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3 Fountain Plaza
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Suite 1400
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NYSBA STAFF LIAISONS
William J. Carroll
New York State Bar Assoc.
One Elk Street
Albany, NY 12207

Kathleen M. Heider
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
Susan L. English
One Marine Midland Plaza
P.O. Box 2039
Binghamton, NY 13901

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

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Message from the Section Chair

FELLOW TICL MEMBERS:

It is with pleasure that I address you as the TICL Section Chair. It was twelve years ago that I began attending Section activities as an associate in my firm tagging along behind a partner who had himself served as the Section Chair. He told me that he himself started the same way—at the heels of a retired firm partner who had been Section Chair some years prior. The TICL Section has a proud heritage and I hope I may continue to increase its statute in the legal community during my tenure.

I welcome your involvement in our TICL Section activities and your input concerning our efforts on behalf of the membership. Thank you.

Very truly yours,

Louis B. Cristo

Save the Date!!!

New York State Bar Association

TORTS, INSURANCE AND COMPENSATION LAW SECTION

Fall Meeting

September 21-24, 2000

Kiawah Island Resort
Kiawah Island, South Carolina

The Dram Shop Act and the Visible Intoxication Standard

By Kevin G. Faley and Andrea M. Alonso

Drunk drivers injure, maim and kill hundreds of thousands of people in the United States each year. In 1997, 16,189 people were killed in crashes involving alcohol, an average of one every 32 minutes.[1] Additionally, 1,058,990 people were injured in alcohol-related crashes, an average of one person injured every 30 seconds.[2] As part of the ongoing effort to decrease alcohol related injuries and deaths, New York State has sought to deter the sale of liquor to individuals who are already intoxicated. To this end, the legislature of the State of New York enacted General Obligations Law Section 11-101(1), colloquially referred to as the Dram Shop Act.

The Dram Shop Act, which in one form or another dates back to 1873,[3] provides that any person who is injured by an intoxicated person, or is injured by reason of the intoxication of such a person, is entitled to a right of action against any person who caused or contributed to the intoxication by the ***unlawful*** sale to or by the ***unlawful*** procurement of liquor for the intoxicated person.[4]

In order to prove that a driver was visibly intoxicated for purposes of a G.O.L. Sec. 11-101(1) action, sufficient evidence in admissible form must be submitted to the trier of fact to show that a reasonable person would have known that the driver was intoxicated at the time of the sale or procurement of the alcohol.

Rounding out The Dram Shop Act is Alcohol and Beverage Control Law Sec. 65(2) which makes it unlawful to *furnish* any alcoholic beverage to a ***visibly intoxicated person***.[5] Section 65(2) was specifically designed to ensure that *alcoholic beverage licensees have sufficient notice of a customer's condition before they are subject to a potential loss of their license or to civil liability for injuries subsequently caused by an intoxicated person*.[6]

The "visibly intoxicated person" standard was further crafted to limit a tavern keeper's exposure and to preclude the imposition of a regulatory or monetary penalty when he or she had no reasonable basis for knowing that the consumer was intoxicated.

Further, the Dram Shop Act only applies to commercial vendors and distributors of alcoholic beverages, and New York courts have held that private hosts and employers are not included within the Act's scope for purposes of civil tort liability.[7]

Simply stated, in New York a tavern or bar is liable to a person injured or killed by a drunk driver *only* when it is shown that liquor was sold to the driver while that driver was ***visibly intoxicated***. But what actually constitutes **visible** intoxication? And what type of proof is necessary to establish that a driver was ***visibly*** intoxicated when he was served alcohol by a tavern keeper for Dram Shop law purposes? These two questions, until recently, were subject to different interpretations by New York State courts.

In 1997 the Court of Appeals of the State of New York began to answer these questions in the case of *Romano v. Stanley*.[8] However, as will be seen, the *Romano* case resulted in more confusion and debate than answers.

In 1998, in *Adamy v. Ziriakus*,[9] the Court of Appeals finally answered those questions.

The *Romano* case arose out of a motor vehicle accident occurring on January 18, 1991 in the Town of Colonie, New York when a car driven by Nancy Stanley crossed the center line of the road and collided with plaintiff Marie Romano's automobile. Romano was seriously injured and Stanley died in the collision.[10]

Romano commenced a personal injury action against the Stanley estate, and against three taverns that had purportedly served alcohol to Stanley on the evening of the accident. Romano's Dram Shop Act cause of action alleged that the taverns unlawfully sold alcoholic beverages to Stanley, a visibly intoxicated person, in violation of ABC Law Sec. 65(2).

Upon completion of discovery, two of the three defendant taverns moved for summary judgment asserting that Stanley was not visibly intoxicated while on their respective premises. In support of their assertions, the defendants submitted proof in the form of testimony from eyewitnesses that Stanley did not appear intoxicated while on their respective premises.

Additionally, following ingestion of three drinks over the course of approximately two and one half hours in the moving defendant's taverns, Stanley proceeded to the establishment owned by the third, non-moving defendant. It was in the third tavern that she was sold and imbibed alcohol to the point of what eyewitnesses described as visual intoxication. The fatal accident occurred soon after Stanley left the third tavern.

In opposing the summary judgment motion, the plaintiff submitted an affidavit from a forensic pathologist which relied on a toxicology report showing a blood alcohol level of 0.26% and a .33% level in the urine when Stanley died. Based on the recorded levels it was asserted that Stanley would have had a substantial amount of alcohol in her system four to five hours prior to the accident, at the time when Stanley would have been in each of the first two taverns.

Consequently, the pathologist concluded that it would be physically impossible to have reached the level of intoxication recorded in her body while drinking solely at the third establishment. In Dr. Oram's opinion, Stanley had to have been intoxicated prior to the time she reportedly arrived at the third establishment.

Based on those findings, it was the doctor's opinion to a reasonable degree of medical certainty that Stanley would have, and did show, visible signs of intoxication while she was drinking at the first two establishments. The affidavit then went on to list the signs of intoxication that would have been exhibited by Stanley and that in his opinion should have been noticed by bartenders in the first two establishments.

However, the affidavit was silent as to the scientific or personal professional basis for the pathologist's conclusions about Stanley's blood alcohol count while a customer at the first two taverns and about how Stanley must have looked and acted in the first two taverns.

In reversing the lower court's denial of the summary judgment motions, the Court of Appeals began to define the level of proof necessary to sustain a Dram Shop Act cause of action. The Court rejected the defendants' contention that the statutory term ***visible*** required direct proof in the form of testimonial evidence that someone who actually observed the allegedly intoxicated person's demeanor at the time and place that the liquor was served.

The Court held that eyewitness testimony is not required to sustain a Dram Shop Act cause of action, and that circumstantial evidence may be used to establish visible intoxication. But in *Romano*, the Court refused to consider the plaintiff's expert's affidavit and the conclusions reported therein. The Court held that:

> Although the underlying facts on which the plaintiff's expert based his opinion—i.e. Stanley's blood and urine alcohol counts and her physical characteristics were set forth in detail (citations omitted) there was nothing in the expert's affidavit at all from which the validity of his ultimate conclusions about Stanley's appearance on the evening of the accident could be inferred.[11]
>
> Where an expert's affidavit is proffered as the sole evidence to defeat summary judgment, such affidavit must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation. If proffered alone at trial, such affidavit must suffice to support a verdict in proponent's favor.[12]

In *Romano*, the Court of Appeals took painstaking care in pointing out that although the expert's affidavit was rejected, it was the spurious content of the affidavit and not the fact that a non-witness expert was used, that led to the dismissal of the action. The Court pointed to the fact that:

> The personal professional background of plaintiff's expert—a clinical forensic pathologist whose specialty is the performance of autopsies—is not alone sufficient to lend credence to his opinions, since individuals in his field are not ordinarily called upon to make judgments about the manifestations of intoxication in live individuals. Moreover, plaintiff's affidavit was devoid of any reference to a foundational scientific basis for its conclusions, and no reference was made either to Dr. Oram's own personal knowledge acquired through his practice or to studies or to other literature that might have provided the technical support for the opinion he expressed.[13]

The Court of Appeals did not discount the use of an affidavit by a properly qualified expert in a Dram Shop Act action, where such an expert's affidavit is part of a package of circumstantial evidence, and the expert has documented proper foundational scientific basis for his conclusions.

Adamy v. Ziriakus is the most recent Court of Appeals decision to address these issues. *Adamy* involved a motor vehicle accident occurring in the early morning hours of January 27, 1990 in the Town of Amherst, New York. The accident occurred shortly after the defendant drunk driver, Ziriakus, left T.G.I. Fridays, a nearby restaurant/bar.

In the hours preceding the incident, Ziriakus consumed a number of alcoholic beverages with friends at the bar. After failing field sobriety tests administered by police officers at the scene, Ziriakus was arrested and ultimately convicted of driving while intoxicated and

failure to yield. Lieutenant Joseph Adamy, a member of the Town of Amherst Police Department, was killed in the accident.

Decedent's widow, plaintiff Candice Adamy, sued both Ziriakus and T.G.I. Fridays, claiming that Fridays had violated The Dram Shop Act by serving Ziriakus alcohol while he was visibly intoxicated. A jury trial resulted in a verdict in favor of plaintiff, and a split of liability finding Ziriakus 40% liable, Friday's 30% liable and decedent 30% liable.

At trial, plaintiff presented several categories of circumstantial evidence along with the testimony of a forensic pathologist, Dr. Michael Baden, who testified that based on Ziriakus' blood alcohol content upon leaving Fridays, Ziriakus would have been visibly intoxicated when last served.

T.G.I. Fridays appealed the verdict asserting that there was insufficient evidence to find that Ziriakus was served alcohol by Fridays' employees while he was visibly intoxicated. In an attempt to overturn the jury's verdict, appellant Fridays likened Dr. Baden's proffered testimony to that of the plaintiff's expert in *Romano*, and urged the Court to find that once again the expert's testimony and opinion were purely speculative and conclusory.

In affirming the Appellate Division's denial of Fridays' appeal, the Court of Appeals further discussed the issue of what evidence is necessary to sustain a Dram Shop Act verdict against an establishment accused of selling alcohol to a visibly intoxicated patron. The Court held that "only where an expert's affidavit is proffered *as the sole evidence to defeat a motion for summary judgment*, that affidavit must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation, and would if offered alone at trial, support a verdict in the proponent's favor."[14] This was not the case in *Adamy*.

In *Adamy*, in stating his expertise for testifying at trial, the plaintiff's expert outlined his teaching career at several institutions, articles he had written germane to his understanding of alcohol and its effects, and his experience as a medical examiner.[15] Defendant Fridays made no objection to his qualifications to testify as an expert witness. Thus, the Court held that Fridays was precluded from arguing that the testimony was inadmissible as a matter of law, since Fridays had the opportunity to bring out weaknesses in the expert's qualifications and foundational support on cross-examination, an opportunity unavailable to a party seeking summary judgment as in *Romano*.

The Court further distinguished the evidence proffered in the *Adamy* case from that in the *Romano* case.

> Unlike *Romano*, where plaintiff's only evidence offered to defeat summary judgment was an expert's affidavit, here, plaintiff also introduced the testimony of several police officers who observed Ziriakus' behavior and appearance at the accident scene. Finally, a missing witness instruction was given to the jury with respect to the fact that the bartender on duty on the night of the accident was not called as a witness by Fridays, and his absence was not explained.[16]

The Court held that:

> Dr. Baden's testimony, when taken together with the police officers' accounts of Ziriakus' behavior at the accident scene only a short time after he left Fridays and the inferences the jury was permitted to draw from Fridays' failure to call Doug Daly as a witness, provided ample evidence that Ziriakus was visibly intoxicated when served at Fridays.[17]

Conclusion

As it stands today, The Dram Shop Act provides for relief against a bar or tavern that unlawfully sells alcohol to a visibly intoxicated person. When endeavoring to prove that a person was visibly intoxicated, the evidence proffered at trial, or on summary judgment, must be sufficient to show that a reasonable person would have determined that the intoxicated driver was visibly intoxicated when served his last drink. There also must be some other evidence to show or suggest that there were some visible manifestations of intoxication.

The *Adamy* case holds that these visible signs of intoxication may occur at the accident site, if the accident was within a short period of time after the service of alcohol. On the flip side, if the defendant driver did not show signs of visible intoxication after the accident, then one could use this evidence as a defense in a Dram Shop Act.

An affidavit offered in conjunction with a motion for summary judgment must eliminate any questions concerning the foundational scientific basis for conclusions reached in the affidavit before the court will consider it as evidence. At trial, it falls on the opponent of the testimony to bring out any and all weaknesses in the expert's qualifications and foundational support on cross-examination.

Governor's Approval Mem., 1986 McKinney's Session Laws of N.Y. @ 3194.

Appellate Practice and Advocacy

Hon. Joseph M. McLaughlin

Introduction

Appellate practice is different from trial practice and requires a different attitude and strategies. In federal courts, procedures are governed by the Federal Rules of Appellate Procedure (F.R.A.P.).

I. What Goes on in Chambers

Each panel of three judges sits for one week and handles 32 cases during each sitting. The week involves hearing more than 50 lawyers and reading well over 2,000 pages of briefs. Each judge may have three law clerks, some less, and chambers receive two copies of the briefs. The judge keeps one and the other set goes to a clerk who will prepare a bench memo on the case. Each memo will be 15 to 20 pages in length, dealing with the facts of the case, a summary of the issues and a suggestion on how the case is to be resolved.

II. Practice Before the Court

A. The Argument

The bench is a "hot" bench, with the briefs and record reviewed prior to oral argument. The Second Circuit prides itself on being the only Circuit where oral argument is always granted if requested. Arguments are usually 10 minutes for each side and at most 15 minutes. This is very different from appeals in England, where the emphasis is on long oral arguments, some running for a day or more!

The cases are not discussed before the argument. Consultations take place only after argument and usually by exchanging memoranda. There are few conferences.

At the end of the week, the presiding judge issues a memo to all the judges on the Court to alert the others as to what significant issues have been raised.

B. The Brief

I. The word "brief" is an oxymoron, and is certainly not related to any term meaning "short." Its origins are Anglo-Saxon.

II. A maximum of 50 pages is allowed, unless the Court upon timely application allows more. In the New York State Court of Appeals, there is no limit set. Making a brief shorter always requires more work and thought than a longer memorandum of law.

III. A brief should begin with a short story of the case. This story should catch the judge's interest. Language used should be ordinary, in words and phrases with simple declarative sentences.

IV. Each sentence should be short and clear, avoiding awkward and pretentious legalese. Daniel Webster had stated it well: "The power of a clear statement is the great power of the bar!" Use of phrases like "with respect to" should be avoided, as well the endless repetition of the words "appellant, petitioner, plaintiff" etc. It is better to use word-images, "the employer," "the debtor" or even the party's real name, etc. See, F.R.A.P., Rule 28(d).

In reciting the facts, do not mention only those favorable to your side; you lose credibility. If certain facts or dates are in dispute, say so. Don't state as a "fact" what is really an inference.

