions obligating rentees to indemnify rental companies for liability were invalid if the indemnification sought to undermine or eviscerate the minimum amount of automobile liability insurance coverage required of every owner of a motor vehicle in the state of New York.[60] In essence, the court reasoned that primary liability could not be shifted from rental companies to customers, nor could primary liability coverage be shifted to customers' primary insurers entirely.

In April 2001, the New York Court of Appeals addressed the issue of indemnification agreements between rentees and rental car companies.[61] The Court clarified the amount of indemnification rental companies can seek from their rentees. Specifically, the Court decided that rental companies are permitted to seek indemnification from their rentees only for amounts in excess of the statutory minimum amount of insurance coverage.[62] The statutory minimum amounts imposed in New York are $25,000 for bodily injury, $50,000 for death, and up to $10,000 for property damages.[63] In *Masara*, the Court specifically held that the amount of coverage for property damages is up to $10,000.[64] In *Ward*,[65] the Court held that VTL § 370 required rental companies to provide a minimum amount of insurance for their vehicles.[66]

Additionally, the Court held that the rental company, in this case ELRAC, may only enforce an indemnification agreement in excess of the statutory minimum amount of insurance coverage required by VTL § 370. In this case, ELRAC was prohibited from seeking indemnification from its renters for amounts less than the minimum liability requirement. However, the Court, on its own initiative, held that the insurance policy must "inure to the benefit" of the "permissive user."[67] The Court reasoned that a rentee is a "permissive user" and therefore section 370 is applicable.[68] Thus, section 370 required the rental company to provide the minimum amount of insurance coverage to the rentee. In writing this decision, the Court stated the language of section 370 was "plain and precise."

The *Ward* Court relied on the anti-subrogation theory. Under the theory of anti-subrogation, an "'insurer has no right of subrogation against its own insured to a claim arising from the very risk for which the insured was covered. . . . even where the insured has expressly agreed to indemnify the party. . . ."[69] The *Ward* decision was extremely imperative and timely. This case acknowledged that rental companies are allowed to seek indemnification from their rentees as long as the amount is above the statutory minimum required by VTL § 370.[70] The Court reasoned that "indeed, to further 'abrogate the right of indemnification' would disparage 'the important countervailing right of freedom of contract.'"[71] The Court of Appeals held that the standard indemnification clause presented to the rentee by the rental company violated public policy and the anti-subrogation rule. Thus, ELRAC could only seek indemnification from its lessees for amounts above the required minimum coverage. This rule was not clearly set forth before this case was decided. Thus, this landmark case changed the policy and holdings for many cases that followed.[72] In essence, this case clearly explained the rights and obligations of rental companies as well as obligations of the rentee, at least insofar as indemnification agreements are concerned.

The holding in *Ward* relied on the reasoning of prior case law. For instance, in *Morris v. Snappy Car Rentals*,[73] the Court of Appeals reasoned that under VTL §§ 370 and 388, a rental company is required to maintain minimum liability coverage for bodily injury, death and property damages.[74] The Court in *Morris* stated "nothing in the statute's scheme, language, or legislative history suggests that a lessor/owner cannot by contract secure indemnification from a lessee/driver for liability stemming from the latter's negligence which exceeds the amounts for which owners are required to be insured."[75]

A string of cases emanated from the recent *Ward* decision.[76] The Appellate Division, Second Department followed the reasoning of *Ward* when it held an indemnification agreement valid and enforceable as long as it "exceeded the minimum amount of insurance it was required to maintain. . . ."[77] The court re-enforced the holding of *Ward* when it stated that to the extent the indemnification provision contained in the rental agreement sought total indemnification from the rentee, it is invalid under New York law.[78]

VII. Taking *ELRAC, Inc. v. Ward* a Step Too Far: *ELRAC, Inc. v. Masara* and Its Progeny

A few months after *Ward* was decided, the New York Court of Appeals expanded the *Ward* holding in *Masara.* The court, on its own motion, rendered a rather solid, but questionable decision. The Court held that rental companies must provide minimum insurance to rentees under VTL § 370 if it "inures to the benefit" of any "permissive user" of the rented automobile.[79] In *Masara*, the court rejected the defendant's argument that *ELRAC* could not seek indemnification from the defendant. In effect, *Masara* held if a person is not designated as a "permissive user" on the face of a rental car policy agreement, in the event of an accident the rental company may seek indemnification from the rentee for the full amount of damages caused by the driver's negligence.[80] The Court reasoned because the driver of the vehicle was not a "permissive user" of the rented automobile, the statutory minimum did not "inure to his benefit." In this case, the Court looked to the face of the rental agreement; it prohibited the rentee from allowing someone not on the rental agreement to operate the car. The rentee's father was operating the car and was involved in the accident. As a result, the rental company sought total indemnification from the rentee, including the statutory minimum amount it would have otherwise been required to provide under New York law.[81] That is all the Court said. The Court did not define the term "permissive use" or distinguish prior case law that defined "permissive use" as being express or implied. The *Masara* decision sets the precedent for the lower courts.

The Court in *Masara* also defined the extent that rental companies are responsible for property damages. Specifically, the Court stated that VTL § 370 requires rental companies to obtain a maximum amount of coverage of $10,000 for property damages. The Legislature explicitly specified "minimum" coverage amounts for other types of injuries, but not for property damages. Since section 370 specifies no minimum insurance requirement for property damages, a rental company may seek indemnification from its rentees for property damage awards to the extent otherwise legally permissible with a capped maximum of $10,000. The Legislature proposed amendments to section 1, subdivisions 1 and 3 of section 388 of the Vehicle and Traffic Law to read as follows:

> A lessor of a vehicle, under an agreement to rent or lease such vehicle for a period of less than one year, shall be deemed the owner of the vehicle for the purpose of determining liability for the use or operation of the vehicle, but for not more than one hundred thousand dollars per person nor not more than three hundred thousand dollars per incident for bodily injury, and not more than fifty thousand dollars for property damage. If the lessee, renter or operator of the vehicle is uninsured or has any insurance with limits less than five hundred thousand dollars combined property damage and bodily injury liability, the lessor shall be liable for up to an additional five hundred thousand dollars in economic damages only arising out of the use or operation of the vehicle. The additional specified liability of the lessor or rental company for economic damages shall be reduced by amounts actually recovered from the lessee, from the operator, and from any insurance or self insurance covering the lessee, renter or operator. The limits on liability in this paragraph shall not ally to an owner of vehicles that are used for commercial activity in the owner's ordinary course of business, other than a rental company that rents or leases vehicles. . . .[82]

New York courts have followed the reasoning in *Masara* without skipping a beat. Specifically, a recent decision on point illustrates that the New York Appellate Division, Second Department upheld *Masara's* interpretation of "permissive use."[83] In *AIU Ins. Co.*, the Appellate Division held, in a one-page opinion, that the insurance company was not obligated to defend or indemnify the defendants.[84] Relying on the reasoning of *Masara*, the court held that the rental company was entitled to full indemnification because, at the time of the accident, an unauthorized driver was operating the car. Based on the prior holdings of *Ward* and *Masara*, the rentee's violation of the rental agreement created the loophole for the rental company to wash their hands of all liability and responsibility. However, if the court attempted to distinguish *Masara* rather than just go along with the decision as if it had no other choice in the matter, the outcome may have been different.

The Appellate Division, Second Department recently decided another decision that is in concert with *Ward*.[85] The *Haight* court held that '"to the extent that the indemnification provision contained in ELRAC's rental agreement seeks total indemnification from the renter, it is invalid under New York law."'[86] However, the facts of *Haight* were distinguishable from *AUI Ins. Co.*, as the renter of the vehicle was the actual driver that rented the vehicle. Thus, there was no opportunity to distinguish *Masara* and attempt to elaborate on the meaning of "permissive use." The court re-affirmed the principle holding of *Ward.*

VIII. Implications of the Court of Appeals Decision in *Masara*

The most important implication stemming from *Masara* is that it affects rental companies and their rentees. The Court of Appeals has narrowly defined the term "permissive use." In essence, rental companies have a loophole. Specifically, if the rentee does not designate a "permissive user" to the rental company, the rental company may avoid complete liability. Rental companies, based on recent New York case law, have to provide minimum insurance coverage; however, this insurance coverage will now turn on the definition and application of the word "permissive user."[87]

If the New York courts continue on their current trend, rental companies will get off the hook rather easily. In fact, they will not be held liable to their rentee's or third parties who are injured if their rentees do not designate additional drivers who are specifically authorized to operate the vehicle.[88] For instance, if a driver is involved in an accident and is not deemed a "permissive user" on the face of the rental car company agreement, then the rental company is not liable for the negligent acts of that driver at all.[89] The bottom line is that in these instances, rental companies can seek indemnification for the full amount of the damages from their rentees. This includes damages that the statutory minimum amount of insurance coverage requires rental companies to provide. This is where the disparity lies.

The rentee has the option to fill out the rental agreement accurately and include any "permissive users" on the form directly. However, if the rentee fails or forgets to list a "permissive user," but "permissive use" could

have been implied from the circumstances, the Court of Appeals has chosen not to address this reality. Thus, the Court concluded that rental companies have no responsibility to their rentees in these circumstance. The Court ignored the public policy motivation as well as the statutory minimum insurance requirement that VTL §§ 370 and 388 mandate. However, the Court of Appeals and the Second Department have consistently applied this contradictory rationale in their holdings.[90]

The legislative intent behind VTL §§ 370 and 388 as explained in earlier case law, unlike the recent case law, emphasizes the public policy aim. The aim is to protect the public and to make an owner liable for an injury caused by the negligent operation of his car.[91] However, New York case law has become dispositive on the term "permissive user." In fact, the court does not look to see if the driver of the rental vehicle had the implied or express permission of the rentee.[92] Older case law that has decided this issue considered the plain meaning of section 388 and reasoned "permissive use" should be determined from the surrounding circumstances at the time that the car was negligently operated.[93] The question under scrutiny here is how the courts have interpreted the term "permissive use" and to what extent is the term in conflict with the legislative intent behind sections 370 and 388. The plain meaning of the term "permissive use" seems to apply to the relationship between the rentee and any driver he or she gives express or implied consent to. Obviously, the rentee is a "permissive user," as he or she rents the vehicle directly from the rental company.

However, what about the driver involved in an accident who is not the rentee? Should the term "permissive use" be interpreted to encompass the relationship between the driver and any additional users he or she designates, an agency theory, or should the relationship be limited to that of the rental company and the actual rentee? This is a determinative factor that needs to be clarified either by the Court of Appeals, or VTL §§ 370 and 388 need to be amended to reflect the Court's new interpretation of a "permissive user."

Indeed, there are cases which have interpreted sections 370 and 380 and concluded that "permissive use" can be expressly or implicitly designated by the rentee.

Even the Legislature acknowledged that "permissive use" may be given to any driver the rentee designates.[94] (Under section 388, the owner of a motor vehicle is presently held liable for injuries to another resulting from the negligent operation of their automobile when the owner gave permission to the driver to operate the vehicle regardless of the purpose for which the car was used.) In fact, these cases were never expressly overruled by the Court. Thus, it is my understanding that the main issue of disparity here is that New York case law does not look beyond the rental agreement between the rentee and the rental company to determine who had "permissive use" to operate the automobile.[95] (The Court reasoned that the driver was not a "permissive user" and the statutory minimum did not apply to the rental agency. However, the Court did not consider if the rentee gave the driver implied or express permission to drive the vehicle. If the rentee gave the driver his implied or express permission to drive the vehicle, then the statutory minimum should apply. However, the Court did not look beyond the four corners of the rental agreement and held that as the rentee did not designate any additional drivers, the rental company was "off the hook" entirely.)

As simple as it may seem, there are grave repercussions associated with the determination as to who is a "permissive user." One of the problems that may stem from these recent cases in New York is that the burden of liability is completely shifted from the rental car company, even if it was only bound to pay the statutory minimum amount of insurance in the first place, to the primary insurance company. The primary insurance company therefore has to pay the bill when a driver of a rental vehicle let another person operate the vehicle without first checking the box or circling the form correctly on the rental car company agreement designating a "permissive user." Thus, the primary insurance company will have to cover the liability in full because it is the rentee's primary insurance carrier.

But why should the rental company avoid all liability and shift the burden directly to the primary insurer? Case law interpreting VTL § 388 reasoned that the public policy behind the statute is to provide an avenue of relief to an injured party.[96] This is a good public policy argument and is well-supported by case law. However, nothing in the statute, or prior case law, suggests that the primary insurance company should be fully responsible in such an incidence.[97] The Court in *Ward* held that rental companies can seek indemnification from their rentees for amounts in excess of the statutory minimum amount required by law.[98] The Court in *Ward* also held that a rentee is a "permissive user" of the vehicle.[99] However, the Court did not define what a "permissive user" was; rather it referenced the Vehicle and Traffic Law. Moving in a narrower direction, the Court in *Masara* applied the term "permissive user" to encompass the relationship between the rentee and the car rental company and looked solely to the rental agreement. Reasoning there were no authorized drivers listed on the rental agreement, the Court held there were no "permissive users."[100] The approach the Court has undertaken is narrow-minded and misconstrued. Specifically, the Court in *Masara* centers on the relationship between the renter and the rental car company thereby eviscerating the legislative intent underlying the New York Vehicle and Traffic Law.

It is my position that the term "permissive user" in VTL §§ 370 and 388 was construed by the *Masara* Court contrary to the definition that earlier case law had established. The term "permissive user" is meant to include those drivers who have the express or implied consent of the owner or lessor or rentee of the vehicle.[101] Since *Masara* was decided in 2001, courts have narrowed their interpretation of the term "permissive user."[102] In doing so, the Court of Appeals has interpreted "permissive user" to apply to the relationship between the rental company and the rentee, rather than looking to the relationship between the rentee and the actual driver of the automobile.[103] (It is uncontroverted that the rentee is a "permissive user" of the car as it is he or she who elects to rent from the rental company.) Clearly, the rentee is a "permissive user" but what about a person who he or she designates to drive the car? This question will turn on the issue of whether the rentee disclosed this information to the rental car agency. If not, then there was no "permissive use." Flying in the face of both public policy as well as VTL §§ 370 and 388 that were enacted to change the strict common-law rules, recent Court of Appeals cases are following this arcane rationale.

For instance, *AIU Ins. Co.* clearly followed in the wake of *Masara* without a ripple. In fact, the Second Department basically said this is what the Court of Appeals has held and therefore we must adhere to it.[104] In light of the shifting of responsibility from the secondary insurance company to the primary insurance company, my opinion is that primary insurance companies will attempt to appeal these verdicts. They will argue they should not have to be 100 percent liable for these accidents.

Conversely, the older Court of Appeals decision in *Motor Vehicle Accident Indemnification Corp.* looked to the relationship between the rentee and the driver of the vehicle.[105] The Court reasoned that the rentee gave constructive consent to the driver of the rented vehicle. As such, the statutory requirement was satisfied as "permission can be given expressly or impliedly."[106] This decision clearly illustrates the term "permissive user" is not limited to the narrow reading it has been given by the recent Court of Appeals decision in *Masara*. Rather than looking to older case law when the Court once looked at the relationship between the rentee and the driver to determine if in fact "permissive use" was given, the Court did not choose this approach. In fact, recent decisions have departed from this mode of analysis completely without legal justification.

Furthermore, deciding questions of "permissive use" on summary judgment motions has grave implications and legal consequences aside from liability damage determinations. Interestingly, prior cases that have interpreted VTL § 388 concluded that if there is a question of "permissive use" or consent, the question should be given to the trier of fact.[107]

"In light of the decisions that came down from the New York Court of Appeals last year, it is clear that the New York courts will continue to hold that rentees who allow another person to drive their rental car but who do not designate them as a 'permissive user' on the rental agreement will be fully liable for any damages in the event an 'unauthorized user' gets into an accident."

Surprisingly, recent cases have been coming to the New York courts on summary judgment motions. This also seems contradictory to the cases that have interpreted the Vehicle and Traffic Law and concluded that questions of ambiguity as to interpretation of "permissive use" go to the jury and should not be decided as a matter of law.[108] (The court held that a rental company was not entitled to summary judgment dismissing a wrongful death action brought on behalf of a passenger killed in a rental car driven by a friend of the rentee. The court did not take into account that the car was being driven beyond the term of the lease or that the car was driven by a driver who was not listed on the rental agreement as a "permissive user." The court reasoned that the rental company failed to overcome the presumption that the vehicle was being used with the owner's consent.)[109] If courts continue to look at the plain meaning of the rental agency agreement and not at the intention of the rentee and at least explore the possibility that "permissive use" was given to the driver involved in the accident, then many cases will automatically be disposed of. This approach undermines and cuts right to the heart of VTL §§ 370 and 388.

IX. Conclusion

In light of the decisions that came down from the New York Court of Appeals last year, it is clear that the New York courts will continue to hold that rentees who allow another person to drive their rental car but who do not designate them as a "permissive user" on the rental agreement will be fully liable for any damages in the event an "unauthorized user" gets into an accident.

However, now that the burden has passed to the rentee's primary insurance company for full liability, a serious issue may arise. Specifically, will the primary insurer just acquiesce and offer to be responsible for the floodgate of litigation that is about to pile up? If rental car companies can evade liability as a result of a rentee

not having designated a "permissive user," why should the primary insurance company pick up the tab without at least a challenge? Since these decisions just came down during the past year, it is likely there will be challenges to this line of case interpretation. No one wants to be 100 percent liable for the negligent acts or wrongdoing of another, especially insurance companies. The solution is not clear, as the law itself is not clear as to the meaning of "permissive use" and its various case law interpretations.

The Court of Appeals has relied on some of the prior cases interpreting VTL §§ 370 and 388, respectively. However, there is still ambiguity that needs to be addressed. The intent and public policy supporting sections 370 and 388 have been overlooked by the high court in New York. The other possibility is that the high court erred when it reasoned that rental companies are free from liability as far as the statutory minimums are concerned if a rentee does not designate a "permissive user" on the face of a standard rental agreement without overruling prior case law.[110] It is possible that the Court of Appeals did not take into consideration these factors and their repercussions. Someone should ultimately be responsible and an injured person should have a legal redress. Nonetheless, as a result of these decisions, I speculate a floodgate of litigation will present itself and the Court may have to address this issue in the near future.

Endnotes

1. N.Y. Vehicle & Traffic Law § 370 (McKinney 1996) (hereinafter "VTL"). The statute states in pertinent part:

   > Every person, firm, association or corporation engaged in the business of carrying or transporting passengers for hire in any motor vehicle or motorcycle . . . for damages for and incident to death or injuries to persons . . . or destruction of property; for each motor vehicle . . . such bond or policy of insurance shall contain a provision for a continuing liability thereunder. . . Any such bond or policy of insurance shall also contain a provision that such bond or policy of insurance shall inure to the benefit of any person legally operating the motor vehicle or motorcycle in the business of the owner and with his permission, in the same manner and under the same conditions and to the same extent as to the owner.

2. VTL § 388 (McKinney 1996) The statute states in pertinent part:

   > Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.

3. *Morris v. Snappy Car Rental Inc.*, 84 N.Y.2d 21, 28; 614 N.Y.S.2d 362, 364 (1994).
4. *Utica Mut. Ins. Co. v. Lahey*, 95 A.D.2d 150, 153, 465 N.Y.S.2d 553, 556 (2d Dep't 1983).
5. VTL § 388.
6. 96 N.Y.2d 847, 729 N.Y.S.2d 60 (2001).
7. *Id.* at 849.
8. *ELRAC, Inc. v. Ward*, 96 N.Y.2d 58, 73, 724 N.Y.S.2d 692, 697 (2001).
9. *Id.* at 73.
10. *Plath v. Justus*, 28 N.Y.2d 16, 319 N.Y.S.2d 433 (1971); *Miller v. Sullivan*, 174 Misc. 2d 690, 694, 666 N.Y.S.2d 892, 895 (1997).
11. *Ward*, 96 N.Y.2d 58 at 72-73; s*ee also* VTL § 388.
12. *See e.g., Darlow v. Drake Bakeries, Inc.*, 2 A.D.2d 749, 153 N.Y.S.2d 243, 244 (2d Dep't 1956), *aff'd*, 2 N.Y.2d 983, 163 N.Y.S.2d 598 (1957).
13. *See e.g., Lincoln v. Austic*, 60 A.D.2d 487, 401 N.Y.S.2d 1020 (3d Dep't 1978).
14. *Id.* at 490.
15. *Aetna Cas. & Sur. Co. v. Santos*, 175 A.D.2d 91, 573 N.Y.S.2d 695, (2d Dep't 1991). *See e.g., Darlow*, 2 A.D.2d at 749, 153 N.Y.S.2d at 244.
16. *Vincinere v. Ward*, 259 A.D. 1019, 1020, 20 N.Y.S.2d 451, 452 (2d Dep't 1940), *aff'd*, 285 N.Y. 823 (1941).
17. *Id.* at 1019–1020; *see also Lincoln*, 60 A.D.2d at 491.
18. 8 N.Y.2d 449, 459, 209 N.Y.S.2d 304, 312 (1961).
19. *Id.* at 460.
20. 35 N.Y.2d 260, 360 N.Y.S.2d 859 (1974).
21. *Id*. at 264.
22. *Id.* at 263.
23. *Id.*
24. *Id.*
25. *Id.* at 264.
26. *Id.*
27. *Id.*
28. 95 A.D.2d at 150, 465 N.Y.S.2d at 553.
29. *Id.* at 153; *see also Vasquez v. Christian Herald Ass'n*, 186 A.D.2d 467, 468, 588 N.Y.S.2d 291, 292 (1st Dep't 1992).
30. *Utica Mutual*, 95 A.D.2d at 153.
31. *Id.* at 152.
32. *Id.* at 153.
33. *Id.* at 152.
34. *Id.* at 153.
35. *Id.*; *see also* VTL § 370.
36. *See e.g., ELRAC, Inc. v. Ward*, 96 N.Y.2d at 58, 724 N.Y.S.2d at 692 (2001); *see also ELRAC, Inc. v. Masara*, 96 N.Y.2d at 847, 729 N.Y.S.2d at 60 (2001).
37. *See Ward*, 96 N.Y.2d at 78.
38. *See Worldwide Ins. Co. v. United States Capital Ins. Co.*, 181 Misc. 2d 480, 485–486, 693 N.Y.S.2d 901, 905 (Sup. Ct., N.Y. Co. 1999).
39. N.Y. Insurance Law § 3420 (McKinney 2000).
40. *Ward*, 96 N.Y.2d at 78.
41. Insurance Information Institute, *Do I Need Insurance to Rent a Car, available at* www.iii.org, last visited Jan. 7, 2002. (The standard automobile insurance policy requires the driver to have (1) bodily injury liability; (2) medical payments or personal injury protection (PIP); (3) property damage liability; (4) collision; (5) comprehensive; (6) uninsured and underinsured motorist coverage.)
42. *Miller v. Sullivan*, 174 Misc. 2d 690, 697, 666 N.Y.S.2d 892, 897 (Sup. Ct., Monroe Co. 1997).
43. *Id.* at 695.

44. N.Y.S. Ins. Dep't, *Collision Damage Waivers & Rental Vehicle Coverage: Some Questions & Answers*, *available at* www.ins.state.ny.us/autorent.htm (last visited Jan. 7, 2002).
45. *Miller*, 174 Misc. 2d at 695.
46. *Id.*
47. *ELRAC, Inc. v. Ward*, 96 N.Y.2d at 76, 724 N.Y.S.2d at 699 (2001).
48. *Id.* at 75.
49. *Id.* at 75–76.
50. *Id.*
51. *Id.*
52. *Id.* at 75-76, (citing *Pennsylvania Gen. Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d 465, 470, 510 N.Y.S.2d 982, 985 (1986)).
53. *Id.* at 76.
54. *Id.* at 77, (citing *Jefferson Ins. Co. v. Travelers Indem. Co.*, 92 N.Y.2d 363, 374–375, 681 N.Y.S.2d 208, 214 (1998)).
55. *Id.* at 73.
56. 175 A.D.2d at 91, 573 N.Y.S.2d at 695.
57. 84 N.Y.2d 21, 614 N.Y.S.2d 362 (1994).
58. *Id.* at 27 (citations omitted).
59. 16 F. Supp. 2d 410 (S.D.N.Y. 1998).
60. *Id.* at 411.
61. *ELRAC, Inc. v. Ward*, 96 N.Y.2d at 58, 724 N.Y.S.2d at 692 (2001).
62. *Id.* at 73.
63. *Id.* at 73.
64. 96 N.Y.2d at 847, 729 N.Y.S.2d at 62.
65. 96 N.Y.2d at 58, 724 N.Y.S.2d at 692.
66. 96 N.Y.2d at 78, 724 N.Y.S.2d at 701.
67. *Id.* at 72.
68. *Id.* at 72.
69. *Id.* at 74, 724 N.Y.S.2d at 698 (citing *Pennsylvania Gen. Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d at 470, 510 N.Y.S.2d at 985 (1986)).
70. *Id.* at 78.
71. *Id.* at 78, (citing *Morris v. Snappy Car Rental Inc.*, 84 N.Y.2d 21 at 28–29, 614 N.Y.S.2d at 364 (1994)).
72. *See, e.g.*, *ELRAC v. Masara*, 96 N.Y.2d at 847, 729 N.Y.S.2d at 61 (2001); *Haight v. Estate of DePamphili*, 286 A.D.2d at 369, 728 N.Y.S.2d at 790 (2d Dep't 2001); *AIU Ins. Co. v. ELRAC, Inc.*, 287 A.D.2d at 668, 732 N.Y.S.2d at 106 (2d Dep't 2001).
73. 84 N.Y.2d at 21, 614 N.Y.S.2d at 362.
74. *Id.* at 28.
75. *Id.*
76. *Haight*, 286 A.D.2d 369, 371; *AIU Ins. Co.*, 287 A.D.2d 668, 669; *Masara*, 96 N.Y.2d at 847.
77. *Haight*, 286 A.D.2d at 371.
78. *Id.* at 371 (citing *ELRAC, Inc. v. Ward*, 96 N.Y.2d at 78, 724 N.Y.S.2d at 701 (2001)).
79. *ELRAC, Inc. v. Masara*, 96 N.Y.2d at 857, 729 N.Y.S.2d at 62 (2001); *see also* VTL § 370.
80. *Id.* at 856.
81. *Id.* at 857.
82. *See* A.6089, 224th Ass. Reg. Sess. (N.Y. 2001). As of the date of this publication, this bill had not been enacted.
83. *AIU Ins. Co. v. ELRAC, Inc.*, 287 A.D.2d 668, 669, 732 N.Y.S.2d 105, 106 (2d Dep't 2001).
84. *Id.* at 668.
85. *See Haight v. Estate of DePamphili*,, 286 A.D.2d at 369, 728 N.Y.S.2d at 790 (2d Dep't 2001).
86. *Id.* at 371 (citing *ELRAC, Inc. v. Ward*, 96 N.Y.2d 58, 78, 724 N.Y.S.2d 692, 748 (2001)).
87. *Ward*, 96 N.Y.2d at 77.
88. *See, e.g., ELRAC, Inc. v. Masara*, 96 N.Y.2d at 847, 729 N.Y.S.2d at 61 (2001).
89. *Id.* at 857.
90. *See, e.g., Masara*, 96 N.Y.2d at 849; *AIU Ins. Co. v. ELRAC, Inc.*, 287 A.D.2d at 669, 732 N.Y.S.2d at 106 (2d Dep't 2001).
91. *See, e.g., Dittman v. Davis*, 299 N.Y. 601 (1949).
92. *See, e.g., Masara*, 96 N.Y.2d at 849. *But see Motor Vehicle Accident Indemnification Corp. v. Continental National American Group*, 35 N.Y.2d at 260, 362 N.Y.S.2d at 859 (1974); *Worldwide Ins. Co. v. United States Capital Ins. Co.*, 181 Misc. 2d at 480, 693 N.Y.S.2d at 901 (Sup. Ct., N.Y. Co. 1999); *Bindert v. Elmhurst Taxi Corp.*, 168 Misc. 892, 6 N.Y.S.2d 666 (Mun. Ct., Queens Co. 1938).
93. *Motor Vehicle Accident Indemnification Corp.*, 35 N.Y.2d at 260; *see also Worldwide Ins. Co.*, 181 Misc. 2d at 480; *Bindert*, 168 Misc. at 892.
94. VTL § 388.
95. *Masara*, 96 N.Y.2d at 857.
96. VTL § 388. (This section was designed in the interest of public safety and the exercise of the police power of the state, applicable to a carrier engaged in interstate commerce. *See also Dittman v. Davis*, 299 N.Y. at 601 (1949)).
97. *See Schuler v. Whitmore Rauber & Vicinus*, 233 A.D. 892, 892, 25 N.Y.S. 886, 886 (4th Dep't 1931); *Hatch v. Lovejoy*, 142 Misc. 137, 137, 254 N.Y.S. 35, 37 (Sup. Ct., Schuyler Co. 1931).
98. 96 N.Y.2d at 73, 724 N.Y.S.2d at 78 (2001).
99. *Id.*
100. 96 N.Y.2d at 849, 729 N.Y.S.2d at 61 (2001).
101. VTL § 388 (The statutory presumption is that a vehicle being operated under an insured owner with the owner's consent at the time of the accident supports the policy that there should be recourse to financially responsible insured defendants for injuries); s*ee Morris v. Snappy Car Rental Inc.*, 84 N.Y.2d at 27, 614 N.Y.S. 2d at 364 (1994).
102. *Masara*, 96 N.Y.2d at 849.
103. *Id.*
104. *AIU Ins. Co. v. ELRAC, Inc.*, 287 A.D.2d at 668, 732 N.Y.S.2d at 106 (2d Dep't 2001); s*ee also Hannibal v. Ford Credit Titling & Trust*, 735 N.Y.S.2d 567, 568 (2d Dep't 2001).
105. 35 N.Y.2d at 264, 360 N.Y.S.2d at 861 (1974).
106. *Id.*
107. *See e.g, Vincinere v. Ward*, 259 A.D. at 1019, 20 N.Y.S.2d at 452 (2d Dep't 1940); *Lincoln v. Austic*, 60 A.D.2d 487 at 491, 401 N.Y.S.2d at 1022 (3d Dep't 1978); *Leotta v. Plessinger*, 8 N.Y.2d at 459, N.Y.S.2d at 312 (1961); *Wynn v. Middleton*, 184 A.D.2d 1019, 1020, 584 N.Y.S.2d 684, 685 (4th Dep't 1992).
108. *Wynn*, 184 A.D.2d at 1020.
109. *See also Vincinere*, 259 A.D. 1019, 1020.
110. *ELRAC, Inc. v. Masara*, 96 N.Y.2d 847 at 849, 729 N.Y.S.2d at 61 (2001).