V. Eliminate indiscriminate details that are not relevant. There is a distinct (and distracting) tendency to insert an endless parade of dates in the narrative. Dates are rarely significant, except in a controversy over the statute of limitations.

VI. Standards of Review, F.R.A.P. 28(D)(B). It is most important to state in the brief the standard of review that governs the decision below. This must be done for each issue. The standards vary from *de novo* review, to an abuse of discretion, to that of being clearly erroneous (exercises of discretion), or that the decision below had no rational basis. *De novo* review is the strictest, where the appellate court comes to its own conclusion, with no deference to the district court. Actually, the appellate court sometimes manipulates the standard to suit its decision.

VII. Point Headings

A. In the play, *Amadeus,* Emperor Joseph II complained to Mozart that a piece of his music had "too many notes." Mozart had assured the Emperor that there were just enough. You should not try to overstate the number of mistakes by the district judge. Four or five are enough and any more sounds like nit-picking. You must not throw everything against the wall in the hope that something sticks. Limit the issues; keep the most important one in focus.

B. Forget the Bluebook Paradigm. The brief is not a law school final exam. You do not need to spot and highlight every question. Just address the big issues and suggest answers to the important questions raised.

1. What do you want the court to do?

2. Why?

3. What reasons do you have?

An example would be (1) a request to dismiss a case for lack of jurisdiction; (2) even if there is jurisdiction, dismissal is required because the defendant was not operating the vehicle within the meaning of the statute; then give your reasons.

VIII. Alternative Arguments. When using alternative arguments, you can, without going on at great length, make clear that you are not waiving a prior argument. Be discrete in using an alternative argument; if it doesn't pass the giggle test, it will undermine your principal argument—and your credibility with the Court.

IX. Matters to Avoid. Some brief writers believe they write well when they do not have the gift. Lawyering is a profession centered on writing and the ability to make words flow. The lead sentence should be punchy, just as journalists are taught to do. Use short sentences and edit your work carefully. Michelangelo always claimed that his statue was encased in a block of marble and all he had to do was chip away what was unnecessary. Avoid redundancies; as an example, "he did x every Tuesday, weekly." Avoid bombast.

Hemingway in his short stories showed his genius at this special skill. Most of his thirty or so stories were told in just a few pages. His language was plain and clear with short sentences, unadorned with adjectives and adverbs. This was magnificent language, eminently suited to brief writing.

Do not use long quotations with "emphasis added." Quotations are most effective when used only occasionally.

Certain phrases are fig leaves designed to conceal mental nudity. Such words are "manifestly," "clearly," "egregious," "mere gossamer," "totally inapposite." You sound more reasonable when you don't use those phrases.

The new technologies using computers can lead to poor organization. Revisions should be made first on hard copies (where your eye can sense the flow) and then transferred to the computer.

Limit the length of a paragraph since a visual break is needed. But single sentences should be avoided.

The spell check can often lead to problems: "trial" can become "trail"; "condemned" can become "condomed."

X. Footnotes. Noel Coward was quoted as saying that footnotes are like being required to go downstairs to answer the door while you are making love. They interrupt the train of thought. Arguments should not be made in a footnote, but only in the text, otherwise the argument will be disregarded.

The worst abuse of footnotes is when they are employed to come within the 50-page limit. One plaintiff submitted a brief with 58 footnotes, many over a page long. This really represented a text of 70 pages.

The Court could have really penalized him but, in fact, he won on appeal. However, he was denied costs. See *Varda, Inc. v. Insurance Co. of No. America*, 45 F.3d 634 (2nd Cir. 1995). In the late sixteenth century, a party was sent to prison for making his pleadings too long. The less clutter in a brief, the better.

C. Oral Argument

Certain roads to disaster in an oral argument are to be avoided. Your beginning should be simple: "May it please the Court" and introduce yourself with your full name. The Court tapes all arguments and they are listened to. If you don't state your name, the listener cannot be sure who is talking.

If there is an error in the memorandum, don't waste a lot of time explaining it. Send the Court a letter.

The Court does not want to be introduced to actual litigants.

Discourage your associate from handing up notes—it is distracting.

It is also very bad to sit at counsel table and grimace or make head motions while your adversary is presenting his or her argument.

Don't fawn on the Court.

Rehearse your argument; do not read it, since you lose eye contact and emphasis. And do not merely rehash what is in the brief.

You can use charts and diagrams if needed, but make sure your opponent and each judge has a copy.

D. The Decalogue of J.W. Davis

John W. Davis was the greatest advocate of the twentieth century. He was the founder of the Davis, Polk firm and he issued his Ten Commandments in a 1940 speech to the ABA. Chief Justice White said that there was no due process of law when John Davis was on the other side. Mr. Davis argued 140 cases before the U.S. Supreme Court, surpassed only more recently by an attorney in the Solicitor General's office.

Time and calendar congestion have eroded some of his points, but most are still vital.

1. "Change places, in your imagination, of course, with the Court."

   Know how the court works. Find out beforehand which judges will be sitting. The names appear each Thursday in the *Law Journal*. Know something about the judges.

2. "State the nature of the case and its prior history." Now this can be shortened since the Court is a hot court.

3. "State the facts." This is now archaic since the brief details the facts and they will be read by a hot Court. But the Court should be reminded of any pivotal facts. A diagram may be helpful.

4. "State the applicable rules of law on which you rely." Don't run a string of cites.

5. "Always go for the jugular." This saying came from Rufus Choate through Joseph Choate to Mr. Davis. These three are legendary lawyers. You must emphasize your most important point. There is always a cardinal point around which lesser ones revolve, like planets around the sun.

6. "Rejoice when the Court asks questions." This shows a judge has been listening and is interested. Stop when the question is asked and answer it. Come back to your argument later, don't tell the judge you will answer it later. This gives you a good idea of what is on the judge's mind. Give a yes or no when possible, or qualify it or explain why you can't answer yes or no.

You may be asked a hypothetical question. Most attorneys would like to avoid such a question. You should not say "that is not this case." Obviously, it is not, but answer the question and, if necessary, then distinguish the case at hand.

7. "Read sparingly and only from necessity." Reading from a paper places a barrier between the reader and the listener like lead in front of an x-ray.

8. "Avoid personalities."

9. "Know your record from cover to cover."

10. "Sit down." Sit down when your argument is finished. Don't use the allotted time if it is not needed. The allotted time "does not constitute a contract for the Court to listen."

The following are sweet words which judges like to hear—they may even allow a longer lunch hour.

"If there are no more questions, I have finished"; "I waive my rebuttal."

This shows self confidence and a strong belief in your case.

There is a story that when a toreador frustrates the bull with his infuriating passes, the bull stops. The toreador in contempt turns his back on the bull to cries of "Olé." Be careful though, the bull can still get you from the rear.

III. The Decision

The Court sometimes issues summary orders stating that they are not to be read as a precedent. I believe this type of aspersion on the precedential value of such orders is unwise. Such a decision may suggest that the case was not given the attention it deserves. I also believe that the rule will be changed eventually.

This paper was given at the meeting of the Section at Bermuda in October 1999.

Defense Counsel's Duties and Responsibilities to the Insurer and the Insured

Safe Sailing Through the Insurer/Insured/Counsel "Bermuda Triangle"— (Or is it now a quadrangle?)

By Eileen E. Buholtz

I. The relationship between insurer, insured and defense counsel

A. Called a *triangle* (Wunnicke, "The Eternal Triangle: Redux," 41 For the Defense, no. 6, p.29 (June 1999) *or tripartite relationship* (Silver, "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L.J. 255 (Nov. 1995))

B. Presence of insurance company changes what would be otherwise an attorney-client dyad into a triad. Debate usually crystallizes around the issue of who is the client and how many are there—one? one and one-half? two?

1. Issue is partially a turf dispute: will insurance law or professional responsibility law dictate nature of arrangements between insurance companies and lawyers?

2. Issue is also a temporal one: are the terms of the arrangement between carrier and lawyer established at the time the insured takes out the policy, at the time the defense lawyer is retained, or at the time an actual conflict develops? David A. Hyman, "Professional Responsibility, Legal Malpractice and the Eternal Triangle: Will Lawyer or Insurer call the shots?," 4 Conn. Ins. L.J. 353, 380-395.

3. New York: the answer is *two* clients. NYSBA Committee on Professional Ethic Opinion 716 (3/8/99). [http://www.nysba.org/opinions/opinions716.html].

C. Insurance policy between carrier and insured:

1. The insurance policy creates a dyadic relationship between the insured and the insurer. Silver, "The Professional Responsibility of Insurance Defense Lawyers," 455 Duke L.J. at 269.

2. Insureds buy liability insurance to cover two risks: to pay cost of the legal defense (attorneys' fees) and to pay indemnity (the risk of having to pay money to the plaintiff as a result of the lawsuit).

3. Vast majority of liability insurance policies cover both defense and indemnity; these policies therefore give the insurance company the right to control the defense of the case and to require the cooperation of the insured in that defense including the obligation not to settle case without carrier's involvement.

4. Policy obliges carrier to defend: the carrier selects counsel to defend an action, supervises counsel's litigation and settlement strategy, and settles claims within policy limits at the company's discretion. Silver, "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L.J. 255, 264-65 (Nov. 1995).

5. Flip side of obligation to defend is carrier's right to control the defense where the risk is completely covered. *Parker v. Agricultural Ins. Co.*, 109 Misc. 2d 678 (Sup. Ct., N.Y. Co. 1981); 7C Appleman, Insurance Law and Practice, § 4681, pp. 2-5. Right to control defense allows insurers to protect their financial interest in the outcome of litigation and to minimize unwarranted liability claims. Giving the insurer exclusive control over litigation against the insured safeguards the orderly and proper disbursement of the large sums of money involved in the insurance business. Of course, the insured at his own expense, may chose to hire independent counsel. *Id.*; See also 70 N.Y. Jur. 2d Insurance § 1657.

6. But, where *some causes of action are covered and some are not*, in situations that would tempt the carrier to want to shift liability from a covered theory to an uncovered theory, the insured has the right to select counsel at carrier's expense so that the tactical decisions are in the hands of an attorney whose loyalty to the insured is unquestioned. *See, e.g., Public Service Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392 (1981); *Ladner v. American Home Assur. Co.*, 201 A.D.2d 302 (1st Dep't 1994). *EXAMPLES:*

   a. Speed of resolution of the lawsuit may create a conflict and therefore give the insured the right to choose counsel. *69th St. & 2nd Ave. Garage Assoc., LLP v. Ticor Title Guar.*, 207 A.D.2d 225 (1st Dep't 1995) (Client needed quick resolution of lawsuit involving title

insurance so that it could keep its application for refinancing its mortgage alive; the carrier wanted to proceed leisurely since there was no pressure on it to resolve the lawsuit).

b. Where the lawsuit alleges uncovered intentional as well as covered negligent conduct. *225 East 57th St. Owners, Inc. v. Greater NY Mut. Ins. Co.*, 187 A.D.2d 360 (1st Dep't 1992); *State Farm Mut. Ins. Co.VanDyke*, 247 A.D.2d 848 (4th Dep't 1994).

c. Carrier commences a declaratory judgment action regarding its duty to defend. *Jadwiga v. Ralty Inc.*, 232 A.D.2d 831 (3d Dep't 1996); *Pistolesi v. General Acc. Ins. Co. of Amer.*, 210 A.D.2d 961 (4th Dep't 1994).

d. Alternative theories in the complaint about whether plaintiff slipped getting out of the defendant's automobile (which would be covered under the auto liability policy) or elsewhere in the driveway (which would not). *Wiley v. New York Cent. Mut. Fire Ins. Co.*, 210 A.D.2d 829 (3d Dep't 1994).

7. Exception to insured's right to choose counsel at carrier's expense in mixed coverage cases: where both the carrier and the insured want a finding of no liability on any ground, it does not matter whether some claims are covered (for example, bodily injury claims) and some are not (for example, property damage claims). Both carrier and insured are united in wanting a finding of no liability. *Public Service Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392 (1981)

D. Retainer agreement governs relationship between carrier and defense counsel.

1. The retainer agreement, not the policy, regulates defense counsel's professional relationships with carrier and insured and fixes scope and content of relationships. Because most of an attorney's duties are "mutable" (i.e., can be created or altered by contract), the retainer agreement is of overwhelming importance in deciding defense counsel's responsibilities. Silver, "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L. J. at 270.

a. Law of agency governs counsel's obligations to the insurer and the insured. The insurer and the insured are co-principals relative to the defense counsel. A principal can generally structure a relationship with an agent along any lines that principal chooses with the agent's consent. *Id*. at 304-306.

2. Mutability of defense counsel's obligations

a. Defense counsel's mutable obligations:

(1) When no other body of law governs, the lawyer's conduct is governed by the retainer agreement. *Id.* at 305.

(2) When another body of law requires conduct inconsistent with the retainer agreement, defense counsel can follow both the law and the retainer agreement's obligation. *Id.*

(3) When another body of law requires the lawyer to act contrary to the retainer agreement, but the legal obligation may be changed or waived by agreement, the lawyer can act according to the retainer agreement with the insured's consent (a mutable obligation). *Id.* (Defense attorney's submitting bills to third party auditors, which is discussed below, falls into this category. Defense counsel can do so, but only with insured's informed consent.)

b. Defense Counsel's immutable obligations: where another body of law imposes an immutable obligation (i.e., one that cannot be changed by insured's consent), lawyer must decline to act as company directs. *Id.*

E. Defense attorney's relationship with insured

1. There's no contract between attorney and insured. Insurance policy does not directly bind defense counsel or affect defense counsel's professional obligations because defense counsel is a stranger to the agreement. Defense counsel's relationship with the insurer and the insured comes into existence when counsel agrees to represent an insured at the company's request. Then the triad relationship manifests. Silver, "The Professional Responsibility of Insurance Defense Lawyers," 455 Duke L.J. at 269.

2. The insured consents to representation by asking the carrier to provide a defense, which foreseeably includes hiring a lawyer who operates subject to the company's control. *Countryman v. Breen*, 268 N.Y. 643 (1935).

3. An attorney may accept employment from an insurance company to represent the carrier's insureds within the limits of the policy without the request of the approval of the insured. If the insured does not wish to avail himself of the company's obligation to defend the suit including counsel, together with payment of any judgment and costs, he is at complete liberty to renounce his rights under the insurance contract

and employ independent counsel at his own expense. A.B.A. Formal Opinion 282 (1950).

4. The insurance defense attorney's primary duty is to the insured, not to the carrier (i.e., immutable). *See, e.g., Ladner v. American Home Assur. Co.*, 201 A.D.2d 302 (1st Dep't 1994); *Feliberty v. Damon*, 72 N.Y.2d 112 (1988).