Natasha Meyers was a summer associate at Rivkin Radler, LLP, Uniondale, and a student at the Jacob D. Fuchsberg Law Center.

"Grave Injury" as Interpreted by the Court of Appeals

By Barbara D. Goldberg and Christopher Simone

In 1996, the Legislature amended section 11 of the Workers' Compensation Law (WCL) to provide that the employer of an injured worker shall not be liable to a third person for contribution or indemnity, unless the third person proves, through competent medical evidence, that the worker has sustained a "grave injury." "Grave injury" is specifically defined as *only* one or more of the following:

> death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

According to the McKinney's Practice Commentary, section 11 provides an employer with "absolute immunity from impleader or contribution from the effective date of the statute" in cases where such an injury is not present.

The Legislative Intent

Limitation of *Dole v. Dow* Claims

By statutorily limiting claims against the employer of an injured worker to cases involving narrowly and specifically defined "grave injuries," the Legislature sought to limit the effect of *Dole v. Dow Chemical Corp.*,[1] which had allowed claims for contribution and indemnification against employers no matter how minimal the injury. This limitation was intended to bring New York more into line with other states where workers' compensation provides the *exclusive* remedy for workers injured on the job, and where, with the exception of contractual indemnification, no claims for contribution or indemnification against an employer are permitted.

Court of Appeals Decisions Construing Section 11

The Court of Appeals has decided two cases concerning the interpretation of WCL § 11 as amended. In the first of these cases, *Majewski v. Broadalbin-Perth Central School District*,[2] the Court addressed the issue of whether section 11 was intended to apply prospectively only, or whether it also applied retroactively to claims pending on the effective date of the amendment. The enabling language provided that the pertinent portions of the amendment would "take effect immediately," but was otherwise silent on the issue of retroactivity.

The Court of Appeals held that section 11 as amended was to be applied prospectively to actions filed after the effective date of the enactment, based on principles of statutory construction and the lack of a clear expression of retroactivity by the Legislature. More importantly, however, the Court repeatedly stressed the statutory objective of limiting *Dole v. Dow* claims, and the importance of the legislative intent in construing the statute. The Court specifically acknowledged that the intention of modifying the *Dole* case was "repeatedly expressed by all sides during the legislative debates," and that

> [w]ith the recent passage of the Act, the Legislature endeavored to clarify and restore
>
> "The force of 'exclusive remedy' (or 'no fault') provisions. Specifically, amendments would protect employers and their employees from other than contract-based suits for contribution or indemnity by third parties (such as equipment manufacturers which have been deemed liable for causing employees injuries or deaths)—in effect, repealing the doctrine of Dole" (Assembly Mem in Support, 1996 McKinney's Session Laws of NY, at 2562).
>
> Memoranda issued contemporaneously with the passing and signing of the Act provided that the "exclusive remedy" would be "restored and reinforced" (id., at 2565; *see also*, Governor's Approval Mem; 1996 McKinney's Session Laws of NY, at 1915).[3]

In the second case, *Castro v. United Container Machinery Group, Inc.*,[4] the Court of Appeals announced a strict interpretation of the statutory definition of "grave injury," in order to comport with the legislative intent. The plaintiff in *Castro* had suffered the loss of the tips of five fingers while operating a rotary die-cutting machine. He brought suit against the manufacturer of the machine, United Container Machinery Group, Inc., which in turn commenced a third-party action against his employer for contribution and indemnification,

alleging that he had suffered a "loss of multiple fingers" as contemplated by section 11.

The amputations of the plaintiff's fingertips were all located between the joint closest to the fingernails and the ends of the fingers. Contending that this did not constitute the "loss of multiple fingers," the plaintiff's employer moved for dismissal of the third-party action. After the Supreme Court denied the motion, finding issues of fact as to the extent and nature of plaintiff's "grave injury," the Appellate Division, Second Department reversed and dismissed the third-party action. The Appellate Division held that based on the statutory language and the legislative history and purpose behind section 11, the loss of the fingertips did not constitute the "loss of multiple fingers," and thus, the plaintiff did not sustain a "grave injury."

Subsequently, United was granted leave to appeal to the Court of Appeals. In the Court of Appeals, United contended that the injury satisfied the definition of "loss of multiple fingers," despite the statute's silence on the issue of partial losses; and that the question of whether the partial loss of multiple fingertips constituted a grave injury was a case-by-case determination for the trier of fact. The employer, Southern Container Corp., took the position that by definition, a "fingertip" is not a "finger," and that accordingly the plaintiff had not suffered the "loss of multiple fingers." Southern also stressed the fact that the plaintiff had been able to return to work at the same machine, and argued that to allow a third-party claim under these circumstances would defeat the legislative intent of drastically curtailing *Dole v. Dow* claims.

In a unanimous opinion by Judge Ciparick, the Court of Appeals affirmed the Appellate Division's order and rejected United's position as based on "a misguided reading of the requirements of Workers' Compensation Law § 11." The Court held that "based on the plain language and legislative history of Workers' Compensation Law § 11, plaintiff's injury cannot be classified as grave."[5] Specifically, the Court observed that since "[i]njuries qualifying as grave are narrowly defined" in the statute, "the only determination to be made is whether the injury falls within the statute's objective requirements." The Court concluded that the loss of the plaintiff's fingertips did not qualify as a "grave injury" and held as follows:

> The term "loss of multiple fingers" cannot sensibly be read to mean partial loss of multiple fingers. Words in a statute are to be given their plain meaning without resort to forced or unnatural interpretations (*see*, McKinney's Cons Laws of NY, Book 1, Statutes, § 232; *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583). As a matter of standard English usage, the word "finger" means the whole finger, not just its tip.
>
> There is, similarly, no merit in United's further contention that the word "total" appearing elsewhere in the litany of injuries leads to the conclusion that its absence in the phrase under consideration was intended to mean something less than a total loss of multiple fingers. In the list of injuries contained at Worker' Compensation Law § 11, "total" is used in conjunction with the term "loss of use" and not in conjunction with "loss of multiple fingers" or any other enumerated body part. While the phrase loss of use might require some indication as to the degree of use lost, the term "loss of multiple fingers" does not.[6]

In reaching this result, the Court applied the "plain meaning" formula, urged by the employer, which had been enunciated in the earlier *Majewski* decision:

> "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. v. City of New York*, 41 N.Y.2d 205, 208; *see also*, *Longines-Wittnauer v. Barnes & Reinecke*, 15 N.Y.2d 443). As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. As we have stated:
>
> "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (*Tompkins v. Hunter*, 149 N.Y. 117; *see also*, *Matter of Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98).[7]

With respect to the purpose of section 11 as amended, the legislative history left no doubt that the Legislature intended to repeal *Dole v. Dow* except in cases of certain specifically defined "grave" injuries. In addition, it was clear that neither the courts nor the Workers' Compensation Board were to have any discretion in determining what constituted a "grave injury." The Court of Appeals quoted the Governor's Approval Memorandum for the proposition that

> [t]he grave injuries listed are deliberately both *narrowly and completely described*. This list is exhaustive, not illustrative; it is not intended to be extended absent further legislative action.[8]

In an apparent response to United's further argument that the statutorily enumerated injuries seemed arbitrary and without rational basis, the Court concluded that "[w]hile it is doubtful that any list that purported to be the complete catalog of "grave" injuries would—or ever could—meet with universal approval, that is not the question before us and we may not lightly alter this legitimate exercise of legislative prerogative."[9]

The message of the Court of Appeals in *Castro* seems clear: "grave injury" is a term of legislative origin and construct, and is not susceptible to varying or subjective interpretations. Pursuant to *Castro*, as well as the legislative history and intent upon which it relied, the narrowly defined "grave injuries" enumerated in Workers' Compensation Law § 11 are to be construed in strict accordance with their plain meaning and consistently with the legislature's purpose of curtailing third-party actions against employers, and without the exercise of judicial discretion.

The Effect of *Castro*

Although *Castro* had the immediate effect of prohibiting United's third-party action, its overall impact on insurance law will certainly be far broader. In particular, the Court's treatment of the phrase "loss of multiple fingers" should apply equally to section 11's other objective "grave injuries," including the "loss of multiple toes," "loss of nose," "loss of ear" or "loss of an index finger." Furthermore, while the amputation of any portion of an "arm" or a "leg" necessarily qualifies as a "grave injury," given the attendant loss of the "hand" or "foot," it seems that in order for the amputation of a hand or foot to constitute a "grave" injury, the loss of the hand or foot would have to be complete.[10]

Likewise, in cases involving the "permanent and total loss of use" of an arm, leg, hand, or foot, it would seem that, consistent with *Castro*, the loss of use would have to be complete, and that any degree of function, however minimal, would preclude a finding of "grave" injury. For example, in a case where the plaintiff suffered comminuted fractures to one of his legs, was required to undergo several surgeries, and could only walk a few feet without assistance, a strong argument could be made that the loss of use was not "total," and that accordingly, the injury was not "grave." Similarly, an argument could be made that a plaintiff who had suffered disabling nerve injuries to his arm, but who still retained some function in his fingers or thumb, would not have suffered the "total" loss of use of an arm or hand. While such results may seem harsh or Draconian, they are consistent with the legislative intent of effectively eliminating third-party claims against employers.

A strict interpretation of the statute in such cases is also supported by the juxtaposition of the language "permanent and total loss of use" with the words "or amputation." This suggests that as far as a "permanent and total loss of use" is concerned, the injury must be the functional equivalent of an amputation.

The reasoning in *Castro* also provides some insight into just how "severe" facial disfigurement must be in order to qualify as grave. Furthermore, while it would seem that nothing short of catatonia or the like would satisfy the statute's "acquired injury to the brain" provision, the Third Department, finding a triable issue, recently held that the "'permanent total disability' envisioned by the Legislature relates to the injured party's employability and not his or her ability to otherwise care for himself or herself and function in modern society."[11] The court reasoned that

> with the exception of death, paraplegia and quadriplegia, none of the other categories of "grave injury" would have the likely effect of preventing the injured party from engaging in routine household functions. In fact, many of the categories, such as loss of the nose, an ear, an index finger or multiple fingers or toes, deafness and permanent and severe facial disfigurement, would permit the injured party to perform a wide range of personal activities.[12]

To be sure, the plain meaning and legislative history of section 11 must be consistently applied. Before the decision in *Castro*, several appellate courts adopted the strict interpretation which has now been substantiated by *Castro*.[13] Since the decision, the Second Department has disposed of several third-party claims citing *Castro*,[14] as has at least one trial court.[15] It is likely that because of the clear mandate of *Castro*, the appellate courts will not be called upon to address many more "grave injury" cases since most will be dismissed at the trial level. Similarly, questionable cases may be settled with a nominal contribution from the employer.

Prior Decisions Impliedly Overruled

Castro also serves to overrule, by implication, two prior decisions of the Appellate Division, First Department concerning the definition of "grave injury." In *Banegaz v. F.L. Smithe Machine Co., Inc.*,[16] which is factually similar to *Castro*, the operator of an envelope folding machine suffered the complete amputation of his right ring finger and the partial amputation of his right pinky finger. He commenced a product liability action

against the manufacturer of the machine, which brought a third-party claim against his employer. The trial court denied the employer's motion to dismiss the third-party action under section 11, and on appeal the First Department affirmed, holding as follows:

> To read the phrase "loss of multiple fingers" to mean, as the employer urges, a total loss of multiple fingers would be to render superfluous the word "total" selectively used before the phrase "loss of use * * * of a [] * * * hand". Had the Legislature intended that the "loss of multiple fingers" must be "total" in order to qualify as a grave injury, it would have used that word immediately before that phrase"[17]

The argument rejected in *Banegaz*—that the "loss of multiple fingers" must be total—was the position accepted by the Court of Appeals in *Castro*. Moreover, *Castro* explicitly abjured the First Department's search for a modifier of the phrase "loss of multiple fingers," holding that, despite the statute's silence, the loss *must* be total. Thus, as the issue in *Castro* was identical, the holding of *Banegaz* has been undermined and should not be followed.

Although addressing a different injury, the First Department's decision in *Meis v. ELO Organization, LLC*[18] apparently has been overruled by *Castro* as well.[19] In *Meis*, the plaintiff plumber suffered the complete amputation of the thumb of his dominant hand in a work-related injury. He sued the premises owner and general contractor, which in turn impleaded his employer. The employer moved, unsuccessfully, to dismiss the third-party actions under section 11. On appeal, the First Department, in a 4-1 decision, affirmed, finding that "a jury should be allowed to examine the degree of plaintiff's impairment to determine if it is sufficiently 'grave' to allow third-party recovery against his employer."[20] Such holding is now at odds with *Castro* and probably would not withstand the scrutiny of the Court of Appeals, inasmuch as it contradicts both the plain meaning and legislative history of section 11.

Moreover, the "loss of a thumb" is not an enumerated "grave injury," and in fact, was specifically excluded from section 11. According to a reputable authority, the choice between inclusion of an index finger or a thumb was left to the plaintiff's bar, which ultimately opted for index finger.[21] Another source reports that prior to enacting section 11 the anatomical issues were discussed: the Governor wanted "thumb" in the list, whereas Assembly Speaker Silver favored "index finger." Ultimately, the Governor dropped the thumb and the impasse was broken.[22] Thus, *Meis* specifically endeavored to expand section 11 to include an injury that was purposefully excluded.

In addition, among the factors the *Meis* majority considered as defining "grave injury" was whether the plaintiff was able to return to his trade.[23] As the dissent explained, however, "that * * * is not the standard."[24] In fact, if that were the standard, then the *Meis* majority would have to agree with the holding of *Castro* because the plaintiff there eventually returned to the same job, performing the same work at the same die-cutting machine.

Lastly, the majority in *Meis* focused on the "loss of use" provision of section 11, noting that "[t]he statute does not require the total loss of a hand; it requires instead the loss of the hand's use."[25] This reasoning obviously ignores the plain meaning of the phrase "permanent and total" unmistakably employed to modify such loss. Interestingly, the same Court in *Banegaz* acknowledged this modifier and phraseology as such.[26] In *Meis*, however, the plaintiff *did not even allege*, much less prove, "permanent and total loss of use" of his hand; he claimed only limitations and restrictions of function.[27]

The sole dissenter in *Meis*, Justice Tom, criticized the majority's analysis as "ignoring the clear language of section 11 and expanding the statutory designated list," thereby "turn[ing] an exclusive legislative delineation into an illustrative and merely descriptive listing," which the Court "lack[ed] power to do."[28] This criticism evidently was well taken by the Court of Appeals, which seemed to borrow some of its reasoning and language. As Justice Tom correctly articulated, "the distinction [between injuries] lay well within the realm of legislative prerogative, leaving no room under these circumstances for judicial fiat."[29]

The Determination of Whether an Injury Is "Grave" Will Usually Be a Question of Law

In *Castro*, the determination of whether the plaintiff had sustained a "grave injury" was made as a matter of law, and this has been true in almost every case decided by the Appellate Division on the issue of "grave injury" as well. Indeed, the only case where the determination was not made as a matter of law was *Meis*, which as indicated, appears to have been overruled by *Castro*.

Like *Castro*, most of the reported decisions have dealt with motions for summary judgment on behalf of a third-party defendant/employer, seeking dismissal of the third-party claim for common-law indemnification on the ground that, as a matter of law, the plaintiffs did not sustain a "grave injury" as required by the statute. One such decision is *Dunn v. Smithtown Bancorp.*,[30] which held that as a matter of law the plaintiff's brain injury was not a grave injury.

In *Dunn*, the plaintiff was injured after falling from a ladder or scaffold while remodeling the defendant's bank. He alleged that among other things, he suffered cognitive deficits, mild expressive language deficits, and impaired problem-solving ability. The defendant subsequently impleaded the plaintiff's employer, seeking common-law indemnification, and moved for summary judgment on the ground that the plaintiff's injury resulted in a "permanent and total disability," as required by section 11 in order for a brain injury to constitute a grave injury. The employer cross-moved for summary judgment on the ground that the injury was not a grave injury. The Supreme Court denied the motion and granted the cross-motion, and adhered to its determination on renewal and reargument. The Appellate Division affirmed, stating as follows:

> The term "grave injury" as contained in Workers' Compensation Law § 11 has been described as a statutorily-defined threshold for catastrophic injuries, and it includes only those injuries listed in the statute and determined to be permanent (see, *Curran v. Auto Lab Serv. Ctr.*, 280 A.D.2d 636; *Kerr v. Black Clawson Co.*, 241 A.D.2d 686). Furthermore, the statutory list of grave injuries is intended to be exhaustive, not illustrative (see, *Curran v. Auto Lab Serv. Ctr.*, *supra*). The Supreme Court correctly determined that the respondent met its burden of proving by competent admissible evidence (see, *Gaddy v. Eyler*, 79 N.Y.2d 995; *Licari v. Elliott*, 57 N.Y.2d 230), that Dunn's injuries, although clearly serious, did not rise to the level of "grave" injuries within the meaning of Workers' Compensation Law § 11 (see, *Curran v. Auto Lab Serv. Ctr.*, *supra*).

In an analogous situation, where the Legislature abrogated certain rights under the "No-Fault" statute and limited recovery for non-economic loss to certain categories of statutorily-defined "serious injury," the Court of Appeals held that it is up to the court to determine whether the plaintiff has made a prima facie showing of serious injury within the meaning of the No-Fault law (Ins. Law. § 5102[d]). In *Licari v. Elliot*,[31] the Court stated as follows:

> Tacit in the legislative enactment is that any injury not falling within the new definition of serious injury is minor and a trial by jury is not permitted under the no-fault system. We are required then to pass on the threshold question of whether the plaintiff in this case has established a prima facie case that he sustained a serious injury within the meaning of the statute.

The Court further stated:

> while it is clear that the Legislature intended to allow plaintiffs to recover for non-economic injuries in appropriate cases, it had also intended that the Court first determine whether or not a prima facie case of serious injury had been established which would permit a plaintiff to maintain a common law cause of action in tort. . . .(citations omitted).
>
> . . .It is incumbent upon the court to decide in the first instance whether plaintiff has a cause of action to assert within the meaning of the statute . . . .Thus, to the extent that the Legislature has abrogated a cause of action, the issue is one for the court, in the first instance where it is properly raised, to determine whether the plaintiff has established a prima facie case of sustaining serious injury. . . .

Subsequently, in *Oberly v. Bangs Ambulance*,[32] the Court held that for a permanent loss of use of a body organ, member, function, or system to qualify as a "serious injury" under the No-Fault Law, the loss of use must be total. This is yet another indication that such statutes are to be narrowly construed in order to effectuate their legislative intent.

The same reasoning set forth in *Licari* would be applicable to section 11 as amended. Just as it is up to the Court, in the first instance, to determine whether a plaintiff has suffered a "serious injury" for purposes of the No-Fault law, it should be up to the court to make the determination of whether or not the injuries sustained by a plaintiff qualify as "grave injuries" as contemplated by section 11.

Summary Judgment Standard

In this regard, there has been some controversy over the applicable summary judgment standard on a motion to dismiss for lack of a grave injury under section 11. In *Ibarra v. Equipment Control, Inc.*,[33] which held that the loss of vision in one eye did not qualify as a "grave injury," the defendant manufacturer argued that the employer had the initial burden of showing, by evidentiary proof, that the plaintiff did not suffer a grave injury, and that since it failed to do so, the burden never shifted to the manufacturer to demonstrate otherwise. In support of this argument, the manufacturer relied on the holding of a Queens County Supreme

Court case called *Harris v. Metropolitan Life Insurance Co.*,[34] which applied the ordinary summary judgment burden standards to a section 11 dismissal motion. The Second Department rejected this argument, stating:

> The Legislature, in amending Workers' Compensation Law § 11, specifically determined that an employer will not be held liable for contribution or indemnification to any third person "unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury.'" Thus, it is clear that the burden falls on the third party seeking contribution or indemnification against an employer to establish a "grave injury." Admittedly, * * * a party seeking summary judgment must initially show a lack of triable issues of fact and it is only then that the burden shifts to the party opposing the motion. However, in cases involving Workers' Compensation Law § 11, as amended, the third party opposing the motion for summary judgment and seeking contribution or indemnification against an employer bears the ultimate burden of showing a "grave injury." At the very least, it must demonstrate the existence of a question of fact in this regard. This burden is not dependent on whether the party moving for summary judgment made a sufficient prima facie case as to the absence of a "grave injury." To the extent that *Harris v. Metropolitan Life Ins. Co.* * * * holds otherwise, we find it unpersuasive.

Although the grave injury issue in *Ibarra*, as now confirmed by *Castro*, was correctly decided, the Court's discussion respecting the ostensible shift in the parties' traditional summary judgment roles understandably created some confusion. Professor Alexander characterized the Court's holding as "questionable" since "[p]rima facie entitlement to summary judgment, whether upon the basis of the pleadings or actual evidence, must be shown by the moving party before any burden shifts to the opponent."[35] He further explained that section 11's allocation of the burden of proof to the third person should not affect the conventional criterion governing opposition to summary judgment because that burden

> properly construed, applies to the defendant's ultimate burden at trial on its claim over against the employer after plaintiff's case has been established. Until that point, the defendant/third person should be entitled to minimize plaintiff's injuries as part of its defense against the plaintiff's claim. It follows that the third person, in order to keep the employer in the case, should not be required to definitively prove, before trial, that the plaintiff has suffered a grave injury. To defeat an employer's motion for summary judgment, it should be sufficient for the third person to show that, on the evidence thus far produced, a jury reasonably could find the plaintiff's injuries to be grave. A triable issue of fact would thus exist.[36]

In its subsequent decision in *Fitzpatrick v. Chase Manhattan Bank*,[37] the Second Department resolved the confusion created by *Ibarra*. The Court explained that the traditional standards for summary judgment did indeed apply to motion to dismiss in a section 11 context, as follows:

> We note that certain dictum in *Ibarra v. Equipment Control*, *supra*, appears to suggest that a proponent of a motion for summary judgment seeking to dismiss a third-party action for want of grave injury is not obligated to prove, prima facie, that the plaintiff did not sustain a grave injury. This is not so and to this extent *Ibarra v. Equipment Control, supra*, should not be followed. Rather, a proponent of a motion for summary judgment dismissing a third-party complaint because the plaintiff did not sustain a grave injury, is required to make a prima facie showing of entitlement to judgment as a matter of law, much the same as a defendant seeking summary judgment dismissing a claim for non-economic damages for lack of a serious injury under the No-Fault Insurance Law (Insurance Law § 5102[d]; *see, Way v. Grantling*, 186 Misc. 2d 110, 714 N.Y.S.2d 639; *Harris v. Metropolitan Life Ins. Co.*, 183 Misc. 2d 431, 703 N.Y.S.2d 703).

Conclusion

Again, it will probably be the rare occasion where the issue of grave injury will reach a jury, especially in light of *Castro*. While there may be instances where such a determination may be open to varying interpretations—as, for example, whether facial disfigurement is "permanent" and "severe" or a head injury causes "permanent total disability"[38]—thereby creating an issue of fact, in almost all cases the question will be

addressed in the context of a summary judgment application by the employer who must show that the plaintiff's injury does not fit into the statutory definition of "grave." *Castro* teaches that section 11 easily lends itself to such a judicial determination in the first instance.

Endnotes

1. 30 N.Y.2d 143 (1972).
2. 91 N.Y.2d 577 (1998).
3. *Id.* at 585.
4. 96 N.Y.2d 398 (2001).
5. *Id.*
6. *Id.* at *2.
7. 91 N.Y.2d at 583.
8. *See* 2001 WL 721399 at *2 (emphasis in original).
9. *Id.*
10. It could be argued, consistently with section 11's plain meaning and legislative history, that the terms "permanent and total" apply not only to "loss of use" but to "amputation" as well. Indeed, it is conceivable that an "arm, leg, hand or foot" might be completely amputated in an accident, but later successfully reattached through surgical intervention. Under such circumstances, the "amputation" would not be "permanent and total," and thus, not "grave."
11. *Way v. George Grantling Chemung Contracting Corp.*, __ A.D.2d __, __ N.Y.S.2d __, 2001 WL 1636831, *2 (3d Dep't, Sept. 11, 2001).
12. *Id.*
13. *See, e.g., Bardouille v. Structure-Tone, Inc.*, 282 A.D.2d 635, 724 N.Y.S.2d 751 (2d Dep't 2001) (barely visible facial scarring and disfigurement of ear not "permanent and severe facial disfigurement" or "loss of ear"); *Bradt v. Lustig*, 280 A.D.2d 739, 721 N.Y.S.2d 114 (3d Dep't 2001), *appeal dismissed*, 96 N.Y.2d 823, 754 729 N.Y.S.2d 442, 2001 WL 557974 (May 10, 2001) (although WCL § 11 lists "paraplegia or quadriplegia" as grave injuries, paralysis contemplated by Legislature limited to permanent, not transient, paraplegia or quadriplegia); *Hussein v. Pacific Handy Cutter, Inc.*, 272 A.D.2d 223, 708 N.Y.S.2d 74 (1st Dep't 2000) (injury causing corrected visual acuity of 20/40 in one eye not "grave injury"); *Ibarra v. Equipment Control, Inc.*, 268 A.D.2d 13, 707 N.Y.S.2d 208 (2d Dep't 2000) (loss of vision in one eye not "grave injury"); *Hilbert v. Sahlen Packing Co.*, 267 A.D.2d 939, 701 N.Y.S.2d 564 (4th Dep't 1999), *appeal dismissed*, 95 N.Y.2d 790, 711 N.Y.S.2d 156 (particular facial and internal injuries, fractures and partial loss of hearing and vision not "grave"); *Barbieri v. Mount Sinai Hospital*, 264 A.D.2d 1, 706 N.Y.S.2d 8 (1st Dep't 1999) (facial scarring not "permanent and severe facial disfigurement" and cognitive deficits not "permanent total disability" under section 11); *Fichter v. Smith*, 259 A.D.2d 1023, 688 N.Y.S.2d 337 (4th Dep't 1999), *lv. denied/dismissed*, 94 N.Y.2d 994 (fracture of both heels not "grave injury").
14. *See, Dunn v. Smithtown Bancorp*, __ A.D.2d __, 730 N.Y.S.2d 150 (2d Dep't 2001) (cognitive deficits, mild expressive language deficits, and impaired problem-solving ability not "grave" injuries); *McCoy v. Queens Hydraulic Co., Inc.*, __ A.D.2d __, 729 N.Y.S.2d 733 (2d Dep't 2001) (loss of upper third of index finger not "grave"); *Fitzpatrick v. Chase Manhattan Bank*, 285 A.D.2d 486, 728 N.Y.S.2d 484 (2d Dep't 2001) (cognitive deficits, facial fractures and significant restriction of use in wrist not "grave").
15. *See Weaver v. Greenlee Textron, Inc.*, 2001 WL 940215 (Sup. Ct., Cortland Co. July 17, 2001) (total loss of sensation in right pinky and decreased sensation in right ring finger not "grave injury" under "loss of multiple fingers" provision).
16. 266 A.D.2d 113, 698 N.Y.S.2d 143 (1st Dep't 1999).
17. *Id.* at 113–14, 143–44.
18. 282 A.D.2d 247, 723 N.Y.S.2d 170 (1st Dep't 2001).
19. *See* Siegel, New York State Law Digest, No. 501, Sept. 2001, at pp. 1–2.
20. *Meis*, 282 A.D.2d at 248–49, 171–72.
21. Siegel, *A Flood of 1996 Procedure Bills: The Workers' Compensation (*Dole/Dow*) Bill*, N.Y.L.J., Outside Counsel, Oct. 7, 1996, at p. 6, col. 4.
22. Metz, *Court Rejects Suit on Finger Loss*, Newsday, June 29, 2001, at A20.
23. *See Meis*, 282 A.D.2d at 248.
24. *Id.* at 254.
25. *Id.* at 248.
26. *See Banegaz v. F.L. Smithe Machine Co., Inc.*, 266 A.D.2d at 113–14, 698 N.Y.S.2d at 143–44 (1st Dep't 1999).
27. The plaintiff's bill of particulars alleged "'significant deficits in functional capabilities of the right upper extremity'; phantom pain in the amputated area; weakness, numbness, and tingling in the fingertips, 'residual diffuse swelling in the fingers and some slight restriction of motion of approximately 5 degrees at all PIP and MIP joints of the second through the fourth digits'; 'acute sensitivity at the end of the thumb metacarpal area to touch'; 'injuries to the nerves, muscles, blood vessels, tendons, ligaments and other soft tissues in and around the affected areas'; and 'permanent loss of use and function of the affected areas as well as chronic and continual pain restriction and limitation of motion and muscle spasm'." His bill also asserted "that his injuries will result in premature osteoarthritic changes; that he is unable to engage in 'those usual and customary daily recreational activities that [he] pursued prior to the occurrence'; that he has been confined to bed and home continuously and intermittently; and has been incapacitated from his job from the date of the accident to the present." 282 A.D.2d at 248, 723 N.Y.S.2d at 171.
28. *See Meis*, 282 A.D.2d at 252–53.
29. *Id.* at 253. Consider the following similar language from *Castro*: "While it is doubtful that any list that purported to be the complete catalog of 'grave' injuries would—or ever could—meet with universal approval, that is not the question before us and we may not lightly alter this legitimate exercise of legislative prerogative." (2001 WL 721399, at *2).
30. __ A.D.2d __, 2001 WL 1096950 (2d Dep't, Sept. 17, 2001).
31. 57 N.Y.2d 230 (1982).
32. 96 N.Y.2d 295 (2001).
33. 268 A.D.2d 13, 707 N.Y.S.2d 208 (2d Dep't 2000).
34. 183 Misc. 2d 431, 703 N.Y.S.2d 703 (2000).
35. Alexander, *Addressing the 'Grave Injury' Issue by Motion for Summary Judgment*, N.Y.L.J., Nov. 20, 2000, p. 3.
36. *Id.*
37. 285 A.D.2d 486, 728 N.Y.S.2d 484 (2d Dep't 2001).
38. *See, e.g., Way v. Grantling*, 2001 WL 1636831.

Barbara D. Goldberg is a partner and Christopher Simone is an associate at Mauro Goldberg & Lilling, LLP (www.mglappeals.com), an appellate practice firm in Great Neck, New York, which represented the third-party defendant Southern Container Corp. on appeal in *Castro*.