5. The carrier cannot interfere with counsel's independent professional judgment in conduct of litigation on behalf of the client. *Nelson Electrical Contracting Corp. v. Transcontinental Ins. Co.*, 231 A.D.2d 207 (3d Dep't 1997). D.J. action by Nelson ("Employer") against Transcontinental ("Insurer"). Employer was the electrical subcontractor during the construction of Carousel Mall in Syracuse. Pyramid was the GC. Three of Employer's employees were injured and sued GC. GC impleaded Employer for contractual and common law indemnification and contribution (covered claims) and asserted a breach of contract claim against Employer for failing to name GC as an additional insured on Employer's G.L. policy with Insurer (non-covered claim). Insurer wanted to show that GC was at least partially at fault for injury to Employer's employees, but such a showing would have shifted liability over to the non-covered claim and increased Employer's breach of contract liability to GC. Insurer permitted Employer to chose its own counsel at Insurer's expense. GC moved for summary judgment against Employer for common law and contractual indemnity. Employer's attorney decided for strategic reasons not to oppose the motion, agreeing with GC's counsel that they should present a united front against Employer's employees rather than point fingers at each other in the third-party action. (For Employer to have defeated GC's motion for judgment over, Employer would have had to present evidence of GC's liability, thus increasing its own liability on GC's breach of contract claim.) Insurer urged Employer's attorney to oppose the motion, but the attorney refused to do so. GC was granted summary judgment against Employer. Insurer disclaimed coverage for failure to cooperate and refused to pay Employer's attorneys' fees. Employer commenced this DJ action for a declaration that Insurer was obligated to defend and indemnify it in the underlying tort action and to pay its attorneys' fee. Insurer contended that Employer's counsel had to obtain Insurer's consent for its course of action on the summary judgment motion or risk loss of coverage.

   a. Held: Insurer's position was untenable. Ethical consideration 5-21 of the Code of Professional Responsibility states that an attorney is to exercise professional judgment solely on behalf of the client disregarding the desires of others that might impair the lawyer's free judgment. An attorney cannot permit the insurer to direct or regulate professional judgment.

   b. Also held: the contractual provision in the policy prohibiting the insured from settling a case without the Insurer's consent can't be read to require the Insurer's permission for attorney's tactical decisions.

6. *Triber v. Hopson*, 27 A.D.2d 151 (3d Dep't 1967). An insured's carrier-retained attorney in the underlying liability action cannot represent the carrier in declaratory judgment action involving insurance coverage for the incident in question. It would be a conflict of interest for the attorney to represent both.

II. Carrier's liability for the malpractice of its retained attorney

A. New York: An insurance carrier is *not* vicariously liable for the malpractice of defense counsel's malpractice. *Feliberty v. Damon*, 72 N.Y.2d 112 (1988). Court declined to find non-delegable duty exception to the independent-contractor rule that an employer is not liable for the negligence of its independent contractor, for two reasons: the insurance company is prohibited from practicing law and must rely on independent counsel; and the paramount duty of independent counsel to the insured, not the insurer, precluding the insurer from interfering with counsel's independent professional judgment in conducting litigation on behalf of the client.

   1. See also *Merritt v. Reserve Ins. Co.*, 34 Cal. App. 3d 858 (Ct. App. 1973); *Brown v. Lumbermen's Mut. Cas. Co.*, 90 N.C. App. 464, 369 S.E.2d 367 (1985).

B. Contra:

   1. *Blakely v. American Employers Ins. Co.*, 424 F2d 728 (5th Cir. 1970);

   2. *National Farmer's Union Prop. & Cas. Co. v. O'Daniel*, 329 F2d 60 (9th Cir. 1964);

   3. *Smoot v. State Farm Mut. Auto. Ins. Co.*, 299 F2d 525 (5th Cir. 1962); *Pacific Employer's Ins. Co. v. P. B. Hoidale Co.*, 789 F.Supp. 1117 (D Kan. 1992);

   4. *Stumpf v. Continental Cas. Co.*, 794 P. 2d 1228 (Or. Ct. App. 1990);

5. *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P. 2d 281 (Alaska 1980).

III. Impetus for carriers' increased control over defense counsel's representation of insured in last decade

A. Economics of insurance industry: (Baliga, Practicing Law Institute/Insurance Law 1999: Understanding the ABC's, "Litigation Management's Impact on the Insured, Insurer and Legal Counsel." (author is a former claim executive with 15 years' experience in the insurance industry))

1. Carriers, facing a "soft" insurance market of cutthroat competition in pricing premiums for 10 years, had internally downsized as far as possible, re-organizing branches and home offices, and had reviewed contracts with outside adjusting firms to increase efficiency. Claim departments, having undergone large scale reductions in force, perceived an unwillingness of law firms to institute comparable business disciplines; claim reps found themselves ineffective in enforcing guidelines themselves and were tired of debates with firms over reductions in fees. Fertile ground thus presented itself for bill reviewing companies. Baliga, *supra*.

B. Law review articles about overbilling

1. Seminal article: Lerman, "Lying to Clients," 138 U.Pa. L.Rev. 659 (1990).

2. Ross, "The Ethics of Hourly Billing by Attorneys," 44 Rutgers L. Rev. 1 (1991).

   a. This article is now a full book: Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys*. Durham: Carolina Academic Press 1996. Discussed further below.

3. See, also, a host of other articles, some of which are:

   a. Darlene Ricker, "Greed, Ignorance and Over Billing: Some Lawyers Have Given New Meaning to the Term 'Legal Fiction'," 80 A.B.A. J. 62 (Aug. 1, 1994).

   b. James P. Schratz, "I Told You to Fire Nicholas Farber—A Psychological and Sociological Analysis of Why Attorneys Over Bill," 50 Rutgers L. Rev. 2211 (Summer 1998). Article starts with a (hopefully fictitious) memo from the management committee of an insurance defense firm to a partner who supervised an associate who was honestly reporting his time. This article sets forth seven categories of personality types of attorneys who overbill.

      (1) Schratz is an oft-quoted source in the literature: 1969 B.A. from SUNY Buffalo; VP of claims at Firemen's Fund; 1976 graduate of U. San Francisco Law School; currently president of Jim Schratz and Associates acting as legal auditor and expert witness of insurance defense firms' billing.

   c. Chief Justice William Rehnquist, "Dedicatory Commencement Address: The Legal Profession Today," 62 Ind. L.J. 151 (1987)."If one is expected to bill more than 2,000 hours per year, there are bound to be temptations to exaggerate the hours actually put in."

   d. But see the following, that attorneys are generally honest in billing:

      (1) Howard L. Mudlick, "Is Padding Widespread? No: Billing Is Serious Business," A.B.A. J. 43 (Dec. 1990): stating that the "Vast majority of lawyers bill ethically and accurately."

      (2) Amy Stevens, "10 Ways (Some) Lawyers (Sometimes) Fudge Bills," Wall St. J., 1/13/95 ("Many of American's 864,000 lawyers keep scrupulous time records, . . . and never inflate charges"), reprinted in Accountability services, *Management Analysis of Legal Services Rendered to ABC Insurance Company*, 561 Practicing Law, Inst./Litigation 99, 157 (1997).

C. Publicity regarding law firm billing: high-profile cases in the news.

1. Webster Hubbell (former justice department official and key Whitewater figure) pleaded guilty in December of 1994 to two felony counts of mail fraud for stealing $394,000 from the Rose law firm of Little Rock, Ark. (Hillary Clinton's firm) and its clients.

2. In 1992, senior partner in Washington office of Winston and Strawn pleaded guilty to defrauding clients and firm.

   a. Also, Winston and Strawn's managing partner, who had cooperated with the government in the 1992 investigation of the senior partner, was two years later himself sentenced for the same offense, pleading guilty to cheating the firm and several clients out of $784,000.

   b. The managing partner's wife, who was a partner at a Chicago firm, then followed suit pleading guilty to faking $900,000 in billings.)

3. In New York, managing partner of the now defunct Myerson and Kuhn, Harvey Myerson was sentenced to prison in 1992 for over billing.

4. Also in 1992, the managing partner of the Santa Rosa, California office of Bronson, Bronson, and McKinnon was indicted for embezzling from clients.

5. In the civil arena, the Annapolis law firm of Digges, Horton and Leven were civilly fined 3.1 million dollars for illicit billing activities; and in Baltimore, a bank sued the firm of Weinberg and Green alleging the firm's systematic padding of bills.

D. Fiction: Tom Cruise finally brought down "The Firm" not because of its mafia activities but because of the firm's fraudulent overbilling.

E. Shoe on the other foot: Attorneys' complaints about technological consultants who "put inexperienced young people on complex matters and charge exorbitant fees; can't stick to a budget; speak in jargon, and charge by the hour so they have every incentive to prolong projects." Leibowitz, "When Lawyers Hire Consultants, Complaints Sound Oddly Familiar," Nat'l Law Journal, 3/31/97, pg. B9.

IV. Carriers' response:

A. Flat Fees—some carriers have experimented w/ flat fees on a per-case or per-task basis.

1. Analogy to fee-for-service payments to doctors in managed-care scenario

2. Parallels between insurance defense counsel's experience and physicians' experience under managed care regime. Hyman, supra, "Professional Responsibility," 4 Conn. Ins. L.J. at 386-389.

   a. Differences: "the world of insurance defense law is adversarial and thus not so certain. No doctor has another surgeon in the operating room trying to jiggle the scalpel." Andrew G. Cooley, "Fee Audits—Coming Full Circle and Looking Down the Road," 41 For the Defense, p. 21, 53 (June 1999).

3. Ethics opinion re flat fees:

   a. Kentucky: A lawyer may not enter into a flat-fee retainer agreement with the carrier; and the lawyer may not agree to accept cases from the carrier with the understanding that the attorney will be responsible for all expenses of litigation without expectation of reimbursement from the insurer. Kentucky Bar Association Ethic Opinion KPA E-368 at *http://www.uky.edu*.

   b. Ohio: Attorney may do work for insurers for flat fee, so long as the fee is reasonable and adequate and the attorney's independent judgment is not adversely affected. Supreme Court of Ohio, Board of Commissioners on Grievances and Disciplines, Opinion 97-7 (12/5/97) (The expenses of litigation, however, must ultimately be borne by the insurer).

   c. Missouri: Insured's consent is required before law firm can enter into flat fee agreement with carrier.

B. Carrier's use of in-house counsel.

1. 1995 ABA study: 80% of corporate clients surveyed are bringing more work in-house. Some clients such as insurance carriers with significant volume of litigation have established nationwide staff counsel programs employing up to 500 attorneys. Some carriers' site studies show 40% savings in legal expenses with no increase in indemnity payments. Typically the in-house attorney is the same cost to the employer as panel counsel, but in-house attorneys spend 40% less time on the case and still obtain the same results. Schratz, "I Told You to Fire Nicholas Farber . . . ," 50 Rutgers L.Rev 2211, 2221-22 (Summer 1998).

2. Segmentation of client base: three types of client work—brains, gray hair, and procedure projects. Schratz, "I Told You to Fire Nicholas Farber. . .," 50 Rutgers Law Review 2211, 2224 (Summer 1998) (citing David Maister, *Managing the Professional Service Firm*, (1993).

   a. Brains projects: case is on cutting edge of law/profession, requiring creativity, innovation, and pioneering of new approaches, concepts or techniques. "Hire Us Cause We're Smart."

   b. Gray hair projects: require highly customized output to meet client's needs but is of lesser degree on innovation and creativity than brains project. "Hire us because we've been through this before and we have practice at solving this type of problem."

   c. Procedure project: most closely akin to insurance defense work. Well recognized and familiar type of issues. Although some need for customization, steps necessary to accomplish goal are pragmatic. Clients interested in efficiency-based practices and costs, reliability, speed. Clients view law firm's services

as fungible and adding little value; hence pressure on what cost-conscious client is willing to pay for fees. Carriers drive down the price they are willing to pay panel counsel and are decreasing the file case load by bringing them in-house.

d. Possible solution: flat fee arrangements, caps, reverse contingency agreements, etc. Convince client that quality of service will not suffer. Schratz, "Nicholas Farber," 50 Rutgers L.Rev. at 2225.

3. Ronald E. Mallen, "Defense By Salaried Counsel: A Bane Or A Blessing?," 61 Def. Couns. J. 518 (Oct. 1994).

a. Pro: eliminates profit margin of outside counsel; improvement in quality of representation by repeated handling of same type of cases.

b. Use of in-house counsel challenged on ethical (conflict of interest) and legal (unauthorized practice of law) grounds. Mallen at p. 518.

4. Majority position, including New York: carrier's use of in-house counsel okay, not unauthorized practice of law. ABA Committee On Professional Ethics and Grievances, formal opinion 282 (1950); NYSBA Unlawful Practice Committee, Opinion 13 (1970); NYSBA Professional Ethics Committee, Opinion 109 (1969); N.Y. Ethics Opinion 519, 1980 WL 19281 (March 21, 1980).

a. Contra: *American Ins. Ass'n. v. Kentucky Bar Assoc'n.*, 917 S.W.2d 568 (KY. 1996); *Gardner v. N. Carolina State Bar*, 341 S.E.2d 517 (N.C. 1986).

b. Minority position is growing. Dacey, "The Delicate Balance of the Attorney-client Privilege in the Tripartite Relationship," 602 PLI/Lit 199 (1999), citing jurisdictions and decisions.

5. In-house counsel subject to same ethical responsibilities (undivided loyalty to insured-client) as outside defense counsel. Richmond, *supra*, 61 Def. Couns. J. at 522-23 authority cited.

(1) In-house counsel subject to same disqualification rules as panel counsel. *See, e.g., Goldenberg v. Corporate Air Inc.*, 457 A.2d 296 (Conn. 1983).

(2) In-house counsel being sued for mishandling defense could not use a finding that insurer had acted in good faith when it failed to settle within its policy limits. *See, e.g., Torres v. Nelson*, 448 So.2d 1058 (Fla. App. 1984).

6. In-house's operation should be designed comparable to that of law firm: a separate department with lines of supervision and control by senior attorneys; employment manuals and published guidelines should formalize professionalism. Counsel's files should be confidential from claims department. Should have conflict system data base to cross-check clients and adversaries. Mallen, *supra*, 61 Def. Couns. J. 518, 524 (Oct. 1994).

7. Query: should in-house counsel defend when there is a coverage issue or limited coverage for indemnity? In-house counsel should be guided by the same restrictions that apply to outside counsel. Mallen, *supra*, 61 Def. Couns. J. 518, 527 (Oct. 1994).

C. Case management guidelines. In the early 1990s came the emergence of EXTENSIVE AND MORE COMPREHENSIVE REVISIONS TO CARRIERS' CASE MANAGEMENT GUIDELINES, addressing every aspect of case management and billing. (Baliga, Practicing Law Institute/Insurance Law 1999: Understanding the ABC's, "Litigation Management's Impact on the Insured, Insurer and Legal Counsel," *supra*.) By the mid-1990s, most carriers large and small had adopted detailed guidelines in one form or another.

D. Settling rather than defending

1. Many carriers have adopted the philosophy that it is more cost-effective to settle than defend the suit. Sanders, "Companies that Roll Over May End Up Dead," National Law Journal, 5/16/94, pg. A19. But Sanders argues that carriers should defend cases, not settle them. "By cutting and running to avoid a trial, companies are not necessarily protecting either their bottom line or their business interests. . . . Companies that consistently settle cases of questionable merit develop a reputation as easy targets. . . . Nothing slows down or stops the filing of cases of doubtful merit like the knowledge that those kinds of cases don't pay off. What lawyer wants a probable loser that, furthermore, probably won't settle? Corporate general counsel would have less defense expense to worry about if they showed more spirit."