Negligent Defendants Entitled to Article 16 Apportionment Against Intentional Tortfeasors

By John M. Shields

The Court of Appeals has further clarified apportionment pursuant to CPLR Article 16 for cases involving joint and several liability. In *Chianese v. Meier*,[1] the Court held that a negligent defendant whose share of fault is fifty percent or less is entitled to Article 16 apportionment against intentional tortfeasors. In a situation involving allegations of inadequate building security, the Court held that the fact that an assailant had acted intentionally did not elevate the purely negligent behavior of the other actors to intentional conduct, thus entitling the defendant building owner and manager to Article 16 protection. Accordingly, apportionment of damages for personal injuries is permissible between a negligent landlord and a nonparty assailant.[2]

Article 16 Apportionment for Cases Involving Joint and Several Liability

Article 16 was enacted as part of tort reform legislation attempting to balance various interests.[3] The purpose of the statute was to remedy the inequities created by the common law rule of joint and several liability on low-fault, deep-pocket defendants.[4] Prior to the enactment of Article 16, a joint tortfeasor could be held liable for an entire judgment, regardless of the relative share of culpability.[5] Thus, joint and several liability provided an incentive to sue "deep-pocket" defendants, including municipalities, even if they are only minimally involved with the injury-causing event. In 1986 the rule of joint and several liability was amended "to assure that no defendant who is assigned a minor degree of fault can be forced to pay an amount grossly out of proportion to that assignment."[6]

Section 1601 modifies the common law rule of joint and several liability by making a joint tortfeasor whose share of fault is fifty percent or less only liable for plaintiff's non-economic loss to the extent of that tortfeasor's share of the total non-economic loss.[7] Minimal fault tortfeasors are liable only for their actual assessed share of responsibility, rather than the full amount of the non-economic loss.[8] Although Article 16 was intended to remedy the inequities created by joint and several liability where one defendant is found to be minimally at fault, "deep-pocket" defendants, including municipalities, remain subject to various exceptions that preserve the traditional rule.[9]

Initially, CPLR 1602 establishes that the limitations created by the general rule in section 1601 do not apply to cases involving the use or operation of motor vehicles, although municipalities are entitled to protection for accidents involving fire or police vehicles. Additionally, section 1602(2)(iv) excludes apportionment protection for "any liability arising by the reason of a non-delegable duty." The plain language of CPLR 1602(2)(iv) clearly indicates that the legislature did not intend to create an exception to the apportionment rule, but rather 1602(2)(iv) was drafted to preserve the principles of vicarious liability and prevent defendants from improperly disclaiming responsibility for non-delegable duties.[10]

"Prior to the enactment of Article 16, a joint tortfeasor could be held liable for an entire judgment, regardless of the relative share of culpability."

In *Rangolan*, the plaintiff, who had cooperated as a confidential informant against other inmates, was seriously beaten by an inmate while incarcerated, despite the fact that the plaintiff's inmate file specifically cautioned that he was not to be housed with his assailant.[11]

The Court in *Rangolan* held that the defendant was permitted to seek apportionment of its liability with another tortfeasor. The fact that the precise "shall not apply" language drafted by the Legislature to delineate the exceptions to the rule is absent in 1602(2)(iv) indicates that the Legislature did not intend to include an exception for liability based on a breach of a non-delegable duty.[12]

CPLR 1602(2)(iv) was drafted to prevent defendants from disclaiming liability for duties for which they are responsible by delegating such responsibilities to another party. When a municipality delegates a duty for which it is legally responsible, such as the maintenance of its roads, the municipality remains vicariously liable for the negligence of the contractor, and cannot rely on CPLR 1601(1) to apportion liability with regard to its contractor.[13] Similarly, CPLR 1602(2)(iv) prohibits an employer from disclaiming *respondeat superior* liability by arguing that an employee was the actual tortfeasor.[14] However, "nothing in CPLR 1602(2)(iv) precludes a municipality, landowner or employer from seeking apportionment between itself and other tortfeasors for

whose liability it is not answerable."[15] Reading 1602(2)(iv) as an exception would impose joint and several liability on municipalities, the precise entities that the rule was designed to protect.[16]

Intentional Act of Non-Party Tortfeasor Does Not Bring Pure Negligence Action Within 1602(5) Exclusion

Section 1602 excepts certain types of actions from the ambit of section 1601, including "actions requiring proof of intent."[17] This exception applies to prevent defendants who are found to have committed an intentional tort from invoking the benefits of section 1601. In *Chianese*, a tenant sued her landlord and building manager for negligence, alleging inadequate building security, after she was assaulted inside the building. The attacker was later apprehended and convicted of a series of crimes, including the attack on the plaintiff. A jury found the landlord and manager fifty percent responsible for the assault, and apportioned damages on that basis. The plaintiff in *Chianese* argued that her negligence claim against the defendants, because it necessarily involved an intentional act by her attacker, was also an "action requiring proof of intent," thus precluding apportionment by the defendants. The defendants countered that the issue was resolved in their favor in *Rangolan*, and in any event that denying apportionment would contravene both the words and the purpose of the statute.

In *Concepcion v. The New York City Health and Hospitals Corp.*,[18] the plaintiff was stabbed by an outpatient while visiting a hospital. Following a threatening confrontation with the outpatient, plaintiff informed a nurse about the incident, who assured the plaintiff that she would alert security.[19] The nurse failed to inform security and the plaintiff was assaulted.[20] The court in *Concepcion* held that when the intentional tortfeasor is not a named defendant, eliminating intent as a required element of the action, 1602 apportionment applies.[21]

The court in *Concepcion* held that "(t)here is nothing in the exclusion that would indicate that it was intended to preclude a negligent tortfeasor from seeking apportionment from an intentional tortfeasor. Moreover, any further extension of the exclusion would defeat the purpose of Article 16, which is to protect low-fault, deep-pocket defendants from being fully liable pursuant to joint and several liability rules."[22]

Because plaintiff's negligence claim is not an "action requiring proof of intent," section 1602(5) on its face does not apply to preclude apportionment of liability.[23] The defendants' liability, in *Chianese*, did not depend on proof of the attacker's state of mind.[24] The plaintiff merely had to prove that she was injured as a result of the defendants' failure to provide adequate security on the premises. The mere fact that a nonparty tortfeasor acted intentionally does not bring a pure negligence action within the scope of the exclusion.[25]

While section 1602(5) forecloses intentional tortfeasors from seeking apportionment irrespective of the mental state of any other tortfeasors, section 1602(11) precludes apportionment with any parties found to have acted knowingly or intentionally and in concert.[26] The primary purpose of 1602(11) is to prevent apportionment among multiple intentional tortfeasors, when dividing liability among them would place them under the section 1601 fifty percent guideline.[27] This interpretation of section 1602(5) is consistent with the exception to apportionment set out in section 1602(11) and does not render section 1602(11) duplicative.[28]

The Court's role in matters of statutory interpretation is to implement the will of the Legislature.[29] What little legislative history there is accords with the reading of section 1602(5), which indicates that Article 16 preserves joint and several liability for instances where the defendant's acts are willfully performed or intentionally performed in concert with others.[30] Conversely, there is no indication in the legislative history that section 1602(5) was intended to create what would amount to a broad exception to apportionment at the expense of the low-fault, merely negligent landowners and municipalities, the very parties Article 16 intended to benefit.[31]

In *Chianese,* under plaintiff's proposed reading of the statute, the right of a low-fault defendant to benefit from apportionment would depend entirely on the nature of the culpability of the third-party tortfeasor.[32] A negligent defendant could apportion liability with a negligent or reckless third-party tortfeasor, but not an intentional tortfeasor.[33] Such a result is not only illogical but also inconsistent with the legislative intent and chief remedial purpose of Article 16.[34]

Conclusion

Article 16 was to remedy the inequities created by joint and several liability. Accordingly, the Court of Appeals, in *Chianese*, held that a negligent defendant is entitled to apportionment against intentional tortfeasors. The fact that an assailant acted intentionally does not elevate the purely negligent behavior of the other actors to intentional conduct. Accordingly, in negligent building security cases, apportionment of damages for personal injuries is permissible between a negligent landlord and a nonparty assailant.

Endnotes

1. 2002 N.Y. LEXIS 1615.
2. *Id.* at *8-11.
3. *Id.* at *4-5, citing *Morales v. County of Nassau*, 94 N.Y.2d 218, 224, 703 N.Y.S.2d 61 (1999).

4. *Rangolan v. County of Nassau*, 96 N.Y.2d 42, 46, 725 N.Y.S.2d 611 (2001).
5. *Rangolan*, 96 N.Y.2d at 46.
6. *Id.*
7. *Chianese v. Meier*, 2002 N.Y. LEXIS 1615 at *5.
8. *Id.*
9. *Id.*; *Rangolan*, 96 N.Y.2d at 46.
10. *Rangolan*, 96 N.Y.2d at 44-47; *Grant v. City of New York*, 284 A.D.2d 302, 725 N.Y.S.2d 386, 387–88 (2d Dep't 2001); *Rucker v. Town of Somerset*, 288 A.D.2d 822, 732 N.Y.S.2d 493, 494 (4th Dep't 2001).
11. *Rangolan*, 96 N.Y.2d at 45.
12. *Id.* at 47–48.
13. *Id.* at 46-47, citing *Faragiano v. Town of Concord*, 96 N.Y.2d 776, 725 N.Y.S.2d 609 (2001).
14. *Id.* at 47.
15. *Id.*, citing *Faragiano*, 96 N.Y.2d 776; *Grant v. City of New York*, 725 N.Y.S.2d at 388 (2d Dep't 2001); *Denio v. State of New York*, 283 A.D.2d 937, 723 N.Y.S.2d 914, 915 (4th Dep't 2001).
16. *Id.* at 48.
17. *Chianese v. Meier*, 2002 N.Y. LEXIS 1615 at *5.
18. 284 A.D.2d 37, 729 N.Y.S.2d 478 (1st Dep't 2001).
19. *Concepcion*, 729 N.Y.S.2d at 479.
20. *Id.*
21. *Id.* at 480; *Roseboro v. N.Y.C. Transit Auth.*, 286 A.D.2d 222, 729 N.Y.S.2d 472 (1st Dep't 2001) (plaintiff struck by a subway train while attempting to avoid an assault by three men); *Maria E. v. 599 West Associates*, 188 Misc. 2d 119, 726 N.Y.S.2d 237 (Sup. Ct., Bronx Co. 2001) (assault victim sued apartment building for negligent maintenance, operation and control of entrance to premises).
22. *Concepcion*, 729 N.Y.S.2d at 480.
23. *Chianese v. Meier*, 2002 N.Y. LEXIS 1615 at *8.
24. *Id.*
25. *Id.*; *Roseboro*, 286 A.D.2d at 224; *Concepcion*, 284 A.D.2d at 39; *Agoado Realty Corp. v. United Int'l Ins. Co.*, 95 N.Y.2d 141, 146, 711 N.Y.S.2d 141 (2000); *Siler v. 146 Montague Assocs.*, 228 A.D.2d 33, 652 N.Y.S.2d 315, *appeal dismissed*, 90 N.Y.2d 927 (1997).
26. *Chianese*, 2002 N.Y. LEXIS 1615 at *9.
27. *Id.*
28. *Id.*
29. *Id.* at *7.
30. *Id.* at *9-10.
31. *Id.* at *10; *Rangolan v. County of Nassau*, 96 N.Y.2d at 48 (2001).
32. *Chianese*, 2002 N.Y. LEXIS 1615 at *10.
33. *Id.* at *10-11, citing *Siler v. 146 Montague Assocs.*, 228 A.D.2d at 40 (2d Dep't 1997).
34. *Id.* at *11.

John M. Shields is an Assistant Attorney General in the Suffolk Regional Office. Any opinions expressed in the article are exclusively those of the author and not the Office of the Attorney General.

Complaint Letters or Conflicting Expert Opinions Regarding the Decision to Install a Traffic Control Device Do Not Affect the Qualified Immunity Afforded to a Municipality

By John M. Shields

Recently the Court of Appeals confirmed that the decision to install a traffic control device is a purely discretionary governmental function, which is completely protected from liability by qualified immunity.[1] The Court reiterated that a recommendation from a private engineering firm that a signal be installed at a particular location does not create liability for a municipality. Something more than a choice between conflicting opinions of experts is required before a governmental body may be held liable for negligently performing its traffic planning function. The Court in *Affleck* went further to hold that letters of complaint to a municipality regarding the necessity of installing a traffic signal do not alter the affect of the judgment by an authorized traffic planning authority.

It is well-settled that a municipality has a non-delegable duty to maintain its roadways in a reasonably safe condition.[2] It is similarly well-established that a municipality is not an insurer of the safety of its roadways. "The design, construction and maintenance of public highways is entrusted to the sound discretion of municipal authorities and, so long as a highway may be said to be reasonably safe for people who obey the rules of the road, the duty imposed upon the municipality is satisfied."[3] Additionally, the state is not required to undertake expensive reconstruction of highways merely because the highway design standards have been amended or upgraded since the time of the original construction of a highway.[4]

The decision to install a traffic control device is a purely discretionary governmental function which will not expose a municipality to liability.[5] However, if a municipality determines that a traffic control device is necessary to remedy a dangerous condition, the municipality should act within a reasonable time frame to correct the condition.[6] If there is an unjustifiable delay in implementing a remedial plan by the municipality, then the municipality may be subject to liability. Even assuming that the state was negligent in highway design or maintenance, the state will not be liable for an accident unless its negligence was the proximate cause of the accident.[7]

In the field of traffic design, a municipality is protected from liability arising out of highway planning decisions by qualified immunity.[8] It is well-settled that under qualified immunity, a governmental entity may not be liable for highway planning decisions unless its study of traffic conditions is plainly inadequate or there is no reasonable basis for its plan.[9]

The *Affleck* case involved an automobile accident in which plaintiff's decedents were struck by an oncoming car while attempting to make a left-hand turn into an entrance to a shopping center in Nassau County.[10] In addition to instituting an action against the drivers and owners of the other cars involved in the accident, plaintiff administrator sued the County of Nassau, alleging that the county negligently failed to conduct traffic studies of the area in question, relying instead on a private study. The plaintiff further asserted that the county's decision not to install a traffic signal at the intersection in question was unreasonable.

The Court of Appeals held that since the county considered the necessity of a traffic signal at the intersection and decided that a signal was unnecessary, the county could not be held liable for failing to install a traffic signal. The Court went further to hold that letters received by the county suggesting that they install a traffic signal did not cast doubt on the considered determination by the county not to install a signal.

In response to customer reports of difficulty exiting the parking lot, the shopping center commissioned a private engineer to conduct a study of traffic conditions at the intersection. Approximately nine months before the accident, the private engineer presented the study to the county with its recommendation that a traffic light be installed. Although the private engineer's report focused primarily on the difficulties faced by drivers attempting to exit the shopping center's parking lot, it also analyzed traffic conditions for drivers entering the parking lot from the street where the accident occurred. The engineer's report indicated that, at all times of the day, conditions for drivers making left-hand turns into the parking lot were within acceptable parameters as set by the Federal Highway Administration of the U.S. Department of Transportation.

According to undisputed affidavits, the county relied on the private report, as well as its own studies of traffic conditions at the intersection, to determine whether a traffic signal should be installed.[11] A traffic

survey or field check was performed at the location in 1992, 1993 and 1994. Additionally, after receiving the private report, the county additionally conducted a number of its own independent on-site observations and reviewed motor vehicle accident data. As a result of the above investigation and review, the county Public Works authorities determined that a traffic signal at the intersection was unwarranted. The county did, however, remove trees and a fence to improve visibility for drivers exiting the driveway and installed warning signs for drivers approaching the driveway. The Court in *Affleck* held that the county adequately examined the need for a signal and did not overlook the issue of left-turn safety. The county reviewed the relevant data, including its own independent investigation, and made observations of traffic moving in every direction at that location.

The Court in *Affleck* held that neither the letters urging the county to install a signal nor the recommendation by the private engineer that one be installed raises an issue of fact concerning the reasonableness of the county's determination.[12] Although the letters may have alerted the county to a situation warranting study, such letters do not substitute for, nor do they cast doubt upon, the considered determination by a duly authorized traffic planning authority.

Moreover, a recommendation from a private engineering firm that a signal be installed at a particular location does not, itself, raise a triable issue of fact.[13] Something more than a mere choice between conflicting expert opinions is required before the state or one of its agencies may be charged with a failure of its duty to plan highways for the safety of the traveling public.[14] The plaintiff must show not merely that another option was available but also that the plan adopted lacked a reasonable basis. Strong public policy considerations warrant that the qualified immunity doctrine shall be applied in circumstances where a governmental body has invoked the expertise of qualified employees.[15] In *Affleck*, the county adequately demonstrated that its decision not to install a traffic signal was based on a weighing of factors that implicated broader concerns than those addressed in the private study.

Conclusion

Although a municipality has a duty to maintain its roadways in a reasonably safe condition, the decision to install a traffic control device is a purely discretionary governmental function, which will not expose a municipality to liability. In the field of traffic design, a municipality is protected from liability arising out of highway planning decisions by qualified immunity. The Court of Appeals, in *Affleck*, held that neither letters to a municipality suggesting the installation of a traffic signal, nor the recommendation by a private engineer that one be installed, raise an issue of fact concerning the reasonableness of the municipality's engineering determination. While letters may alert the municipality to a condition worthy of attention, such letters do not replace or challenge the considered highway planning determination.

Endnotes

1. *Affleck v. Buckley*, 96 N.Y.2d 553, 732 N.Y.S.2d 625 (2001).
2. *Ciasullo v. Town of Greenville*, 275 A.D.2d 338, 712 N.Y.S.2d 579, 581 (2d Dep't 2000); *Schuster v. Town of Hempstead*, 263 A.D.2d 473, 692 N.Y.S.2d 721, 722 (2d Dep't 1999); *Vizzini v. State of New York*, 278 A.D.2d 562, 717 N.Y.S.2d 415, 416 (3d Dep't 2000); *Ring v. State of New York*, 270 A.D.2d 788, 705 N.Y.S.2d 427 (3d Dep't 2000); *Zecca v. State of New York*, 247 A.D.2d 776, 769 N.Y.S.2d 413 (3d Dep't 1998).
3. *Ciasullo*, 712 N.Y.S.2d at 581.
4. *Vizzini*, 717 N.Y.S.2d at 417.
5. *Onorato v. City of New Yo*rk, 258 A.D.2d 633, 684 N.Y.S.2d 637 (2d Dep't 1999); *O'Brien v. City of New York*, 231 A.D.2d 698, 647 N.Y.S.2d 561, 562 (2d Dep't 1996).
6. *Id.*; *Ring* at 789.
7. *Hamilton v. State of New York*, 277 A.D.2d 982, 716 N.Y.S.2d 529, 530–31 (4th Dep't 2000); *Ring* at 788; *Dumond v. State of New York*, 259 A.D.2d 1033, 689 N.Y.S.2d 898 (4th Dep't 1999).
8. *McCabe v. Town of Brookhaven*, 735 N.Y.S.2d 608 (2d Dep't 2001); *Quigley v. Village of Garden City*, 276 A.D.2d 681, 714 N.Y.S.2d 733, 734 (2d Dep't 2000); *Schuster v. Town of Hempstead*, 692 N.Y.S.2d at 722 (2d Dep't 1999).
9. *McCabe*, 735 N.Y.S.2d at 609; *Affleck v. Buckley*, 732 N.Y.S.2d at 627 (2001) (citing *Weiss v. Fote*, 7 N.Y.2d 579, 200 N.Y.S.2d 409 (1960) and *Friedman v. State of New York*, 67 N.Y.2d 271, 502 N.Y.S.2d 669 (1986)); *Quigley*, 714 N.Y.S.2d at 734; *Schuster v. Town of Hempstead*, 692 N.Y.S.2d at 722 (2d Dep't 1999); *Galvin v. State of New York*, 245 A.D.2d 418, 666 N.Y.S.2d 673, 674 (2d Dep't 1997); *Romeo v. State of New York*, 273 A.D.2d 934, 709 N.Y.S.2d 783, 784 (4th Dep't 2000); *Dumond*, 689 N.Y.S.2d at 898; *Light v. State of New York*, 250 A.D.2d 988, 672 N.Y.S.2d 543, 544 (3d Dep't 1998); *Zecca v. State of New York*, 769 N.Y.S.2d at 414 (3d Dep't 1998).
10. *Affleck*, 732 N.Y.S.2d at 626.
11. *Id.* at 627.
12. *Id.*
13. *Id.* at 628.
14. *Id* at 627–28; *McCabe v. Town of Brookhaven*, 735 N.Y.S.2d at 609 (2d Dep't 2001); *Schuster v. Town of Hempstead*, 692 N.Y.S.2d at 723 (2d Dep't 1999); *Monfiston v. County of Suffolk*, 248 A.D.2d 518, 670 N.Y.S.2d 53, 54 (2d Dep't 1998); *O'Brien v. City of New York*, 647 N.Y.S.2d at 562 (2d Dep't 1996); *Romeo v. State of New York*, 709 N.Y.S.2d at 785 (4th Dep't 2000); *Chary v. State of New York*, 265 A.D.2d 913, 696 N.Y.S.2d 331, 332 (4th Dep't 1999); *Light v. State of New York*, 672 N.Y.S.2d at 544 (3d Dep't 1998).
15. *Romeo*, 709 N.Y.S.2d at 785 (citing *Weiss v. Fote*, 7 N.Y.2d 579, 200 N.Y.S.2d 409 (1960) and *Friedman v. State of New York*, 67 N.Y.2d 271, 502 N.Y.S.2d 669 (1986)).

John M. Shields is an Assistant Attorney General in the Suffolk Regional Office. Any opinions expressed in the article are exclusively those of the author and not the Office of the Attorney General.

Governmental Immunity for Discretionary Actions—Unless a Special Relationship Is Proven

By John M. Shields

The state is protected by immunity for actions or decisions requiring the exercise of discretion. Negligent performance of a governmental function, such as the protection and safety of the public, including decisions relating to police protection and the incarceration or supervision of escaped or released prisoners or parolees, cannot result in liability without the demonstration of a "special relationship" between the injured party and the state. In order for liability to attach, the plaintiff must demonstrate that the state, through direct personal contact, assumed an affirmative duty to act on the injured party's personal behalf, which was conveyed to the injured party and subsequently relied upon. The critical element of the special relationship exception, and the one most difficult to prove, is the plaintiff's justifiable reliance on the government's assurances. The plaintiff must prove that the defendant's conduct actually lulled her into a false sense of security, caused her to either relax her vigilance or forgo other means of protection, and thereby placed her in a worse position than she would have been in otherwise.

"The critical element of the special relationship exception, and the one most difficult to prove, is the plaintiff's justifiable reliance on the government's assurances."

The state has always maintained its immunity for governmental actions requiring expert judgment or the exercise of discretion.[1] This immunity is absolute when the action involves the conscious exercise of discretion of a judicial or quasi-judicial nature.[2] This absolute immunity reflects the value judgment that the public interest in having officials free to exercise their discretion unhampered by the fear of retaliatory lawsuits outweighs the benefits to be had from imposing liability.[3] Whether immunity applies to a discretionary act depends on whether the position entails making decisions based on an "exercise of reasoned judgment which could typically produce different acceptable results."[4] Judicial and quasi-judicial acts are even protected when the decision and results are incorrect or tainted by improper motives.[5] To hold otherwise would subject the state and local municipalities to massive liability, placing an impossible burden on state and local government.

Logically, other neutrally positioned government officials who are delegated judicial or quasi-judicial functions are entitled to the same immunity and protections for their acts.[6] For example, determinations pertaining to parole and its revocation are strictly sovereign and quasi-judicial in nature and, accordingly, the state, in making such determinations, is absolutely immune from tort liability.[7]

In *Davis*, the court held that "the decision of when and how to execute a warrant is fundamentally a discretionary act, not a ministerial one," and therefore, the state is immune from liability arising out of the execution of warrants.[8] The court in *Davis* also noted that the true nature of the claim was the negligent performance of a governmental function.[9] The challenged conduct in *Davis* involved precisely the type of policy-rooted decision-making that governmental immunity is designed to safeguard. It is a well-settled principle that an action of a governmental employee is protected by immunity if the functions and duties of the particular position inherently entail the exercise of discretion and judgment.[10] Discretion is indicated if the powers are to be executed or withheld according to a governmental agent's own view of what is necessary and proper under the circumstances.[11]

Special Relationship Required to Overcome Governmental Immunity

In *Sebastian v. State of New York*,[12] the Court of Appeals held that, absent a special relationship between the injured party and the state, tort liability cannot be fixed for the state's performance of a governmental function.[13] Unless *precise assurances were made to the specific individual*, there can be no liability.[14] The claimant must demonstrate that the state, through *direct personal contact assumed an affirmative duty to act on the injured party's personal behalf, which was conveyed to the injured party, and subsequently relied upon*.[15]

In *Clark v. Town of Ticonderoga*,[16] the plaintiff sued to recover for injuries sustained by the decedent, which she claimed resulted from the failure of the town police department to provide her with adequate police protection from her estranged husband. In an effort to avoid the operation of the general rule that a municipality may not be held liable for injuries resulting from a failure to provide police protection, plaintiff asserted the

existence of a "special relationship."[17] In order to establish a special relationship the plaintiff must prove: 1) an assumption by the municipality of an affirmative duty to act on her behalf; 2) knowledge on the part of the municipality's agents that inaction could lead to harm; 3) direct contact between the parties; and 4) the plaintiff's justifiable reliance on the assurances.[18]

In *Clark*, after a series of threatening events involving the plaintiff and her estranged husband, criminal charges were filed and a temporary protection order was issued. When an officer delivered a copy of the temporary order of protection to plaintiff, the officer assured the plaintiff that the police would "keep an eye on" her.[19] Subsequently, the plaintiff's husband confronted her and was charged with violating the terms of the temporary order of protection, but was released on his own recognizance. The plaintiff later saw her husband in the area, but she did not call the police because she realized that the police could not do anything at that time. Tragically, her husband arrived shortly thereafter and repeatedly stabbed the plaintiff.

Justifiable Reliance Necessary for Special Relationship

Although the plaintiff in *Clark* was able to prove that a special relationship existed, she was unable to prove that she had justifiably relied on the town's undertaking. Because the plaintiff's evidentiary showing satisfied the first three of the special relationship requirements, the court focused on the fourth and most burdensome element, plaintiff's justifiable reliance on the municipality's undertaking.[20] "Providing the essential causative link between the special duty assumed by the municipality and the alleged injury, the justifiable reliance requirement goes to the core of the special relationship exception."[21]

The reliance that is required is more than a mere hope or belief that the defendants could provide her with adequate protection.[22] The plaintiff must prove that the defendant's conduct actually lulled her into a false sense of security, induced her to either relax her own vigilance or forgo other means of protection, and thereby placed her in a worse position than she would have been in otherwise. When the plaintiff's husband was released on his own recognizance, the plaintiff was aware that he was not in custody and that the police were unable to take any further action against him unless he further violated the order of protection or committed an independent crime. The plaintiff could expect no police protection beyond the officer's intermittent conduct of checking on her.

The plaintiff also attempted to assert that the defendant erred in its prosecutorial decisions concerning what crimes to charge her husband with.[23] Even assuming her husband's conduct could have supported more substantial charges than he received, the ultimate decisions concerning prosecution and the terms of release of a criminal defendant are beyond the control of police agencies or officers, and protected by immunity. Ultimately, although the plaintiff successfully demonstrated the first three elements, her failure to prove justifiable reliance warranted a dismissal of the action.[24]

The state is immune from negligence claims concerning purely governmental functions undertaken for the protection and safety of the public pursuant to the general police powers.[25] The confining and releasing of individuals is a quintessentially governmental activity.[26] The allowance of ordinary tort liability against the state for the injuries resulting from escaped or released prisoners, absent a special relationship, would otherwise deter prevailing rehabilitation and release goals of society.[27]

The governmental function doctrine is based primarily upon separation of powers principles.[28] The legislative and executive branches of government, rather than the judiciary, have the unique responsibility to allocate scarce public resources.[29] Second-guessing of the discretionary priorities set and resources allocated by the other two branches of government is not appropriate.[30]

Similarly, it is well-settled that the incarceration of prisoners is a governmental function.[31] A claim based upon the negligent supervision of parolees also requires a special duty to protect the claimants as identified individuals and the reliance on the part of the claimants on specific assurances of protection.[32] In *Balsam*, after police responded to an accident scene, made a risk assessment and departed to handle other traffic duties, another accident occurred. The Court held that traffic control decisions by police were governmental in nature. "That the function has traditionally been assumed by police rather than by private actors is a tell-tale sign that the conduct is not proprietary in nature."[33]

The courts have also applied the special duty and governmental function analysis in dismissing claims by victims of escaped prisoners, holding that the duty to safeguard prisoners was a governmental duty owed to the public at large, not to individuals.[34] The court in *Nadal* discussed the absence of liability for escapes by prisoners and the important public policy which encourages prison officials to extend prisoners' privileges associated with lessened levels of security, in order to rehabilitate inmates and to prepare them for their eventual release into society.[35] In *Santangelo v. State of New York*,[36] the rationale for non-liability was broadened by the Appellate Division to one of *absolute immunity*.[37]

The special duty limitation on liability represents a sensible middle ground between no liability at all for governmental functions and liability without practical limits.[38] The special duty limitation permits liability where the government knows of the danger to specific, identified individuals and is in a practical position to prevent the harm.[39]

Conclusion

Absent a special relationship, tort liability cannot be fixed for the state's performance of a governmental function. The plaintiff must demonstrate that the state, through direct personal contact, assumed an affirmative duty to act on the injured party's personal behalf, which was conveyed to the injured party, and subsequently relied upon. Courts have recently focused on the most critical element of the special relationship, the injured party's justifiable reliance on the government's assurances. The plaintiff must prove that the defendant's conduct actually placed him in a more dangerous condition by creating a false sense of security, causing him to relax his guard and not pursue other options of protection.