2. USF&G experience: using high-quality expensive attorneys who have professional freedom to fully represent insureds' interests has significantly cut indemnity costs. Amy Stevens, "Have Big Legal Bills? Maybe You Should Pay More for Attorneys," Wall St. J. 1/7/94.

E. Auditing of defense attorneys' bills. The mid-1990s saw the rise of THIRD-PARTY BILL REVIEW OF INSURANCE DEFENSE FIRMS' BILLS. *Id.*

1. Before: the claim representative on the file reviewed the bills. Third-party auditors, however, sprang up promising insurance companies more efficient management of bill review and more effective enforcement of insurance company guidelines, promising possible cost savings of 10% to 15% and thereby freeing claim representative from the tedium of reviewing bills in favor of focusing on managing cases. *Id.*

2. 1990s: to improve profitability, many insurers focus on controlling defense costs (and conjunctively performance of defense counsel) because they lend themselves to statistical analysis and objective performance measures. Cost-conscious liability insurers focus on defense expenditures because they can. Richmond, "Getting on the Bus: Of Legal Audits and Legal Ethics," 65 Def. Couns. J. 512 (Oct. 1998).

    a. Some carriers estimate attorneys' fees as 50% of their total payout, but the amount is probably closer to 14%.

3. Legal audits are nothing new. Insurers have employed experienced claims professionals to evaluate defense counsel's performance and reasonableness of charges for many years. But now many insurers require defense attorneys to submit bills directly to outside auditors for review before payment. At least five major legal auditing firms nationwide and many smaller ones. Lisa Brennan, "Driven To Defection," Nat'l. L.J., May 18, 1998, at A1, A26.

4. Great detail and specificity required in bills: nature of legal services, specific legal research performed, information that could disclose counsel's mental impressions, strategic decision and case theories; perhaps information obtained from or about insureds that would otherwise be kept confidential.

5. Defense bar's concerns: evidentiary and confidentiality issues; auditors' insensitivity to intricacies of particular case; variation among and within carriers as to billing requirements and critical; little or no appeal from auditors' decisions; delay in payment of bills; auditors' self-interest in justifying their function and costs (motive to cut and slash bills).

6. Insurers' and outside legal auditors' reaction: defense lawyers' protests about professional responsibility problems are disingenuous. Lisa Brennan, "Outside Fee Audits Draw Bar Dissent," Nat'l. L.J., August 3, 1998 at A6. Insurers and auditors argue issue is not ethics, but rather defense attorneys' dislike of audit process. But many authors, including Richmond, *supra*, 65 Def. Couns. J. 512, 513, conclude that ethics and attorney/client privilege issues are indeed valid, regardless of motives of either side.

7. Types of legal audits. James P. Schratz, "Cross-examining a Legal Auditor," 18 Thomas Jefferson L.Rev. 41 (Spring 1996).

    a. The most comprehensive: on-site audit (includes a review of all fee and expense entries, law firm work product, expense documentation, pre-bills and time sheets, and interviews of key law firm personnel.

    b. Less comprehensive: preliminary analysis. (Review of all the firm's fee and expense entries and expense documentation, work product, pre-bills, and time sheets. Avoids cost of visiting a law firm and forgoes benefit of interviewing personnel).

    c. Review of 100% of the firm's fee and expense billings without review of any expense documentation, work product, pre-bills, or time sheets. (Lacks on-site interviews and documents review).

    d. Least comprehensive: letter report. (Analysis of specific concerns or issues of the client that can be identified from billing entries or statements).

8. First three levels of analysis require inputting invoice data into COMPUTER PROGRAM, which allows auditor to perform various work searches and other functions.

9. Purpose of audit and what to expect. Purpose may be fraud or efficiency. Accountability services, "Management Analysis of Legal Services Rendered to ABC Insurance Company," 561 Practicing L. Inst./Litigation 99 (1997) (author is Judith Bronsther, lawyer turned legal auditor).

    a. Fraud audit seeks to determine if the work billed was actually performed. Auditor compares documentation against the actual bill, reviews invoices, and checks documents and correspondences that were billed. *Id.*

    b. Efficiency audit reviews bill for staffing inefficiencies and other factors that adversely affect the legal costs. *Id.*

    c. Both purposes might be combined in the same review. *Id.*

10. Law auditors

    a. See web sites, for example, http://www.legalfees.com (Steven M. Voltz's litigation cost control); http://www.legalgard.com (web site for Legalgard).

    b. Ohio: Improper for attorneys to form an ancillary business offering to small and medium-sized business its service to negotiate legal fees between the business and its retained counsel. By conducting negotiations of legal fees through this ancillary business, the attorneys would be improperly attempting to exert influence upon the attorneys retained by the business and would be interfering with existing fee contracts between attorney and client.

11. Practice guides re legal billing audits

    a. James P. Schratz, "Cross-examining A Legal Auditor," 18 Thomas Jefferson L. Rev. 41 (Spring 1996). explains how to prepare for cross examination of legal auditors and suggests fruitful areas for cross examination.

    b. William G. Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys*. Durham: Carolina Academic Press 1996. Reviewed by James P. Schratz in a book review, 27 Cumb. L. Rev. 673 (1996-97). Shows not only the extent of the problem throughout the legal profession but provides extensive legal research on the various court decisions that establish proper billing guidelines. Includes historical analysis of attorney's fees, citing a Roman statute passed 204 B.C., which "prohibited anyone from accepting money or gift for pleading a case," and continues historical background up to present day. Reports the result of two nationwide surveys of attorneys (conducted in 1991 and in 1994-95): more than half the lawyers surveyed believed lawyers defrauded clients by padding bills up to 10% of the time, and nearly 25% surveyed estimated fraud present in as much as 25% of the bill. 64% of lawyers surveyed said they had actual knowledge of fraud. Chapters divided into various types of billing abuses (e.g., overstaffing, extensive research, clerical tasks charges, excessive overhead charges, need for precise record keeping, ethical and economic problems of law firms investing in technology, phantom hours, billing for travel time, minimal billing increments, excessive attorney conferencing). Use when:

        (1) fee dispute between your client and his former attorney;

        (2) fee dispute between you and your former client;

        (3) you represent a party who must either oppose or seek a fee application under a fee shifting statute;

        (4) you represent insurer or insured in policy coverage D.J. action where the successful insured may be entitled to attorney's fees;

        (5) you represent a party in bankruptcy court and are seeking approval or disapproval of a fee application for attorney's fees.

        (6) Your client seeks/opposes claim over for attorneys' fees in third-party action for indemnification.

            (a) Query whether insurance carrier for successful third-party plaintiff can seek a higher hourly rate for its in-house counsel than it internally budgets for its in-house counsel's time.

    c. Schratz always asks law firm making pitch for new business four questions (the four basic "numbers" that insurance company watch very closely on a monthly basis): [Schratz, "Nicholas Farber," 50 Rutgers L.Rev. at 2225-2226.]

(1) What is your average paid legal and what were the amount of fees you charged for these types of cases last year? *Id.*

(2) What is your average paid indemnity? How much did your insurance clients pay in settlement and/or judgments on each category of cases you handled for them last year?

(3) What is your closing ratio? Are you closing more cases than opening. (Insurance companies want to close more cases than they open because the longer a case stays open, the more it will cost. If closing ratio is under 100%, pending case load is increasing. If it is over 104%, closing cases too fast and paying too much in settlements. Rule of thumb: closing ratio of approximately 102%.

(4) What is your average life of a case? How long does the case stay open?

(5) Very few instances where law firm could answer questions. Law firm that tracks this information and offers to handle cases for fixed fee or alter-

native billing method presents excellent opportunity for law firm to keep current clients and attract new ones.

d. Also advocating the imposition of similar business disciplines on the practice of law are Haig, "Corporate Counsel's Guide: Legal Development Report on Cost-Effective Management of Corporate Litigation," 601 PLI/Lit 475 (1999) and Rickerson, "New Tools to Improve Case Management While Reducing Costs," 561 PLI/Lit 189 (1995-97).

V. "Fall out" from carriers' increased control

A. Reaction of plaintiffs' bar.

1. "The plaintiffs' bar alternately smirks at defense lawyers' problems and files a new batch of bad faith law suits." Andrew G. Cooley, "Fee Audit—Coming Full Circle and Looking Down the Road," 41 For the Defense, No. 6, p. 19 (June 1999).

   a. Texas: full-blown challenge to practice of insurance companies using in-house counsel who may or may not be licensed in the particular state. See *Unauthorized Practice of Law Committee v. Allstate Insurance Co.* (District Court, Dallas County, Texas) plaintiff's attorney, Mark A. Ticer, 4144 N. Central Expressway, Suite 1250, Dallas, Texas 75204; (214) 823-6046.

2. New species of bad faith lawsuit brought by consumers of insurance against auditors and carriers seeking disgorgement of profits, alleging that insurance companies are enjoying savings and defense costs by artificially restricting activities of defense counsel entitling insured to refund of premiums paid. *Smith v. Law Audit Services, et al*, No. 164549 (Superior Court, San Francisco County, Feb. 11, 1999); *Smith v. Legalgard, et al*, no. 164548 (Superior Court, San Francisco County, Feb. 11, 1999) (plaintiff's attorney Kevin J. McInerney, SBN 46941; Kelly McInerney, SBN 20017, 18124 Wedge Parkway, No. 503, Reno, NV 89511; (702) 849-3811; fax (702) 849-3866). Greg Mitchell, "Insured, Law Firm Auditor Sued," The Recorder, 2/12/99.

3. *State Farm Mutual Automobile Ins. Co. v. Traver*, 980 S.W.2d 625 (Tex. 1998);

   a. Facts: Traver was executor of estate that was defendant in underlying negligence lawsuit. The negligence plaintiff was a passenger in the other vehicle which had collided with Traver's decedent. Both drivers (the other driver and Traver's decedent) were insured by State Farm and each had a policy with a per-person liability limit of $25,000. The negligence plaintiff sued both drivers in one action and State Farm retained separate attorneys for each driver. Jury found Traver's decedent 100% responsible for the accident and awarded damages of $375,000 against Traver's decedent plus $100,000 in prejudgment interest. Traver sued State Farm claiming breach of duty to defend because the attorney retained by State Farm to defend the estate failed to attend several key depositions and failed to offer a meaningful defense at trial. Traver alleged State Farm deliberately orchestrated that attorney's malpractice to avoid potential bad-faith liability against State Farm vis-a-vis its handling the settlement negotiations on behalf of the other driver before the case went to trial. [Traver had sued the defense attorney as well, but the defense attorney's bankruptcy filing stayed Traver's suit against him.]

   b. Held: Carrier not responsible for defense attorney's alleged negligence because defense attorney was independent contractor.

   c. Gonzalez, J., concurring and dissenting: "Whether insureds are getting the value and level of representation they are paying for deserves serious, thorough study. I do not mean to imply that all insureds are entitled to a 'Cadillac' defense when all they paid for is a 'Chevrolet.' My concern, however, is that because of recent market changes in insurance defense practice, some insureds who have paid for a 'Chevrolet' defense are getting a 'Yugo' defense. 980 S.W.2d 625, 634.

VI. Legal issues raised: ethical obligation of confidentiality

A. NYSBA Committee on Professional Ethics Opinion 716 (3/8/99).
http://www.nysba.org/opinions/opinions716.html.

1. Topic: Lawyers' submission of client billing records to outside auditor employed by insurance company.

2. Digest: A lawyer representing an insured may not submit legal bills to an independent audit company employed by the insurance carrier without the consent of the insured after full disclosure.

3. Opinion: Billing records contain confidential or secrets that are subject to the duty of confidentiality. Billing records may not be disclosed with-

out clients' consent. Advance consent in an insurance policy could be revoked once a claim arises and the carrier has retained an attorney. Client/insured has capacity to voluntarily consent. ("No doubt, a client's desire to take advantage of the instance company's duty to defend will highly influence the client to consent. Particularly where other important interests of the client would be placed at risk by disclosing information to the auditor, however, the lawyer must take care to insure that the client's consent is uncoerced as well as informed.) The required full disclosure will vary somewhat from case to case and client to client, but ordinarily, the lawyer should at least discuss the nature of the information to be found in the billing records sought by the auditor as well as the relevant legal and non-legal consequences of the client's decision, including the extent of the client's obligation under the insurance contract to authorize the disclosures and the risk that the insurance company would refuse to indemnify the client and pay the client's attorney's fees if the client does not consent, and the risk that evidentiary privileges could be waived. Defense attorney's primary allegiance must remain to the client and therefore the advice regarding disclosures to the auditors must also be disinterested. In New York, the policy holder's agreement to be represented by a lawyer to be compensated by the insurer does not make the insurer a co-client of the policy holder for purposes of the code of professional responsibility. The policy holder alone is the client.

B. All states' ethics opinions on subject are same as New York's [see below] except Massachusetts and Nebraska (no ethical violation).

1. For a hard-copy listing of ethics opinions and case law on third-party audit of attorney's bills and related issues, see Kathryn A. Thompson, "Ethics Opinions/Third-Party Audits of Attorney Bills," 41 For the Defense, No. 6, p. 44 (June 1999).

2. Entire on-line bibliography with additional articles, commentary and synopsis available at Defense Research Institute's web site http://www.dri.org. Must be a DRI member to access.

C. In more comprehensive type audit, attorneys were audited by outside auditing agency for carrier. Auditor requested attorney forward work product documentation to support the billing statements. Ethics opinion: attorney's providing the requested information would have violated rules of professional conduct. Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, PA. Eth. Op. 97-119, 1997 WL 816708 (10/7/97).

VII. Legal issues raised: Attorney work product

A. CPLR 3101(c): "The work product of an attorney may not be obtainable."

1. The attorney work product privilege protects not only material prepared for the litigation then in progress but also to work product prepared for other litigation. *Beasock v. Dioguardi Enterprises, Inc.*, 117 A.D.2d 1016 (4th Dep't 1986).

B. *Indian Law Resource Center v. Dept. of the Interior*, 477 F.Supp. 144 (D.D.C. 1979): plaintiff, a non-profit legal assistance provider to the Navajo Indian tribe in Arizona tried to get law firm statements submitted by the attorneys for the Hopi Indians (an adversary tribe). The statements had been submitted to the Department of Interior for payment pursuant to statute. The statements revealed strategies to safeguard Hopi tribal interests. Held: no entitlement to disclosure; protected as attorney work product. No waiver of work product privilege because no disclosure to any party other than Department of the Interior. Held: statements exempt from disclosure also on grounds of confidentiality. The attorneys' identities and actual fee amounts paid and attorney fee schedules are not privileged either as work product or professional confidence. (As to the last point, see also *Clarke v. American Commerce Nat'l Bank*, 974 F.Supp. 127 (9th 1992).