Endnotes

1. *Arteaga v. State of New York*, 72 N.Y.2d 212, 214, 532 N.Y.S.2d 57 (1988).
2. *Id.*
3. *Id.*; *Davis v. State of New York*, 257 A.D.2d 112, 691 N.Y.S.2d 668 (3d Dep't 1999).
4. *Id.*
5. *Semkus v. State of New York*, 272 A.D.2d 74, 708 N.Y.S.2d 288 (1st Dep't 2000); *Tarter v. State of New York*, 68 N.Y.2d 511, 517–18, 510 N.Y.S.2d 528 (1986).
6. *Tarter*, 68 N.Y.2d at 518.
7. *Silmon v. Travis*, 95 N.Y.2d 470, 718 N.Y.S.2d 704 (2000); *Semkus*, 708 N.Y.S.2d at 288; *Davis*, 691 N.Y.S.2d at 670–71; *Tarter*, 68 N.Y.2d at 518-19.
8. *Davis*, 691 N.Y.S.2d at 670–71.
9. *Id.*, citing *Cuffy v. City of New York*, 69 N.Y.2d 255, 513 N.Y.S.2d 327 (1986).
10. *Id*.
11. *Davis*, 691 N.Y.S.2d at 671.
12. 93 N.Y.2d 790, 698 N.Y.S.2d 601 (1999).
13. *Sebastian*, 93 N.Y.2d at 793; *D'Avolio v. Prado*, 277 A.D.2d 877, 715 N.Y.S.2d 827 (4th Dep't 2000); *Clinger v. New York City Transit Auth.*, 85 N.Y.2d 957, 959–960, 626 N.Y.S.2d 1008 (1995); *De La Paz v. City of New York*, 2002 N.Y. App. Div. LEXIS 4853 at *2; *McEnaney v. State of New York*, 267 A.D.2d 748, 700 N.Y.S.2d 258 (3d Dep't 1999) (campus security against third-party attacks); *Cardona v. County of Albany*, 188 Misc. 2d 440, 728 N.Y.S.2d 355 (Sup. Ct., Albany Co. 2001); *Mohamed v. Town of Greenbush*, 229 A.D.2d 820, 646 N.Y.S.2d 424 (3d Dep't 1996); *Marilyn S. v. City of New York*, 134 A.D.2d 583 (2d Dep't 1987), *aff'd*, 73 N.Y.2d 910, 912, 539 N.Y.S.2d 293 (1989). Similarly, absent a special relationship, liability cannot be imposed on a governmental agency for failure to enforce a statute or regulation. *Urbiera v. Housing Now Co.*, 184 Misc. 2d 846, 709 N.Y.S.2d 910 (Sup. Ct., Bronx Co. 2000); *Shahin v. City of Yonkers*, 254 A.D.2d 346, 678 N.Y.S.2d 668 (2d Dep't 1999); *Weiss v. City of New York*, 260 A.D.2d 249, 688 N.Y.S.2d 533 (2d Dep't 1999); *Gonzalez v. Barbieri*, 271 A.D.2d 407, 705 N.Y.S.2d 399 (2d Dep't 2000); *Rickson v. Town of Schuyler Falls*, 263 A.D.2d 863, 694 N.Y.S.2d 213 (3d Dep't 1999); *Josyln v. Village of Sylvan Beach*, 256 A.D.2d 1166, 682 N.Y.S.2d 781 (4th Dep't 1999); *Lindsay v. N.Y.C. Housing Auth.*, 1999 U.S. Dist. LEXIS 1893 (E.D.N.Y. 1999).
14. *D'Avolio*, 715 N.Y.S.2d at 829.
15. *Id.*
16. 7 N.Y.S.2d 412 (3d Dep't 2002).
17. *Id.* at 413–14; *Grieshaber v. City of Albany*, 279 A.D.2d 232, 234, 720 N.Y.S.2d 214 (3d Dep't 2001).
18. *Clark*, 7 N.Y.S.2d at 414 (citing *Cuffy v. City of New York*, 69 N.Y.2d 255, 513 N.Y.S.2d 327 (1986)); *Miller v. City* of *New York*, 277 A.D.2d 363, 717 N.Y.S.2d 198 (2d Dep't 2000); *Greishaber*, 279 A.D.2d at 234.
19. *Clark*, 7 N.Y.S.2d at 414.
20. *Id.*; *Greishaber*, 279 A.D.2d at 235.
21. *Clark*, 7 N.Y.S.2d at 415; *Greishaber*, 279 A.D.2d at 235.
22. *Clark*, 7 N.Y.S.2d at 415.
23. *Id.*
24. *Id.* at 416.
25. *Sebastian v. State of New York*, 63 N.Y.2d at 793 (1999).
26. *Id.* at 795.
27. *Id.* at 796.
28. *Kircher v. City of Jamestown*, 74 N.Y.2d 251, 255–56, 544 N.Y.S.2d 995 (1989).
29. *McEnaney v. State of New York*, 700 N.Y.S.2d at 260 (3d Dep't 1999); *Kircher*, 74 N.Y.2d at 255–56; *Grieshaber v. City of Albany*, 279 A.D.2d at 234 (3d Dep't 2001).
30. *McEnaney*, 700 N.Y.S.2d at 260; *Balsam v. Delma Engineering Corp.*, 90 N.Y.2d 966, 967–968, 665 N.Y.S.2d 613 (1997); *Tarter v. State of New York*, 68 N.Y.2d at 518 (1986); *Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d 175, 182 (1982).
31. *Balsam*, 90 N.Y.2d at 968.
32. *Tarter*, 68 N.Y.2d at 519; *Arteaga v. State of New York*, 72 N.Y.2d at 214 (1988).
33. *Balsam*, 90 N.Y.2d at 968.
34. *McEnaney*, 700 N.Y.S.2d at 260; *Cossano v. State of New York*, 129 A.D.2d 671, 671–72, 514 N.Y.S.2d 431 (2d Dep't 1987); *Nadal v. State of New York*, 110 A.D.2d 890, 488 N.Y.S.2d 442 (2d Dep't 1985).
35. *Nadal,* 110 A.D.2d 890.
36. 101 A.D.2d 20, 474 N.Y.S.2d 995 (4th Dep't 1999).
37. *Santangelo*, 101 A.D.2d at 26–29.
38. *Kircher v. City of Jamestown*, 74 N.Y.2d at 255–56 (1989).
39. *Boland v. State of New York*, 218 A.D.2d 235, 240, 638 N.Y.S.2d 500 (3d Dep't 1996), *dismissed on other grounds*, 263 A.D.2d 801, 693 N.Y.S.2d 748 (3d Dep't 1999) (proximate cause).

John M. Shields is an Assistant Attorney General in the Suffolk Regional Office. Any opinions expressed in the article are exclusively those of the author and not the Office of the Attorney General. **A version of this article was previously published and is reprinted with permission from the *New York Law Journal* © 2002 NLP IP Company.**

New York Court Opens Door to Damages Beyond Policy Limits

By Marc A. Perrone

A New York appeals court recently permitted a breach of contract claim against an insurer seeking consequential damages beyond the policy's limits where plaintiff alleged an insurer's bad-faith delay in paying a claim. This ruling deviates from previous New York law which was commonly held to limit damages for an insurer's bad-faith refusal to settle a claim to recovery of the policy's limits.

The split Appellate Division, First Department, declined to follow the majority of jurisdictions which have adopted a tort for bad faith in handling a policyholder's claim, stating such would be "an extreme change" in New York State law. The court, however, followed the more conservative approach adopted by a minority of jurisdictions by expanding the scope of contract remedies in this context to potentially include consequential damages beyond the subject policy's limit of liability.

In *Acquista v. New York Life Insurance*[1] the 3-2 divided Appellate Division reinstated breach of contract, bad faith, and unfair practices claims alleged by Dr. Angelo Acquista, an insured internist who sought coverage under three disability insurance policies after being diagnosed with myelodysplasia, a debilitating illness which could potentially convert to leukemia.

After some delay, the insurer of all three policies, New York Life Insurance Co., denied Acquista's claim for "total disability" benefits, stating he was still able to perform some of "the substantial and material duties" of his job. Acquista filed suit, alleging four counts for breach of contract, bad faith, unfair practices, fraud, and negligent infliction of emotional distress. Specifically, Acquista alleged New York Life "undertook a conscious campaign to avoid and delay payment of his claims while having determined at the outset that it would deny coverage."

On motion to dismiss, the trial court, Hon. Solomon, J., Supreme Court, New York County, found that, as a matter of law, Acquista was not "totally disabled" pursuant to the policies and dismissed seven of Acquista's eight claims, leaving only one breach of contract claim seeking partial disability benefits. Acquista appealed.

The Appellate Division unanimously affirmed the dismissal of Acquista's claims for fraud and negligent inflection of emotional distress, and reinstated the three breach of contract claims, agreeing there were questions of fact concerning whether Acquista was "totally disabled" within the meaning of the policies. The court divided, however, concerning whether Acquista's bad-faith and unfair-practices claims should be reinstated.

Writing for the majority, Justice Saxe, J., initially noted that until then New York had maintained the traditional view that an insurer's failure to make payments or provide benefits in accordance with its policy constituted merely a breach of contract, for which the remedy had traditionally been limited to the policy limits, under the theory that such would inherently place the plaintiff in as good a position as they would have been in had the contract been performed.

The court recognized, however, that many times this limited remedy inadequately compensated the insured, and, depending on the disparity between the statutory interest rate and the insured's return, may have provided the insurer a financial interest in denying claims. "The problem of dilatory tactics by insurance companies seeking to delay and avoid payment of proper claims has apparently become widespread enough to prompt most states to respond with some sort of remedy for aggrieved policyholders," Justice Saxe wrote.

While acknowledging that the majority of jurisdictions have adopted a tort cause of action applicable to instances where an insurer has used bad faith in handling a claim, the court went on to adopt the admittedly more conservative approach of the minority of jurisdictions, allowing only for compensatory damages which may exceed the policy limits to redress an insurer's "bad faith refusal of benefits under its policy."

In doing so, the court also expressly adopted the underlining minority holding that "the duties and obligations of the parties [to an insurance policy] are contractual rather than fiduciary." Although the court did not address this point, it apparently reasoned that since there is no fiduciary relationship, there could not be a corresponding tort for first-party bad faith.

The majority also reinstated Acquista's unfair practices claim under General Business Law § 349, holding that Acquista's allegations that New York Life routinely delays and then denies claims in bad faith may fall within the parameters of an "unfair or deceptive practice" defined as "a representation or omission likely to mislead a reasonable consumer."

Writing for the dissent, Hon. Andrias, R., joined by Hon. Tom, P., objected that Acquista had no cognizable bad-faith claim, as his allegations were insufficient to establish the "insurers conduct constituted a gross disregard of the insured's interest." The dissent also pointed out that Acquista's counsel raised the bad-faith allegations early in the investigation, suggesting that this bad-faith claim was the kind of "manufactured claim" warned of by the Court of Appeals in *Pavia v. State Farm Mutual Auto Ins. Co.*,[2] where the Court rejected a bad-faith claim based solely upon an insurer's failure to respond to a time-limited settlement offer and its delay in offering the policy limits.

Impact of *Acquista*

Although three courts have discussed *Acquista* in the 11 months since its ruling, they were not directly on point because in those cases the plaintiffs sought punitive damages arising from insurers' bad faith, rather than consequential damages as upheld in *Acquista*.[3] This distinction is crucial as punitive damages in a denial of coverage context are only available in tort, and the New York Court of Appeals has held that the tort of bad-faith denial of coverage against an insurer is not independently recognized in New York.[4] Consequential damages, however, are available in breach of contract claims in New York and have previously been awarded in an insurance context even before *Acquista*.[5] *Acquista* is significant despite this prior ruling because it comes after the aforementioned Court of Appeals rulings which many interpreted, arguably incorrectly, to limit damages in claims against insurers to policy limits.[6]

Thus, the holding in *Acquista* has not since been addressed on point by another court. Whether the Court of Appeals ultimately overturns *Acquista*, therefore, will likely be the primary factor when courts consider future cases on point.

"Although three courts have discussed Acquista *in the 11 months since its ruling, they were not directly on point because in those cases the plaintiffs sought punitive damages arising from insurers' bad faith, rather than consequential damages as upheld in* Acquista*."*

Endnotes

1. 2001 WL 752640 (N.Y.A.D. 1st Dep't 2001).
2. 82 N.Y.2d 445 (1993).
3. *See Sichel v. Unum Provident Corp.*, 2002 U.S. Dist. LEXIS 7499 (S.D.N.Y. Apr. 29, 2002); *Wiener v. Unumprovident Corp.*, 2002 U.S. Dist. LEXIS 3557 (S.D.N.Y. Feb. 28, 2002); *Brown v. Paul Revere Life Ins. Co.*, 2001 U.S. Dist. LEXIS 16626 (S.D.N.Y. Oct. 11, 2001).
4. *See New York Univ. v. Continental Ins. Co., supra,* 87 N.Y.2d 308, 662 N.E.2d 763, 639 N.Y.S.2d 283; *and Rocanova v. Equitable Life Assur. Soc'y*, 83 N.Y.2d 603, 634 N.E.2d 940, 612 N.Y.S.2d 339 (1994).
5. *See Sweazey v. Merchants Mutual Ins. Co.*, 169 A.D.2d 43, 45, 571 N.Y.S.2d 131, 132–33 (3d Dep't 1991) (noting that in the context of insurance coverage, certain consequential damages may be awarded for breach of contract where such damages were foreseeable and within the contemplation of the parties at the time the contract was made).
6. *See New York Univ.,* 87 N.Y.2d 308; *and Rocanova,* 83 N.Y.2d 603.

Marc A. Perrone is an associate at the New York office of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, where he specializes in complex insurance coverage matters.

The Evolution of Labor Law Section 240(1) from *Weininger/Joblon*

By Timothy Gallagher

A. Background of Labor Law § 240(1)

Enacted 1885

As the Court in *Joblon* noted,

Special statutory protections against the dangers of elevation-related hazards in the workplace have existed in this state since 1885.[1]

1. Current Provision

Labor Law § 240(1) provides that:

> All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.[2]

2. General Purposes

The general purpose of the statute "is one for the protection of work[ers] from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed."[3]

3. Consistent with the General Purpose, the Statute Has Been Liberally Construed over the Years

Consistent with the legislative objective of worker protection for elevation-related risks, the Court of Appeals has given the statute an expansive reading in a variety of circumstances.[4]

In *Felker v. Corning Inc.*,[5] the plaintiff, a painter, was injured when, after losing his balance while standing on a ladder reaching over an eight-foot high alcove wall, he fell over the wall, through a suspended ceiling, and onto a floor eight feet below. The Court identified two elevation-related risks: the need to be elevated above the alcove wall, and the need to reach over the wall. The Court expressly noted that there were no complaints regarding the quality of the ladder, or its placement relative to the *first* risk. The Court assigned liability under Labor Law § 240(1) based on the contractor's failure to provide any safety device to protect against the second risk.

In *Gordon v. Eastern Ry. Supply*,[6] the Court applied the Labor Law to a worker who was injured as he sandblasted the exterior of a railroad car while working from a ladder that was leaning against the car. He was injured not by hitting the ground, but by being hit with spraying sand from his tool after his ladder tipped when he pulled the trigger on the sandblaster. The work was done in a "sandhouse" owned by defendant, Eastern Railway Supply, which leased the sandhouse to another defendant and which had not contracted for the work. Even under these conditions, the Court held that the owner could not escape Labor Law § 240(1)'s nondelegable duty. It also held that the injury mechanism was sufficiently related to the elevation-related risk to be covered.

In *Lombardi v. Stout*,[7] the Court held that Labor Law § 240(1) applied to a plaintiff who fell from a ladder while sawing a limb from a tree, because that work was sufficiently related to a house construction/remodeling project.

B. The Beginning of the Backlash: The Narrowing of Labor Law § 240(1)

After decades of expansive interpretation of Labor Law § 240(1), the Court of Appeals began to issue a series of decisions in the 1990s that seemingly narrowed section 240(1).

1. *Brown v. Christopher Street Owners Corp*.[8] In *Brown* the plaintiff was a window cleaner. He was engaged in cleaning the windows of a residential cooperative apartment when he was injured. As noted above, "cleaning" is one of the enumerated activities in the section 240(1). Despite these facts, the Court held that the statute did not apply.