VIII. Legal issues raised: Attorney/client privilege

A. CPLR 4503(a): "Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation

organized under Article 15 of the Business Corporation Law to practice as an attorney and counselor-at-law as the clients to whom it renders legal services."

B. Attorney/client privilege is strictly construed. Because the attorney-client privilege, like all privileges, is an obstacle to the ascertainment of truth, New York courts frequently concur with Wigmore's view that it should be strictly confined within the narrowest possible limits consistent with the logic of its principle. *See, e.g., Spectrum Systems International Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991).

C. The party asserting the privilege usually bears the burden of establishing all of the essential elements. *People v. Mitchell*, 58 N.Y.2d 368 (1983).

D. In-camera inspection is an appropriate procedure to resolve questions as to the applicability of privilege to documents. *Spectrum Systems International Corp. v. Chemical Bank, supra*, 78 N.Y.2d at 378.

E. This privilege protects only the communication between lawyer and client, not client's knowledge of facts themselves. Witness must answer question "What happened" but cannot be compelled to answer question "What did you tell your lawyer about what happened?" *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

F. For the communication between lawyer and client to be privileged, it must relate to the client's seeking of legal advise or services, but is not restricted to communications involving litigation. *People v. Mitchell*, 58 N.Y.2d 368, 373 (1983).

G. The identity of a client and information about fees paid by the client or the client's benefactor generally do not fall within the scope of the privilege. *Priest v. Hennessy*, 51 N.Y.2d 62 (1980).

H. Under evidence law, communications with the insurance company in this tripartite relationship depend on the company's authority to obtain legal services for the insured and to act for the insured on the basis of legal advise. It is therefore covered by the attorney-client privilege. Silver, "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L.J. at 288 (Nov. 1995).

I. Common interest theory: where for example two attorneys representing two different clients involved in a common defense share confidences and work product, both privileges still attach. *See, e.g., United States v. Massachusetts Institute of Technology*, 129 F3d 681 (1st Cir. 1997).

J. Finding no violation of the privilege in releasing attorneys' bills: *Hunterdon County Policemen's Benevolent Ass'n Local 188 v. Township of Franklin*, 669 A.2d 299 (N.J. Super. 1996) (Stating that F.O.I.L. release of attorneys' bills paid by municipality for local's attorneys' fees did not violate attorney-client privilege because bills generally do not contain confidential information, but instead contain "a few word description of the general category of work performed.").

K. Finding waiver of attorney-client privilege re: submission of attorneys' bills to outside auditors:

1. Disclosure of attorneys' bills to auditing arm of Dep't of Defense waived attorney-client privilege. IRS audited MIT's records to determine whether MIT still qualified for tax exempt/charitable status under ' 501(c)(3) of the Internal Revenue Code and to determine whether it was complying with provisions re: employment taxes and reporting of unrelated business income. IRS requested disclosure from MIT of billing statements of law firms, among other things. MIT refused. IRS served a subpoena on the auditing arm of the Department of Defense to whom the billing statements had been provided for billing audits re: MIT's contracts with Department of Defense. MIT moved to quash subpoena on ground of work product and attorney-client privilege.

   a. Although there is a narrow circle of others needed in the representation with whom the attorney and client may share the information without waiving privilege, a governmental auditor is not one of them. MIT voluntarily disclosed its attorney statements to the Department of Defense's auditing arm and therefore waived all privileges.

   b. MIT also could not claim "common interest" theory because the Department of Defense was adversary to MIT.

2. Disclosure of information to a certified public accountant conducting an audit required by the securities laws likewise waives privileges. *In re: Subpoena Duces Tecum served on Willkie Farr & Gallagher*, 1997 WL 118369 (S.D.N.Y. 1997); *In re: Woolworth Corporation Securities Class Action Litigation*, 1996 WL 30657 (S.D.N.Y. 1996); *United States v. Arthur Young & Co.* 465 U.S. 805 (1984). See also *United States of America v. South Chicago Bank*, 1998 WL 774001 (N.D. Ill. 1998).

3. Disclosures made voluntarily to the SEC or the Department of Justice during investigations conducted by those agencies waived attorney-client privilege and work product doctrine, and rendered disclosed documents available for discovery in litigation. *Westinghouse Electric Corp. v. The*

Republic of the Philippines, 951 F2d 1414 (3d Cir. 1991).

L. One writer concludes no waiver of attorney-client privilege for privileged statements found in defense counsel's bills because auditors are covered by the attorney/client privilege just as insurance companies are. David R. Anderson, "The Attorney-Client Privilege in Outside Auditor-Oil and Water?," 41 For the Defense no. 6, p. 23 (June 1999).

IX. Suggestions for solving ethics/privilege issue. Richmond "Getting On The Buss: Of Legal Audits and Legal Ethics," 65 Def. Couns. J. 512, 522-23 (Oct. 1998):

A. Bring legal auditors in-house. (Con: increase in cost. Auditing was outsourced in the first place to save money).

B. Include in policy a provision that insured consents to disclosure of confidential or privileged info to outside legal auditors. (Con: is not case-specific, and probably can be withdrawn when loss arises).

C. Employ outside audits only at conclusion of a given case. (Con: carrier would have to ask defense counsel to disgorge fees paid but not earned).

D. Insurer should include in initial letter to insured about carrier's employment of outside legal auditors and effect thereof on confidentiality/attorney-client privilege.

E. Allow defense attorneys to forego detail on privilege or confidential info (Con: defeats the specificity that the carrier seek via billing guidelines).

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Construction Site Accidents, the Labor Law and Impleader of the Employer Since the Workers' Compensation Reform Act of 1996

By James P. O'Connor

I. The Labor Law

The Labor Law was enacted to correct the dangerous working conditions prevalent throughout history. This is particularly true of construction accidents requiring significant protections to the workers. Although various sections of the Labor Law come into play in construction site accidents, the least favorable to injured workers is § 200. This section is a codification of a common law duty and is often referred to as the "safe place to work" doctrine. As such, it is not actually limited to construction sites. Recovery is allowed if defendant's negligence leads to the failure to maintain a safe work place, either by actual or constructive notice. The defendant must have authority to control the parties, including authority over an employer whose employee may be found negligent.[1]

Section 241(6) allows recovery for violation of a section of the New York Industrial Code, but comparative negligence is a defense.[2] But general regulations are not specific enough. General contractors are liable for the negligence of a subcontractor, but violations are only evidence of negligence. Protection to workers is required during construction or demolishing of buildings and excavation work. Other sections of the Labor Law address specific categories of workers, such as §202, which covers window cleaners (which may also be covered in commercial cases by § 240(1)).[3]

The most protective section for the worker is § 240(1), the "scaffold law," which includes much besides scaffolds and ladders and requires railings over unprotected open areas. The special hazards covered by the section involve elevation related accidents, "such specific gravity related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured."[4]

In pertinent part, Labor Law § 240(1) provides that:

> All contractors and owners and their agents, except owners of one- and two-family dwellings who contract for but do not direct or control the work, in the . . . demolition, repairing, altering . . . 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.

Section 240(1) has been interpreted to impose absolute liability for any breach thereof which is the proximate cause of an injury.[5] The duty imposed by Labor Law § 240(1) is non-delegable and a contractor or owner is liable for a violation of this section, even where he or she exercises no supervision or control over the work.[6]

In order to prevail on a Labor Law § 240(1) claim, plaintiff must show that there was a violation of the statute and that the violation was the proximate cause of the injury.[7] Proximate cause is established where "defendant's acts or failure to act as the statute requires" was a substantial cause of the events which produced the plaintiff's injuries.[8]

Section 240(1) requires that the construction site involve a building or structure, however liberally these may be construed. An inspection of premises is not included either.[9]

Other restrictive cases have come down concerning § 240. These cases construe the term "altering" as it appears in the statute. In April, 1998, the Court of Appeals decided *Joblon v. Solow* and *Weininger v. Hagerdorn*, holding that to have an "alteration" there must be "a significant physical change to the configuration or composition of the building"[10] as opposed to a simple routine activity. In *Joblon*,[11] plaintiff, an electrician, fell from a ladder while chopping a hole through a wall (Aalteration" appears both in § 240(1) and § 241 (6)). In *Weininger*,[12] "altering" was found but the Court went on and alluded to the fact that the plaintiff's actions may have been the sole proximate cause of his injuries. He had a folding ladder and may have stepped on the cross bar instead of one of the rungs of the ladder. If his own fault was the sole cause, there was no violation under § 240. This was a jury issue, as was the question of supervision and control, an issue on the indemnification claim over. A causal link between the violation of the section and the accident has always been required.

In the *Anderson* case, the worker was coming down a ladder backwards with coffee in one hand and food in

the other. His fall was held not covered by the Labor Law.

In another restrictive case, plaintiff, who sought to repair a freight elevator, was injured on a ladder. Since the repairs were to be done by an elevator repair company, Plaintiff lost his claim under § 240, with a holding that he was acting outside the scope of his employment.[13]

There is also a "recalcitrant worker" defense. This is where the plaintiff violated elementary precautions, failed to use a safety device placed at his or her disposal or worked around a safety device to avoid it.[14] This may involve a question of fact for the jury.[15]

On the other hand, where the facts clearly show the injury is due to a height and it involved a ladder, scaffold or other enumerated equipment, summary judgment has been available for the plaintiff.[16]

II. *Dole v. Dow* Is Now Changed

Construction accidents are a fertile ground for impleading, particularly where an owner may be liable vicariously under the Labor Law.

The State Insurance Fund is particularly interested in the Labor Law cases because it is often impleaded under its policy coverage or, at least now, is sought to be impleaded under different rules because of 1996 changes in the Law.

Prior to September 1996, New York courts consistently held that an employer of an injured worker was subject to being joined by an alleged third party tortfeasor for contribution and/or indemnity in an action filed against that tortfeasor by the injured employee, even if the employer was liable to pay workers' compensation benefits to an employee and, although the employer was immune from a common law action by the injured employee.[17]

In 1996, New York amended its workers' compensation statute to restrict the circumstances under which an employer may be joined by a third party tortfeasor seeking contribution and/or indemnity. New York's amended statute, the Omnibus Workers' Compensation Reform Act of 1996, reads as follows:

> **An employer shall not be liable** [emphasis added] for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer **unless** [emphasis added] such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean 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, disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.[18]

Prior to the amendment of New York's workers' compensation statute, a third party could have properly joined the employer in this action for contribution and/or indemnity. Now in New York, an employer may not be sued by a third party for contribution and/or indemnity for injury to an employee unless the third party can prove with competent medical evidence that the employee has sustained what the statute calls a "grave injury."[19] "Grave injury" is defined narrowly to include only those injuries listed within the language of the statute stated above.

A "grave injury" involves injuries that are permanent and disabling; amputations, loss of use, blindness, loss of ears, nose, *etc.* A third party plaintiff-defendant has the burden of proof in showing a grave injury.[20]

III. Litigation Under the Reform Statute

The most significant problem for a time was the date on which the restrictions of the 1996 Act were to be operable. Did it change the law in pending suits for instance? The Court of Appeals has held that the impleader action is barred unless the plaintiff sustained a grave injury when the complaint in the main action was filed after 10 September 1996, the effective date of the amendment. Carriers would have wanted the Act to be effective before a judgment was entered against the third party plaintiff, which starts the statute of limitations running on an indemnity claim.[21]

The Reform Act has been declared constitutional.[22] It was held that there was no violation of the equal protection clause and classification was proper. The purpose of the Reform Act was to diminish the insurance costs of doing business in New York State, a valid legislative objective. The case has been settled. The Attorney General submitted a brief in the case.

Whether there has been a grave injury was an issue to be decided by the jury in the following cases: *Zucker v. Sheridan*, (Sup. Ct., Kings County) (N.Y.L.J. 1/22/99); *Kitchen v. Kelin*, (Sup. Ct., Albany County) (Ind. No. 1198-97, decision 8/5/98) (liberal construction of Bill of Particulars); *Tighe v. American Compressed Gases*, (Sup. Ct., Bronx County) (severe burns alleged in bill of particulars, with scarring) (N.Y.L.J. 5/6/97): *London v.*

Hobart Construction, (S.Dist. Of N.Y., 98-Civ-908 (AGS), decided 4/2/99).

In *Granada v. Tair*,[23] further discovery was allowed requiring a physical examination to determine the amount of loss of use of the foot in a claim of a left foot drop.

Another major impleading issue is the "doctrine of anti-subrogation" enunciated in *North State Reinsurance v. Continental Insurance*.[24] An insurer cannot pass a loss from one of its insureds to another insured or create a conflict of interest. This usually occurs when one insured seeks coverage for another contracting party under the same policy. If the parties have separate policies or separate coverages, the doctrine does not apply and impleader is allowed.[25]

A somewhat similar issue arises when a contractor agrees to provide insurance coverage to the general contractor or vice versa, or even in a joint venture situation where one party contracts to obtain insurance coverage for another. Failure to obtain the insurance is a breach of contract.[26] This may also be the basis for a third party complaint.

Indemnification allowing a third party impleader may be contractual as well as common law. Contribution is also allowed under the statute, *i.e.*, a finding of proportionate liability.

One area of written contractual indemnity is governed by the General Obligations Law. Agreements allowing full indemnification between a general contractor and subcontractor are unenforceable under GOL § 5.322.1.[27] A contracting party cannot be indemnified for its own negligence. Whether an agreement allowing partial indemnification was covered by § 5.332.1 was not decided directly.

Endnotes

1. Cf., *Lombardi v. Stout*, 80 N.Y.2d 290 (1992) (no supervisory control); *Ross v. Curtis Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993) (no violation of 240(1) scaffold law, but possible violation of §200 found due to difficult place to work and defendant may have exercised supervision and control).
2. *Galawanji v. 40 Sutton Place Condominium*, 691 N.Y.S.2d 437 (1st Dept. 1999) (failure to provide safety goggles).
3. *Terry v. Young Men's Hebrew Assn.*, 168 A.D. 2d 399, 563 N.Y.S.2d 408, *aff'd.*, 78 N.Y. 2d 98. Section 202 provides absolute liability but is more limited geographically than § 240(1).
4. *Ross v. Curtis-Palmer Hydor-Elec. Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993).
5. See, *Rocovich v. Consolidated Edison*, 78 N.Y. 2d 509, 512, 577 N.Y.S. 2d 219 (1991); *Bland v. Manocherian*, 66 N.Y.2d 452, 459; *Zimmer v. Chemung County Perf. Arts*, 65 N.Y.2d 513, 524.
6. *Rocovich v. Consolidated Edison*, *supra* at 513.
7. *Lightfoot v. State of New York*, 245 A.D. 2d 488.
8. *Gordon v. Eastern Ry. Supp.*, 82 N.Y.2d 555, 561-562; *Rodriguez v. Forest City Jay St. Assoc.*, 234 A.D. 2d 68, 69. Guardrails are among the required safety devices. See, *Boice v. Jegarmont Rlty. Corp.*, 204 A.D. 2d 675; *Cartella v. Margaret Woodbury Strong Mus.*, 135 A.D. 2d 1089.
9. See, *Karaktin v. Gordon Hillside Corp.*, 143 A.D. 2d 637, 532 N.Y.S.2d 891 (2nd Dept. 1988).
10. 91 N.Y.2d at 461.
11. 91 N.Y.2d 457, 672 N.Y.S.2d 286.
12. 91 N.Y.2d 958, 672 N.Y.S.2d 840.
13. *Higgins v. 1790 Broadway Assoc.*, __ A.D. 2d __, 691 N.Y.S.2d 31 (1st Dept. 1999).
14. *Tweedy v. Roman Catholic Church*, 232 A.D. 2d 630 (2nd Dept. 1996).
15. *Job v. 1133 Bldg. Corp.*, 674 N.Y.S.2d 710 (2nd Dept. 1998).
16. *Urrea v. Sedgwick Ave. Associates*, 191 A.D. 2d 319 (1st Dept. 1993).
17. See, *Dole v. Dow Chemical Co.*, 30 N.Y. 2d 143, 331 N.Y.S.2d 382 (1972).
18. N.Y. Work. Comp. § 11 (McKinney 1997).
19. N.Y. Work. Comp. § 11 (McKinney 1997).
20. *Fichter v. Smith*, 688 N.Y.S.2d 377 (4th Dept. 1999).
21. *Majewski v. Broadalbin-Perth Central School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966 (1998).
22. *Ayer v. Pyramid Co.*, decided by the Supreme Court, Onondaga County, (Ind. No. 97-34831, decided 12/4/98).
23. Sup. Ct., Queens County (Ind. No. 3378/97, decided 3/16/98).
24. 82 N.Y.2d 281.
25. *White v. Hotel D'Artiste*, 23 A.D. 2d 657 (issue premature; a different insurer). *McGurran v. Di Canio Planned Dev.*, 216 A.D. 2d 538, 540 (separate risks, same policy).
26. *Kinney v. G.W. Lisk Co.*, 76 N.Y.2d 215, 217-219; *Roblee v. Corning Community Coll.*, 134 A.D. 2d 803, 804-805.
27. *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, decided by the Court of Appeals 5/13/97, 89 N.Y.2d 786, 658 N.Y.S.2d 903.

James P. O'Connor is General Attorney and Chief Legal Officer of the New York State Insurance Fund.

Developments in Insurance Law Affecting Labor Law Cases

By Carole A. Burns

I. Damages Available for Breach of Contractual Obligation To Procure Insurance

A. Pre-*Kinney v. G.W. Lisk Company, Inc.* cases

1. *Marconi Wireless Telegraph Company of America v. Universal Transportation Co. , Inc.*, 233 N.Y. 581, 135 N.E. 926 (Court of Appeals, 1922).

In the Appellate Division, First Dep't (194 App. Div. 272, 185 N.Y. Supp. 65), the court noted that the contract between the parties provided: "The wireless apparatus shall be insured by the steamship company in favor of the Marconi Company in the sum of $2,000 against all war risks."

The defendant claimed "that the measure of damages was the amount of premiums which would have been charged for war risk insurance on the wireless apparatus."

The Appellate Division reversed the lower court and found for the plaintiff:

> This rule of damages [advocated by the defendant] is applicable when the party whose interest is to be insured has knowledge or notice of the fact that the party agreeing to secure the insurance has failed to secure it.
>
> The reason of this rule is apparent; it is *the duty of the party who has knowledge* or notice that the other party has broken the contract to *minimize the damage* to have protected himself from loss *by securing the insurance himself*, in which event he would be entitled to recover the premiums to be paid, and his *damage is limited to the amount of the premiums*. But where, as in the instant case, *he has no knowledge* or notice of the defendant's failure to take out the insurance, *the measure of damage is the loss sustained*, not exceeding the amount of the required insurance. *Jacksonville M.P. BY. & Nav. Co. v. Hooper*, 160 U.S. 514, 529, 16 Sup. Ct. 379, 40 LED. 515; *France v. Stout*, 139 Wis. 223, 120 G.W. 867. (Emphasis added.)

The Court of Appeals affirmed on the Appellate Division's opinion.

Comments: The Court's focus was on whether the plaintiff had knowledge of the defendants' default. That knowledge triggered a duty on the part of the plaintiff to mitigate its damages by procuring the insurance itself, regardless of whether the contract provided that option. If the plaintiff then procures its own insurance, its damages will be limited to the premiums.

If a plaintiff has its own insurance, and that insurance is providing coverage for the loss (generally a defense and indemnity), what is "the loss sustained" by the plaintiff? Since the Court is expressly limiting the plaintiff's recovery to "the loss sustained," awareness of the breach should not be the determinative factor and, at least by implication, a plaintiff who has procured its own insurance (whether before or after becoming aware of the breach) should be entitled to recover only the cost of the premium.

2. *Rodriguez v. Gnetum*, 57 A.D.2d 920, 395 N.Y.S.2d 51 (2d Dep't 1977).

"Since it has been shown that plaintiffs *were aware* that defendant failed to procure insurance, in violation of the agreement, damages are limited to the cost of such insurance." (Emphasis added.) (57 A.D.2d at 921, 395 N.Y.S.2d at 52-53)

Cites only *Marconi*.

Comments: The decision does not reveal whether plaintiff had its own insurance, but the decision is consistent with *Marconi* in emphasizing the plaintiff's awareness of the breach as controlling the damages issue.

3. *Roble v. Corning Community College*, 134 A.D.2d 803, 521 N.Y.S.2d 861 (3d Dep't 1987).

> Since Der breached its agreement to procure general liability coverage for the college, it is liable for the college's resultant damages, i.e., its payments in discharge of liability to injured third persons to the extent of the required policy limits and the costs of defending a suit which would have been defended by the insurer under such a policy. (134 A.D.2d at 805, 521 N.Y.S.2d at 863.)

Cites only *Broquerie v. Employers Mut. Lab. Ins. Co. of Wisconsin*, 45 A.D.2d 591, and a New Jersey case. *Bro-*

querie does not concern a breach of an agreement to procure insurance. That case involved the interpretation of an automobile liability policy.

Comments: This decision does not reveal whether the plaintiff was aware of the defendant's breach: If plaintiff was aware, then the Court's holding on the measure of damages is contrary to *Marconi*. This is because *Marconi* imposed on an "aware" plaintiff a duty to mitigate its damages. Further, the decision does not reveal whether the plaintiff, regardless of its state of awareness, had its own insurance coverage. If it did, *Marconi* implies that the damages would be only the cost of the premiums, because the plaintiff was not otherwise damaged.

B. *Kinney v. G.W. Lisk Company, Inc.*, 76 N.Y.2d 215, 557 N.Y.S.2d 283, (Court of Appeals, 1990).

In *Kinney*, on trial, the defendant general contractor obtained summary judgment in its third-party action against a subcontractor, on the ground that the sub-contractor had failed to procure insurance coverage as required in the sub-contract. The issue on appeal was whether the contractual provision requiring the sub-contractor to maintain insurance for the contractor violated General Obligations Law § 5-322.1.

Both the Appellate Division and the Court of Appeals agreed the contractual provision did not violate the statute because:

> By its terms, the statute addresses only agreements to indemnify or hold harmless. It makes no reference to agreements to purchase or maintain insurance . . . and there is no basis for construing the statute's narrow and unambiguous prohibition to cover such agreements. An agreement to procure insurance is not an agreement to indemnify or hold harmless. (Emphasis in original.) 76 N.Y.2d at 218, 587 N.Y.S.2d at 285.

As to the issue of the general contractor's damages, the Court held that the sub-contractor is liable for the resulting damages, including the contractor, "liability to plaintiff." 76 N.Y.2d at 219, 557 N.Y.S.2d at 285. The sole authority cited for that proposition is *Roble, supra*, and a New Jersey case.

Comments: As in *Roble*, the decision in *Kinney* does not reveal whether the contractor was aware of the sub-contractor's breach; further, the decision does not reveal whether the contractor, regardless of its state of awareness, had its own insurance coverage. Based on *Marconi*, if the contractor was aware of the breach, or if the contractor had its own insurance coverage, the contractor should not have been awarded its "resulting damages, including [the contractor's] liability to plaintiff."

C. Post-*Kinney v. G.W. Lisk Company, Inc.* cases

1. *Morel v. The City of New York*, 192 A.D.2d 428, 597 N.Y.S.2d 8 (1st Dep't 1993).

"When one sophisticated commercial entity agrees to indemnify another through the employment of insurance, that agreement is enforceable" [citing *Kinney*]. *Id*. at 429, 597 N.Y.2d at 9.

"The penalty for breaching this agreement to procure such insurance [contained in a lease] is to be liable for all resulting damages. Those damages include costs of defending a third-party suit" [citing *Roble*]. *Id*.

2. *Wallen v. Polo Grounds Bar and Grill*, 198 A.D.2d 19, 603 N.Y.S.2d 132 (1st Dep't 1993).

"The usual penalty for breaching an agreement to procure insurance is to be liable for all the resulting damages (*Morel v. City of N.Y.*)." 198 A.D.2d at __, 603 N.Y.S.2d at 134.

> Thus Lerad Co. apparently exercised its option under para. 8 to procure its own insurance, and is therefore relegated by that action to recover the cost of such insurance from the tenant. It should be noted that it has been held, that where the landlord is aware that the tenant has failed to procure insurance, in violation of the lease, and the landlord procures its own insurance, damages are limited to the cost of such insurance *(Rodriguez v. Gnetum*). In *Rodriguez* (*id*.), there was apparently no provision in the lease providing the landlord with the option to procure its own insurance and to then pass the cost on to the tenant. *Id*.

No reference is made in the decision to *Kinney*.

Comments: The lease gave the landlord the option to procure its own insurance, and the landlord apparently was aware of the breach before the accident and obtained its own insurance. Regardless of the option, since the landlord was aware of the breach and obtained its own insurance, the decision is consistent with *Marconi* and *Rodriguez*.

3. *Wilson v. The Haagen Dazs Co., Inc.*, 201 A.D.2d 361, 607 N.Y.S.2d 333 (1st Dep't 1994).

The tenant did not procure the insurance for the landlord, as required in the lease, and the landlord exercised its option and obtained insurance for itself. The appellate court reversed the lower court and denied the landlord's motion for judgment over on its

cross-claim seeking indemnification for any liability which would have been covered by the insurance which the tenant should have obtained, in reliance on *Wallen*.

Comments: No express statement in the decision as to whether the landlord was aware of the tenant's breach, although the decision implies an awareness which led to the landlord's exercise of "its contractual right to procure its own insurance."

4. *Doyle v. B3 Deli, Inc.*, 224 A.D.2d 478, 637 N.Y.S.2d 783 (2d Dep't 1996)

   However, since the appellant exercised his option under the lease to obtain his own insurance, his damages are limited to the cost of such insurance (see, *Wallen v. Polo Grounds Bar and Grill*), as affected by whether the appellant charged the codefendants additional rent to cover the cost of this insurance. 238 A.D.2d at 479, 637 N.Y.S.2d at 785.

5. *Mavashev v. Shalosh Realty*, 233 A.D.2d 301, 649 N.Y.S.2d 718 (2d Dep't 1996).

"However, because Shalosh and Rich did procure their own insurance covering the plaintiff's claims, Israell's liability for the breach of the lease provision is limited to the cost of that liability insurance." 233 A.D.2d at 302-303, 649 N.Y.S.2d at 720.

Cites *Doyle*, *Wilson*, and *Wallen*.

Comments: No indication in the decision as to whether the lease contained the option or whether the landlord's purchase of the insurance was because he became aware of the tenant's breach. However, the record reveals that the lease contained the option, as in *Wallen*, *Wilson* and *Doyle*. Query: Is the decision predicated merely on the fact that Shalosh and Rich purchased their own insurance? Does this mean that the existence of an option is irrelevant?

6. *Khan v. Convention Overlook, Inc.*, 232 A.D.2d 529, 648 N.Y.S.2d 946 (2nd Dep't 1998).

Without discussion, the Court granted third-party plaintiffs, the owner and the managing agents of the subject building, summary judgment against the third-party defendant contractor based on the contractor's breach of its contractual obligation to procure liability insurance for the benefit of the third-party plaintiffs.

The record on appeal reveals that the subject insurance provision gave the owner the option, as a remedy for the contractor's breach, to terminate the contract or to obtain the insurance coverage itself and charge the cost to the contractor. However, the contractor did not argue the damages issue and, therefore, the courts were not called on to decide whether the owner's damages should be limited to the cost of the premiums for the owner's own insurance coverage.

7. *Isnardi v. Genovese Drug Stores, Inc.*, 242 A.D.2d 672, 662 N.Y.S.2d 790 (2nd Dep't 1997).

To the same effect as the decision in *Kahn*.

8. *Critelli v. Dormitory Authority of the State of New York*, 251 A.D.2d 444, 673 N.Y.S.2d 917 (2d Dep't 1998).

"Although issues of fact exist as to whether the appellant Polera Building Corp. purchased its own insurance, which would limit damages for the respondent's contractual breach to the cost of that insurance, summary judgment is warranted as to liability." 257 A.D.2d at 444, 673 N.Y.S.2d at 918. Cites only *Mavashev* and *Doyle*.

The record on appeal and the briefs reveal that the construction contract between certain contractors and a subcontractor provided, in the insurance provision, that if the subcontractor did not procure insurance for the benefit of the contractors, the contractors "shall have the right to procure and maintain the said insurance for and in the name of the Subcontractor and the Subcontract or shall pay the cost thereof." *Id*.

In the Court below, and on appeal, the contractors argued that they were entitled to judgment in the full amount of any verdict and their defense costs; the subcontractor argued that its exposure was limited to the premiums which the contractors had paid for their own insurance.

Comments: Note that there is no discussion of awareness of a breach or of whether the parties' agreement contained the option or of when the contractors purchased their insurance. The only issue, on the face of the decision, is *whether the contractors had their own insurance*. This decision is consistent with the *Marconi* Court's discussion of the damages issue which, at least by implication, would restrict the recovery of a plaintiff which has its own insurance to the cost of the premium, whether or not the insurance was procured as a result of knowledge of the breach and/or as a result of exercise of a contractual option.

However, the fact remains that the construction contract at issue in *Critelli* did contain the option. Since the Court did not make mention of the option, and focused simply on whether the contractors had purchased their own insurance, the question remains whether the *Critelli* Court's decision was predicated on the existence of the option. If it was not, as appears on the face of the decision, then at least the Second Department has signaled its receptiveness to a limitation of damages argument in the context of construction con-

tracts. That seems to be the trend in cases construing insurance provisions contained in lease agreements, and may well be where the Courts are heading insofar as construction contracts are concerned.

II. Scope of Additional Insured Coverage

A. Coverage for an additional insured is not necessarily limited to the circumstance where the additional insured is found vicariously or derivatively liable.

1. *Long Island Lighting Company v. American Employers Insurance Company*, 131 A.D.2d 733, 517 N.Y.S.2d 44 (2nd Dep't 1987).