2. *Misseritti v. Mark IV Construction Co.*[9] In Misseritti, due to the absence of bracing on a firewall, the firewall collapsed while the plaintiff was working at ground level, and injured the plaintiff. "Braces," like window cleaning, are enumerated in the statute. However, the Court of Appeals upheld the Appellate Division ruling dismissing the claim.

C. Court of Appeals Decision in *Joblon*/*Weininger*

1. Procedural History/Decisions Below

The plaintiff in *Joblon* was allegedly injured while working in a utility room which, he claimed, prevented the ladder from being fully opened.[10] While Joblon was working in the utility room, he ascended the unsecured ladder and allegedly fell backward.

The plaintiff in *Joblon* alleged negligence as well as violations of Labor Law §§ 240(1) and § 241(6). At the close of discovery, Joblon moved for partial summary judgment on liability under section 240(1). The District Court denied plaintiff's motion for summary judgment on the section 240(1) claim and granted the third-party defendant's (plaintiff's employer's) motion to dismiss, concluding that it was more consistent with the underlying purpose of the statute to find that Joblon was engaged in mere "modification or extension of an existing system" and therefore was not repairing or altering the building.[11] Defendants Solow (owner) and Avon (tenant) thereafter sought summary judgment dismissing the Labor Law § 241(6) claim, which the District Court also granted, concluding that because Joblon was not "altering" under section 240(1) he was not performing "construction" work within the meaning of section 241(6).[12]

The Second Circuit certified the following questions to the Court of Appeals:

> (1) where an electrician fell from a ladder while employed to 'chop a hole through a block wall with a hammer and chisel' and route a conduit pipe and wire through the hole to install a wall clock, does New York Labor Law Section 240(1) apply on the grounds that his work constituted an alteration or repair of a 'building' or 'structure' within the meaning of the statute; and (2) does New York Labor Law Section 241(6) apply, based on his work being 'alteration,' 'repair,' or 'maintenance' within the meaning of the New York State Industrial Code, 12 N.Y.C.R.R. et seq.[13]

In *Weininger*, by contrast, the defendants below lost the section 240(1) issue. The history of that case is as follows: Plaintiff, an employee of third-party defendant Alpha Tele-Connect, Inc., was injured when he fell from a ladder while working at premises leased by defendant Hagedorn & Co. At the time of his accident, plaintiff was running computer and telephone cable through the ceiling from an existing computer room in Hagedorn's office to newly leased space that would be used as a telecommunications center. This involved standing on a ladder to access a series of holes punched in the ceiling and pulling the wiring through "canals" that had been made in chicken wire in the ceiling.[14]

In that case, both the Supreme Court and the Appellate Division agreed that the plaintiff was covered by section 240(1), as he was "altering" a building.

2. Issues before the Court of Appeals

As noted above, two specific questions were certified at the Court of Appeals from the Second Circuit in the *Joblon* case. Both questions involved whether or not the work plaintiff was performing qualified under the Labor Law as "alteration" of a building or structure.

In *Weininger*, a similar question was presented. However, among other questions there was a significant question regarding proximate cause within the context of Labor Law § 240(1).

3. Rulings in *Joblon* and *Weininger*

In *Joblon*, the Court held that "'altering' within the meaning of Labor Law § 240(1) requires making a *significant* [emphasis in the original] physical change to the configuration or composition of the building or structure. Such a rule implements the legislative purpose of providing protection for workers, is fully consistent with our precedents and at the same time excludes simple, routine activities we have previously placed outside the scope of the statute."[15] Furthermore, the Court stated:

> Having concluded that Joblon was engaged in "altering" under Labor Law Section 240(1) at the time of his injury, we likewise determine that the facts presented could support a claim under Labor Law Section 241(6), which requires that all "areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety."
>
> Liability under Labor Law Section 241(6) is not limited to accidents on a building construction site. (Citations omitted). As in *Jock v. Fien* (80 N.Y.2d 965, 967) we look to the regulations contained in the Industrial Code (12 NYCRR 23-1.4[b][13]) to define what constitutes construction work within the meaning of the statute (Citation omitted). Because the Industrial Code includes "work of the types performed

> in the construction, erection, *alteration* [emphasis on the original], repair, maintenance, painting or moving of buildings or other structures" in the definition of construction work (12 NYCRR 23-1.4[b][13] [emphasis added], we conclude that plaintiff could state a claim under Labor Law Section 241(6).

In *Weininger*, the Court held that at the time of his injury, "plaintiff's work involved 'making a *significant* [emphasis on the original] physical change to the configuration or composition of the building or structure' not a simple routine activity" (citing *Joblon*).[16]

The Court of Appeals did, however, hold that the Supreme Court erred in directing a verdict in favor of plaintiff, at the close of his own case, on the issue of proximate cause. "In the circumstances presented, a reasonable jury could have concluded that plaintiff's actions were the sole proximate cause of his injuries, and consequently that liability under Labor Law § 240(1) might not attach. (Citation omitted)."[17]

4. Impact of the Decisions in *Joblon/Weininger*

a. The addition of the word "significant"

The Court of Appeals' conclusion that altering requires a "significant" physical change to the configuration or composition of a building or structure is, on its face, a narrowing of the statute. There is simply no basis in the statute for the addition of that word. The addition of the word "significant" into the decision is akin to the decisions of the Court in *Brown* and *Misseriti* to ignore activities and safety devices that were explicitly included in the statute. On its face, such narrowing is a significant victory for defendants.

b. The holding that construction is not necessary for imposition of liability under Labor Law § 240(1)

However, the Court's addition of the word "significant" must be understood in light of what the Court was requested to do. The Court was requested to limit the Labor Law to building construction jobs. The defendant specifically pointed to the title of Article X of the Labor Law, "Building, Construction, Demolition and Repair Work," and noted that it was created to place the "ultimate responsibility for safety practice at building construction jobs where such responsibility actually belongs, on the owner and general contractor."[18]

The defendants suggested that a guiding principle for the Court should be to examine the context of the work leading to injury, and only when it is performed as part of a building construction job should Labor Law § 240(1) liability attach.[19]

The Court explicitly failed to limit the statute to building construction jobs. Indeed, it stated, "[n]ow to limit the statute's reach to work performed on a construction site would eliminate possible recovery for work performed on many structures falling within the definition of that term but found off construction sites (citations omitted)."[20]

However, the Court recognized that adopting the plaintiffs' argument would, "if taken to its logical conclusion . . . be 'tantamount to a ruling that all work related falls off ladders will fall within Labor Law Section 240.'"[21]

Therefore, the addition of the term "significant" to the statute may be seen not as a narrowing of the statute, but a means of keeping the statute at equilibrium.

c. *Joblon*'s § 241(6) holding

As noted above, the Court also held that the plaintiff was engaged in "altering" pursuant to Labor Law § 241(6). Again, the word "altering" is in the statute. The word "significant" is not. Therefore, at first glance the additional word "significant" would seem to be a narrowing of that statute, too.

However, the Court held that section 241(6) is not limited to accidents on building construction sites.[22]

The Court confirmed that it looked at the regulations contained in the Industrial Code to determine the scope of section 241(6).[23]

The Industrial Code includes in its definition "work of the types performed in the construction, erection, alteration, repair, maintenance, painting, or moving of buildings or other structures . . ." in the definition of construction work.[24]

The Court's addition of the word "significant" to section 241(6) may also be seen as a way to keep the statute at equilibrium, rather than as a narrowing of the statute.

However, the fact that the word "maintenance" is included in the Industrial Code is troubling. Under the ruling in *Joblon*, it is implied that maintenance activities may be covered under Labor Law § 241(6). As such, the *Joblon* decision may actually represent a widening of the statute.

d. The "sole proximate cause" standard in *Weininger*

At first glance, the most important ruling in either case is the ruling in *Weininger* regarding "sole proximate cause." The Court specifically held in the circumstances presented that a reasonable jury could have concluded that the plaintiff's actions were the sole

proximate cause of his injuries, and consequently liability might not attach under Labor Law § 240(1).

This is significant because the plaintiff in *Weininger* was working on an A-frame ladder prior to being injured. He was injured when he stepped on the cross-brace of the ladder and the ladder collapsed and fell. The Court of Appeals held that there was a question of fact with respect to what caused plaintiff's injury.

Plaintiff argued that the placement of the ladder made it impossible for him to reach the area where he needed to work without stepping onto the cross-brace. The defendants below argued that the sole proximate cause of the accident was the misuse of the ladder (plaintiff standing on the cross-brace). It was clear that the ladder could have been moved so that the plaintiff could have reached the place that he needed to reach without stepping on the cross-brace.

On these facts, initially it seems that the "sole proximate cause" standard reintroduces the idea of the plaintiff's negligence into a strict liability statute. This would be an incredible narrowing of the statute and a boon to defendants.

However, in both *Joblon* and *Weininger* the tenants argued that the misuse of the ladder was the sole proximate cause. Misuse, however, was dependent upon the placement. If the plaintiff in *Joblon* had opened the ladder fully, he would not have fallen.

Similarly, if the plaintiff in *Weininger* had climbed down the ladder and moved the ladder over, he would not have needed to step on the cross-brace. The statute, however, specifically places the burden for placing the ladder on the owner and requires that ladders shall be so "placed" as to give proper protection to a person so employed.

The question arises then whether this whole proximate cause issue is meaningless. If misuse arises out of misplacement, then misuse can never be the sole proximate cause. Indeed, it is hard to imagine a situation where misuse would not also involve misplacement of a device. Obviously, if it is being misused, it is not placed where it should be.

This is a question that the courts will have to address in the future.

D. *Joblon/Weininger* Progeny

Martinez v. City of New York.[25] Held: Environmental consultant's pre-construction investigative work was not covered work; he was injured when he fell from a desk on which he stood to examine a pipe near the ceiling, prior to the commencement of construction activities.

Melber v. 6333 Main Street, Inc.[26] Held: Carpenter injured when he fell, as a result of tripping over conduits protruding from an unfinished floor, while walking down a corridor on 42-inch stilts that he had been using to install metal studs on top of wall, did not state claim under Labor Law § 240(1).

Endnotes

1. *See generally Wingert v. Krakauer*, 76 A.D. 34, 78 N.Y.S. 664 (1st Dep't 1902); 1885 N.Y. Laws ch. 314; *Joblon v. Solow*, 91 N.Y.2d 457, 462, 672 N.Y.S.2d 286 (1998).
2. N.Y. Labor Law § 240(1).
3. *Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 520-21, 493 N.Y.S.2d 102 (1985) (quoting *Quigley v. Thatcher*, 207 N.Y. 66, 68 (1912)).
4. *Joblon*, 91 N.Y.2d 457, 463.
5. 90 N.Y.2d 219, 224, 660 N.Y.S.2d 349 (1997).
6. 82 N.Y.2d 555, 559, 606 N.Y.S.2d 127 (1993).
7. 80 N.Y.2d 290, 296, 590 N.Y.S.2d 55 (1992).
8. 87 N.Y.2d 938, 641 N.Y.S.2d 221 (1996).
9. 86 N.Y.2d 47, 654, N.Y.S.2d 35 (1995).
10. At the time of trial, a photograph showed that the ladder could be fully opened in the utility room.
11. 914 F. Supp. 1044, 1048.
12. 945 F. Supp. 734, 739; *Joblon v. Solow*, 91 N.Y.2d at 462 (1998).
13. *Joblon v. Solow*, 135 F.3d 261, 262.
14. *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958, 672 N.Y.S.2d 840 (1998).
15. *Joblon*, 91 N.Y.2d at 465.
16. 91 N.Y.2d 958, 959.
17. *Id.* at 959.
18. *Joblon*, 91 N.Y.2d at 463; 1969 N.Y. Legis. Ann. at 407.
19. *Joblon*, 91 N.Y.2d at 463, 464.
20. *Id.* at 464.
21. *Id.*, quoting *Giambalvo v. National R.R. Passenger Corp.*, 850 F. Supp. 166, 170 (E.D.N.Y. 1994).
22. *Id.* at 465 (citations omitted).
23. *Id.*
24. *Id.*, quoting 12 N.Y.C.R.R. § 23-1.4[b][13].
25. 93 N.Y.2d 322, 690 N.Y.S.2d 524 (1999).
26. 91 N.Y.2d 759, 676 N.Y.S.2d 104 (1998).

Louis B. Cristo and Saul Wilensky

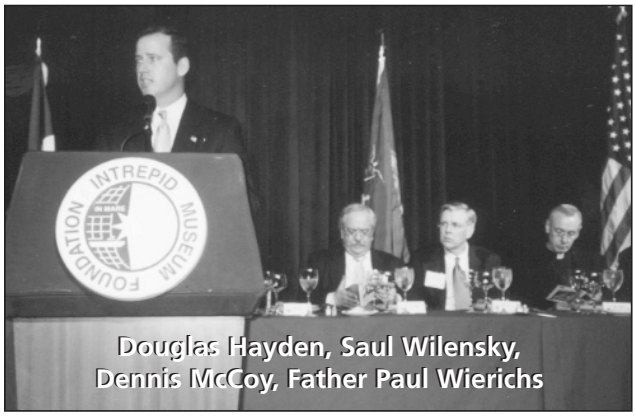
Scenes from the

Torts, Insurance and Compensation Law Section

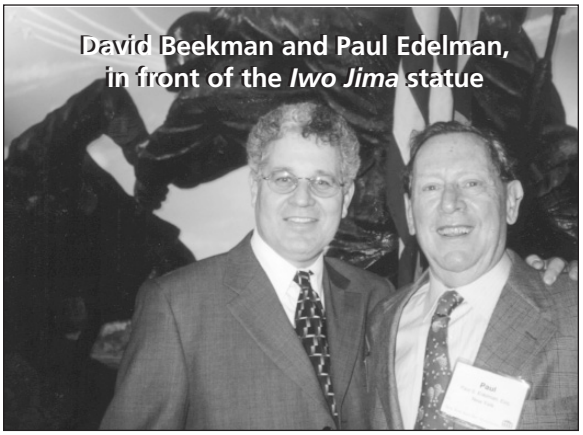
2002
Annual Meeting Dinner

January 23, 2002
Intrepid Sea, Air, Space Museum

The *Iwo Jima* statue



Douglas Hayden, Saul Wilensky, Dennis McCoy, Father Paul Wierichs



David Beekman and Paul Edelman, in front of the *Iwo Jima* statue

Glenn Monk, Paul Suozzi, Gloria L. Bisogno and David Cook

Editor's Note

We wish to acknowledge the generosity of sponsors to the dinner of the TICL and Trial Lawyer Sections at the Intrepid Sea, Air, Space Museum on 23 January 2002:

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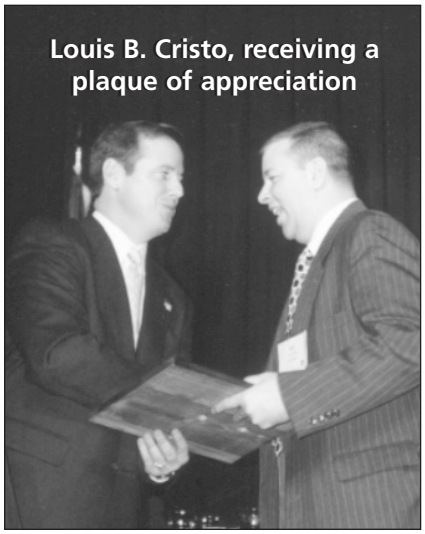

Louis B. Cristo, receiving a plaque of appreciation

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