American Employers' policy required it to indemnify LILCO, as an additional insured, against liability arising out of any claim for personal injuries resulting from the "erection, maintenance, presence, use or removal of Cablevisions attachments" to LILCO's utility poles.

Held: that the policy provided coverage for the additional insured regardless of whether or not the reason for which the additional insureds are held liable is their own negligence or that of Cablevision.

2. *The Charter Oak Fire Insurance Company v. The Trustees of Columbia University*, 198 A.D.2d 134, 604 N.Y.S.2d 55 (1st Dep't 1993).

The insurance endorsement to a plumbing contractor's policy named Columbia University as an additional insured and provided that coverage would be provided for Columbia University "with respect to liability arising out of operations performed for [Columbia University] by or on behalf of [the named insured]."

Held: the endorsement "does not limit its coverage of defendant to those situations in which defendant is only vicariously liable, nor does it provide that the coverage for defendant is only 'excess' to other insurance [citations omitted]." 198 A.D.2d at 135, 604 N.Y.2d at 55.

3. *Consolidated Edison Company of New York, Inc. v. Hartford Insurance Company*, 203 A.D.2d 83, 610 N.Y.S.2d 219 (1st Dep't 1994).

The additional insured endorsement provided:

> The "Persons Insured" provision is amended to include as an insured [Con Edison] but only with respect to liability arising out of operations performed for such insured by or on behalf of the named insured [Tara]. 203 A.D.2d at 83, 610 N.Y.S.2d at 220.
>
> An employee of a sub-contractor hired by Tara was injured when a steam valve exploded; the injury occurred "while [the employee was] conducting operations for [Con Ed] by or on behalf of Tara in the course of removing debris and other material accumulated from Tara's contracted insulation work." *Id*.

The insurer sought to avoid coverage on a variety of grounds, including its claim that the cause of the injury was the employee's negligence.

Held: "The fact that the cause of the injury may have been [the employee's] fault, or due to [his] negligence, is immaterial [citations omitted]. The language of the subject endorsement extends coverage for the injuries sustained by the subcontractor's employee in this case. [I]f the parties intended to exclude coverage arising out of the negligence of Con Edison, such language could have been easily added into the subject endorsement." 203 A.D.2d at 83-84, 610 N.Y.S.2d at 221.

4. *George Cambell Painting Corp. v. Fireman's Fund Ins. Co.*, 234 A.D.2d 183, 651 N.Y.S.2d 472 (1st Dep't 1996).

Plaintiff contractor was held not to be an additional insured, based on unambiguous and consistent provisions of the policy in which a distinction was made between the "Insured" (the named insured) and the "Contractor," including the policy definition of "Contractor," which provided that "Contractor" is defined as "the Contractor designated in the Declarations and does not include [the insured]."

5. *Tishman Construction Corporation of New York v. CNA Insurance Company*, 236 A.D.2d 211, 652 N.Y.S.2d 742 (1st Dep't 1997).

The subject Additional Insured Endorsement provided: "The insurance for that Additional Insured is limited as follows: 1. That person or organization is only an Additional Insured for its liability arising out of premises you own, rent, lease or occupy, or for 'your work' for or on behalf of the Additional Insured."

The injured person was an electrician employed by an electrical sub-contractor on the job; the employee testified that his accident occurred as he was heading towards his company's shanty, located in the basement of the job site, the St. Regis Hotel, to either obtain materials or to speak to his foreman. The employee alleged that as he proceeded, he fell on a ramp covered by masonite sheets; the ramp was used by all of the subcontractors. The employee did not know who placed the masonite sheets on the ramp.

Held: Tishman, as an additional insured under its subcontractor's policy, was entitled to coverage. The clause was not to be read as an exclusion from coverage

since, as an endorsement, it was an addition to coverage, not a limitation. Further:

The focus of the clause is "not the precise cause of the accident, as [the insurers] urge, but upon the general nature of the operation in the course of which the injury was sustained [citation omitted]." 236 A.D.2d at 211, 652 N.Y.S.2d at 743.

6. *79th Realty Co. v. X.L.O. Concrete Corp.*, 247 A.D.2d 256, 668 N.Y.S.2d 559 (1st Dep't, 1998).

Plaintiff, the general contractor, sought coverage as an additional insured under a policy issued to a subcontractor naming the general contractor as an additional insured.

Held: "Since the complaint in the underlying personal injury action contains allegations against both the general contractor and the sub-contractor, and the subject policy clearly names the general contractor as an additional insured and provides coverage that is primary, the insurer has a duty to defend as a matter of law." 247 A.D.2d at 256, 665 N.Y.2d at 600. However, as to the insurer's duty to indemnify the general contractor, the Court held a decision in abeyance, pending determination that the underlying accident arose out of the subcontractor's performance of work under its contract with the general contractor.

7. *Lehrer McGovern Bovis, Inc. v. S&A Concrete, Inc.*, Supreme Court, New York County, N.Y.L.J., December 3, 1998, page 29, col. 3.

An employee of a sub-contractor was injured in the course of his work at the subject project. Lehrer McGovern, as the Project Manager, was an additional insured under the policies of insurance issued to the project's contractors and their subcontractors.

One of the contractors, McNally, obtained a policy from Liberty Mutual which provided that the named additional insureds were covered:

> 1 . . . only with respect to liability arising out of:
>
> A. "Your work" for the additional insured(s) at the location designated above, or
>
> B. Acts or omissions of the additional insured(s) in connection with their general supervision of "your work" at the location.

The injured worker was not an employee of McNally, but claimed that he tripped and fell on metal scaffolding anchors set in the floor at the request or direction of Lehrer McGovern and McNally and used by McNally. However, proof was offered to the effect that McNally had been gone from the job site for several weeks before the accident and that Lehrer McGovern had actual notice of the alleged unsafe condition.

Liberty Mutual thus took the position that the underlying facts demonstrated that the accident did not arise out of, or in the area of, the work of McNally, or any of its subcontractors on the project, and coverage under the McNally policy was not triggered.

Held: "The policy does not limit coverage to those situations where [the named insured] or Lehrer McGovern are alleged to be either directly or vicariously liable, but encompasses all circumstances. Thus, by its express terms, the McNally policy covers Lehrer McGovern for liability arising out of McNally's work for Lehrer McGovern at the construction site or acts or omissions of Lehrer McGovern in connection with their general supervision of McNally's work."

III. Third-Party Practice Since the September 10, 1996 Amendment to Workers' Compensation Law Section 11

A. Effective September 10, 1996 Workers' Compensation Law Section 11 was amended to provide that:

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a grave injury. (L 1996, ch 635, § 2)

B. The Retroactivity Issue: *Majewski v. Broadalbin-Perth Central School District*, 91 N.Y.2d 577, 673 N.Y.S.2d 966 (Court of Appeals, May 12, 1998).

1. The Court held the provision precluding a third-party action against the employer to apply *prospectively*, not retroactively.

Plaintiff *Malewski* was injured on October 26, 1994; his action was begun on December 20, 1995; and the third-party action against his employer was begun on January 29, 1996. Thus, all of the material events (the accident, the commencement of the plaintiff's action, and the commencement of the third-party action) were completed prior to the effective date of the amendments.

2. The Court then stated:

> We conclude that, *irrespective* of *the date of the accident*, a prospective application of the subject legislation to actions *by employees* for on-the-job injuries against third-parties *filed after* the *effective date of the* relevant *provisions* is eminently con-

sistent with the overall and specific legislative goals behind passage of the Act. (Emphasis added.)

3. Based on that statement, *retroactive* application should be given to the case where the plaintiff's accident occurred *prior* to September 10, 1996, but the plaintiff's action is begun after September 10, 1996.

C. The "Slipped-Between-the-Cracks" Scenario

1. The plaintiff is injured *and* begins his lawsuit *prior* to September 10, 1996, but the third-party action is begun after September 10, 1996.

2. *Capon v. The Great Atlantic & Pacific Tea Co., Inc.*, 177 Misc. 2d 47, 657 N.Y.S.2d 822 (Sup. Ct., Kings County) (May 29, 1998).

The plaintiff's accident and the commencement of his personal injury suit both occurred prior to September 10, 1996; the third-party action against plaintiff's employer was begun in 1997 after the amendment. The Court denied the employer's motion to dismiss the third-party action, holding that "because the date the underlying personal injury action was filed marks the maturation of the parties' substantive rights to contribution and indemnity, the amendments to Section 11 of the Workers' Compensation Law should apply only to those first-party actions filed after the statute's effective date, September 10, 1996.11 The decision cites, *inter alia*, *Majewski*.

3. *Macer v. Whitehead*, 254 A.D.2d 263, 678 N.Y.2d 271, (2d Dep't, 1998), holding, in partial reliance on *Majewski* and *Capon*, that the amendments were inapplicable.

4. *Leporid v. Karassik*, Supreme Court, Rockland County, N.Y.L.J., November 10, 1998, holding:

The measuring date for determining whether Workers Compensation Law Section 11 bars a third-party action is the date the summons and complaint are filed, not when the third-party action was filed [citing *Caponi*, *Maher*, and *Majewski*].

Request For Articles

If you would like to submit an article, or have an idea for an article, please contact

TCIL Journal Editor
Paul S. Edelman, Esq.
Kreindler & Kreindler
100 Park Avenue, 18th Fl.
New York, NY 10017-5590
(212) 687-8181

Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information.

SCENES FROM TICL SECTION MEETINGS

Executive Board Meeting
Lawrence R. Bailey, Section Chair; Louis Cristo, Vice-Chair; Dennis R. McCoy

Executive Board Meeting
Joseph Baum; Edward Flink, Meeting Chai;, Kevin Lane

Eileen Buholtz and James Gauthier

Saul Wilensky; Lawrence R. Bailey, Jr.; Louis Cristo

BERMUDA

Catherine L. Habermehl, Buffalo; Eric Dranoff, New York City; Paul Michael Hassett, Buffalo, President Elect, New York State Bar Association, at the podium; Lawrence R. Bailey, Section Chair, at the rear

Hon. Sir James R. Astwood, former Chief Justice of Bermuda, now on Bermuda Court of Appeals; Lawrence R. Bailey, Section Chair; and Lady Gloria Astwood

Dr. Robert Rotella, Sports psychologist, speaker

Lawrence R. Bailey, Jr., Section Chair, at the podium; Hon. Joseph M. McLaughlin, Judge, Second Circuit Court of Appeals; James P. O'Connor, State Insurance Fund

Lady Gloria Astwood; Hon. Joseph McLaughlin, Hon. Sir James R. Astwood; and Mrs. Frances McLaughlin

Arlene A. Reich; Edward S. Reich, former Section Chair; Lawrence R. Bailey, Section Chair, at the podium; and Eileen E. Buholtz, Rochester

Paul F. Jones, Buffalo; David Cook, New York City, Chair, Fire & Property Insurance Committee; William N. Cloonan, Kingston, former Section Chair; and Edward S. Reich, former Section Chair

BERMUDA

Social Event: Lady Gloria Astwood; Paul Michael Hassett, President Elect, New York State Bar Association; Hon. Sir. James R. Astwood; Marcella and David Beekman, New York City

Social Event: Paul Michael Hassett, Lady Gloria Astwood; Hon. Sir. James R. Astwood; Paul S. Edelman, former Chair, *Journal* Co-Editor

LADY TAMARA, Hamilton Harbor cruise ship

Edward S. Reich, former Chair; Dr. Robert Rotella, speaker; Edward B. Flink, Latham, meeting Chair

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Emerging Issues and Recent Developments in Labor Law

By Anthony W. Russo

I. Who Is Protected?

A. Statutory Definitions

Labor Law § 240—covers "a person so employed"—limited to persons permitted or suffered to work on a building or structure and who are hired by the owner, contractor or their agent. *Whelen v. Warwick Valley Civic and Social Club*, 47 N.Y.2d 970, 393 N.E.2d 1032, 419 N.Y.S.2d 959 (1979).

Labor Law § 200 and 241(6)—cover all persons "employed therein or lawfully frequently such places"—much broader definition.

Labor Law § 2(5)—defines an "employee" to mean "a mechanic, workingman or laborer working for another for hire."

Labor Law § 2(7)—defines "employed" as including someone "permitted or suffered to work."

B. Prior Appellate Division cases tended to support an expansive reading of the Labor Law statutes, particularly Sections 200 and 241

Examples of cases allowing recourse under Labor Laws to persons on construction sites who were not working there:

> *Corbett v. Brown*, 32 A.D.2d 27, 299 N.Y.S.2d 219 (3d Dep't 1969)—Labor Law not limited to employees, but also anyone lawfully frequenting the premises, including members of the general public.
>
> *Brennan v. M.L.P. Bldrs.*, 262 N.Y. 464, 188 N.E. 21—Labor Law § 241 extended to steamfitter invited to job site for potential employment.
>
> *DeFreece v. Penny Bag*, 137 A.D.2d 744, 524 N.Y.S.2d 825 (2d Dep't 1988)—A worker who went onto factory roof to discuss future employment with permission from contractor repairing roof and fell was covered by § 241 (6). Court relied on expansive Industrial Code definition of "persons lawfully frequenting" contained in 12 N.Y.C.R.R. 23-1.4(b) (39) which includes "any person exercising a lawful right of presence or passage, including persons on a public sidewalk, street or highway."
>
> *Kelly v. Canino*, 156 A.D.2d 948, 549 N.Y.S.2d 536 (4th Dep't 1989)—A plaintiff who visited a construction site to seek religious counsel and comfort from his pastor, a contractor on the site, found to be a "person lawfully frequenting" a construction site for purposes of Labor Law § 241 (6). The Court also held that the Industrial Code could be relied upon to interpret Labor Law § 241(6) and applied the broad definition of "persons lawfully frequenting" contained in 12 N.Y.C.R.R. § 23-1.4(b)(39).

C. In 1990, the Court of Appeals limited the scope of protection afforded under the Labor Law to "employees"

> *Mordkofsky v. V.C.V. Development Corp.*, 76 N.Y.2d 573, 563 N.E.2d 263, 561 N.Y.S.2d 892 (1990) Court of Appeals rejected argument that Labor Law protection extends to the general public.

Refused to extend Labor Law protection of Sections 200 and 241 to a contract vendee of home being custom built who was injured while inspecting progress of work. Court found the plaintiff was not within class of persons "employed therein or lawfully frequenting the construction site," although plaintiff was lawfully present.

Court found that clear legislative history of sections 200, 240 and 241 of the Labor Law demonstrates that the legislature's principal objective and purpose was to provide for the health and safety of *employees*.

Labor Law § 200 codifies the common law duty of an employer to provide *employees* with a safe place to work.

Sections 240 and 241 seek to protect "workers" by placing ultimate responsibility for safety practices at building construction jobs where such responsibility ultimately belongs, on the owner and general contractor, instead of *workers*.

Court of Appeals was not persuaded by the plaintiff's reference to Industrial Code 12 N.Y.C.R.R. § 23-1.4(b) (39) and its expansive definition of persons lawfully frequenting as "[a]ny person exercising a lawful right of presence or passage in an area."

Court of Appeals reviewed prior Appellate Division cases extending Labor Law *(Corbett, Brennan, DeFreece* and *Kelly*) and concluded that in all but one case *(Canino)*, injured plaintiff was either a worker at premises or a person seeking employment at job site.

Thus, in order to invoke the protections afforded by the Labor Law, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it the owner, contractor or their agent.

Shortly after *Mordkofskv*, the Court of Appeals reaffirmed its holding in *Gibson v. Worthington Div. of McGraw-Edison Co.*, 78 N.Y.2d 1108, 585 N.E.2d 376, 578 N.Y.S.2d 127 (1991). Plaintiff, a design engineer, went to a building for the purpose of inspecting damage to aid his employer, a contractor, in making an estimate for repair and was injured when the roof gave way. The Court of Appeals said inasmuch as plaintiff's firm had not been hired to perform any construction work on the premises at the time the accident occurred, plaintiff was not a person "employed" to carry out the repairs as that term used in §§ 200(l), 240(l) and 241(6) of the Labor Law and, accordingly, plaintiff was not within the class of workers that those statutory provisions were enacted to protect and could not invoke them as a basis for recovery.

Even though plaintiff was an employee of a company engaged in construction work, since the employer had not been hired to work at the site at the time of the accident, he was not a person "employed" to do repairs and the Labor Law was held to be unavailable to him.

D. Cases developed that so long as injured party was "employed" at premises, even though employment not related to construction, the Labor Law afforded protection

Dunham v. Walfred Assocs., 155 Misc. 2d 422, 588 N.Y.S.2d 985 (Sup. Ct., Rensselaer Co. 1992). Members of fire and police departments present at construction site in order to rescue iron workers injured in collapse of steel building frame were within class of persons protected under Labor Law §§ 200 and 241(6) affording protection to persons lawfully frequenting construction site.

Williamson v. Borg Florman Dev. Corp., 191 A.D.2d 335, 594 N.Y.S.2d 778 (1st Dep't 1993). Hospital employee present in area undergoing renovation protected by Labor Law § 241(6) even though she was not engaged in construction. Employees present at worksite, even if they are not engaged in the actual construction, are protected by Labor Law § 241(6).

Martin v. Back O'Beyond, 198 A.D.2d 479, 604 N.Y.S.2d 205 (2d Dep't 1993). Person on site to take measurements pursuant to his employer's manufacturing agreement is covered under Labor Law § 240 (1) as plaintiff's work was a necessary prerequisite to construction.

E. However, recent trend seems to be back in line with *Mordkofsky* limiting protection of Labor Law to persons employed by owner, contractor or their agents, (not just anyone who is employed) to carry out construction

Examples of cases returning to rule that Labor Law will only be extended to persons employed at the construction site to carry out construction:

Harrison v. City of New York, 670 N.Y.S.2d 527 (2d Dep't, March 23, 1998). Plaintiff injured while inspecting an area to evaluate the feasibility of a hoist for a contractor on site, was neither employed at site nor a person lawfully frequenting the premises within the meaning of the labor law. The injured plaintiff's firm had not been hired by any contractor, owner or agent to perform work on the site but, instead, plaintiff was merely acting as volunteer on site to look at and evaluate whether a hoist was possible.

Ceballos v. Kaufman, 671 N.Y.S.2d 229 (1st Dep't 4/7/98). The Court dismissed plaintiff's 240 and 241 causes of action against the owner stating that the plaintiff, a cable television contractor, was not someone who was protected under the Labor Law since "none of the defendants hired or even knew of the retention of the cable television contractor in whose employment plaintiff was at the time of the accident." (Note: Although plaintiff was working at site and was lawfully frequenting, Court refused to afford protection under Section 241.)

Plung v. Cohen, 673 N.Y.S.2d 114 (1st Dep't, May 14, 1998) Tenant's employee not protected by labor law for injuries allegedly sustained in fall on debris left on floor by carpeting contractor. (Note: Compare to contrary holding in *Williamson v. Borg—Florman, supra.)*

Agli v. Turner Construction Co., 676 N.Y.S.2d 54 (1st Dep't 7/2/98). Maintenance worker injured at a construction site not protected by labor law as plaintiff was not employed or engaged in construction work. (Note: First Department recognized impropriety of

Williamson, supra, since it does not accord with *Mordkofsky.*)

Valinoti v. Sandvik, 677 N.Y.S.2d 311 (1st Dep't 7/16/98) Plaintiff, an employee for UPS, was injured when he entered his place of employment and stepped on a metal welding stick. The Court dismissed the Labor Law claims stating that it had previously concluded that plaintiff must demonstrate both that he was permitted or suffered to work *on* a building or structure and that he was hired by someone, be it owner, contractor or agent. Here, according to the court, plaintiff was not employed to carry out any of the construction work which was taking place and therefore not entitled to the labor law protection. Working *at* a building is not enough. A plaintiff not working *on* the building renovation and who was not a person "employed" to carry out the repairs is not within class of workers the Labor Law was enacted to protect.

But see, Williams v. G.H. Development and Construction Co., 672 N.Y.S.2d 937 (3d Dep't 5/14/98). Plumbing supply subcontractor's employee, who was injured when he fell while delivering a tub and shower unit to a one-family dwelling unit under construction, was protected by Labor Law. Though the plaintiff was not employed in construction on the premises, the plaintiff had been involved in an activity integral to the construction of the dwelling unit, since the tub and shower unit had to be delivered to the site before it could be installed.

II. What Type of Work Is Covered?

A. Statutory Definition

Labor Law § 240 applies to the "erection, demolition, repairing, altering, painting, cleaning or pointing" of a building or structure.

Labor Law 241(6) applies to "construction, excavation or demolition work."

B. The Labor Law does not apply to routine maintenance in a non-construction, non-renovation context

The Labor Law is not meant to apply to routine maintenance in a non-construction, non-renovation context.

Edwards v. Twenty-Four Twenty-Six Main Street Assocs., 195 A.D.2d 592, 601 N.Y.S.2d 11 (2d Dep't 1993)—Replacement of dilapidated plywood shelves is not a repair.

Phillips v. City of New York, 644 N.Y.S.2d 764 (2d Dep't 1996), Labor Law 240(l) was not designed to encompass routine maintenance work which is far removed from the risks associated with the construction or demolition of a building and which takes place in a non-construction, non-renovation context.

Smith v. Shell—Oil Co., 85 N.Y.2d 1000, 654 N.E.2d 1210, 630 N.Y.S.2d 962 (1995). Changing a light bulb does not fall under Labor Law § 240(l).

Piccone v. 1165 Park Avenue, Inc., 677 N.Y.S.2d 891 (N.Y. Sup. Ct. 1998). Repairing light fixture constitutes repair, which falls under Labor Law § 240(l).

Czaska v. Lenn Lease Limited, 674 N.Y.S.2d 559 (4th Dep't June 10, 1998). Insulating second story windows by stapling sheets of plastic over them constitutes routine maintenance and does not fall within protection of Labor Law.

Hazlitt v. Autagne, 677 N.Y.S.2d 924 (4th Dep't, October 2, 1998). Cleaning kitchen exhaust system with high pressure washer not covered by § 240(l).

Malsch v. City of New York, 232 A.D.2d 1, 662 N.Y.S.2d 458 (1st Dep't, September 11, 1997). Installation of antenna on roof during installation of two way radio system for use by contractor constitutes "altering" of building.

The *Malsch* court recognized that 2d and 3d Departments had reached contrary conclusions on similar facts. See, *Kesselbach v. Liberty Haulage, Inc.*, 582 N.Y.S.2d 739 (2d Dep't 1992) and *Borzell v. Peter*, 138 N.Y.S.2d 589) .

Boyd v. Bethlement Steel Corp., 665 N.Y.S.2d 490 (1997). The 4th Dep't held that a waste disposal worker who was injured by hot coal tar as he transferred it into a roll-off container while standing atop planks positioned between two empty 55-gallon drums, did not have a cause of action against the plant owner under the Labor Law, since the disposal of coal tar was routine maintenance in a

non-construction, non-renovation context.

McGuirk v. Ruan Leasing Co., 665 N.Y.S.2d 489 (4th Dep't 1997). A worker who was injured in the collapse of scaffolding as he prepared to remove decals from a tractor trailer was engaged in routine maintenance in a non-renovation, non-construction context, and thus could not maintain a claim under the Labor Law.

Williams v. Perkins Restaurants, Inc., 667 N.Y.S.2d 567 (4th Dep't 1997). The Labor Law was not applicable to a cleaning company employee who was injured when she fell as she descended a ladder from the roof of a restaurant that had hired the company to clean the kitchen exhaust system, since the term "cleaning," as used in the Labor Law, did not include routine cleaning in a non-construction, non-renovation context.

Koche v. E.C.H. Holding Corp., 669 N.Y.S.2d 896 (2d Dep't 1998), the Second Department held that the plaintiff, who slipped from the top of his truck while cleaning it after delivering cement to a construction site could not make a claim under the Labor Law because he was engaged in routine maintenance in a non-construction, non-renovation context.

Greenwood v. Shearson, Lehman & Hutton, 656 N.Y.S.2d 295 (2d Dep't 1997). Building mechanic, injured when he fell from office desk while searching for source of ceiling leak in building could not recover under 240, even though certain areas of the building were under construction, since the work performed by plaintiff was far removed from the risks associated with the construction or demolition of a building. (citing, *Manente v. Ropost, Inc.*, 524 N.Y.S.2d 96).

Rowlett v. Great South Bay Assocs., 655 N.Y.S.2d 16 (1st Dep't 1997). Although installation of an air conditioner on roof of building may fall within protection of Labor Law § 240, routine maintenance of air conditioner does not, even though a repair was necessitated during seasonal maintenance.

Raposo v. WAM Great Neck Association, 674 N.Y.S.2d 112 (2d Dep't, 6/8/98).

Court dismissed the plaintiff's 240 claim stating it would not strain the language of the statute to fit the facts of this case where plaintiff was injured while performing routine maintenance on air conditioning system.

C. In considering whether replacing parts of a building's equipment is work covered by § 240 (1), the New York courts have distinguished between equipment which was functioning and that which was not

For example, an attempt to fix a sign that was "operating improperly" constitutes a repair within the meaning of § 240(l), *see, Izrailev v. Ficarra Furniture of Long Island, Inc.*, 70 N.Y.2d 813, 815, 523 N.Y.S.2d 432, 433, 517 N.E.2d 1318, 1319 (1987), whereas the replacement of burnt-out light bulbs is maintenance, not repair, *see, Smith v. Shell Oil* Co., 85 N.Y.2d at 1002, 630 N.Y.S.2d at 963, 654 N.E.2d at 1211. Similarly, the removal of a "broken" motor for the purpose of mending it is a repair, see, *Holka v. Mt. Mercy Academy*, 221 A.D.2d 949, 634 N.Y.S.2d 310, 311 (4th Dep't 1995), as is the replacement of a fire alarm system that was "no longer functional," *see, Tate v. Clancy-Cullen Storage Co., Inc.* , 171 A.D.2d 2 92, 575 N.Y.S.2d 832, 834 (1st Dep't 1991) , whereas the replacement of a component that is merely worn is routine maintenance, see, *e.g., Rennoldson v. James J. Volpe Realty Corp.*, 216 A.D.2d 912, 629 N.Y.S.2d 141 (4th Dep't) (change of leaking tube on car wash machine is routine maintenance and not a repair under § 240 (1)), leave to appeal denied, 86 N.Y.2d 837, 634 N.Y.S.2d 446, 658 N.E.2d 224 (1995).

D. Recent Decisions

1. *Joblon v. Solow*, 91 N.Y.2d 457, 695 N.E.2d 237, 672 N.Y.S.2d 286 (Court of Appeals, April 30, 1998).

Electrician employed to chop hole through block wall of office building with hammer and chisel in order to route conduct pipe and wire through hole to install wall clock was found to be engaged in "alteration" of building or structure.

Court rejected defendant's argument that Labor Law § 240 applies only when work involved is performed as part of building construction jobs—too narrow.

Court also rejected plaintiff's definition that § 240 encompasses any work which results in a change to the building or structure too expansive.

Court concludes that "altering" within the meaning of Labor Law 240(l) requires making a **"significant** physical change to the configuration or composition of the building or structure." This rule implements the legislative purpose of providing protection for workers, consistent with precedents, and excludes "simple, routine activities."

It is not important how the parties generally characterize the injured worker's role but rather what type of work the plaintiff was performing at the time of the injury.

Court concluded that work in question which required extending electrical wiring and chiseling hole through concrete wall was more then a simple, routine activity and was, although close, significant enough to fall within the statute.

Court also confirmed that liability under Labor Law § 241(6) is not limited to accidents in building construction sites and that Court must look to expansive definition of construction work found in Industrial Code § 12 N.Y.C.R.R. § 23-1.4(b) (13) to define what constitutes construction work within the meaning of statute.

2. *Weininger v. Hagedorn & Company*, 91 N.Y.2d 958, 695 N.E.2d 709, 672 N.Y.S.2d 840 (Court of Appeals, April 30, 1998)—worker injured while running computer and telephone cable through ceiling, which involved standing on ladder to access a series of holes punched in ceiling and pulling wiring through canals that had been made in chicken wire in ceiling constitutes significant physical change to configuration or composition of building, not a simple routine activity, and thus, worker was engaged in "altering" building or structure.

E. Expansive definition of construction contained in Industrial Code (12 N.Y.C.R.R. § 23-1.4(b)(13)) may broaden "construction" work encompassed by Labor Law § 241(6) to include maintenance

Vernieri v. Empire Realty Co., 219 A.D.2d 593, 631 N.Y.S.2d 378 (2d Dep't 1995). A contractor' s employee, injured while moving a large sign, was not engaged in "construction, excavation or demolition work" within meaning of Labor Law 241(6), even considering the expansive definition of "construction" contained in Industrial Code 12 N.Y.C.R.R. § 23-1.4(b)(13), which defines construction work expansively to include "all work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures."

Wilson v. City of New York, 89 F.3d 32 (2d Circuit 1996). Cites *Vernieri* for application of expansive definition of construction under 12 N.Y.C.R.R. 23-1.4(b) (13) to claim brought under § 241(6) and for application to elevator "maintenance" plaintiff was performing. However, court dismissed the § 241 claim due to plaintiff's failure to prove violation of a specific standard of conduct proximately causing the injuries.

Under *Wilson*, argument may be made that maintenance work can be encompassed within Labor Law § 241(6) under the expansive definition of construction work contained in the Industrial Code.

But *See, Agli v. Turner Constr. Co.*, 676 N.Y.S.2d 54 (1st Dep't, 7/2/98).

Maintenance worker injured at construction site when overhead net struck him not entitled to protections of Labor Law § 240 and 241(6) as plaintiff's activities consisted exclusively of maintenance functions and plaintiff did not work with construction companies. Plaintiff was an operating engineer assigned to prepare stock room and assemble the tools needed to operate the building. Court states that Labor Law §§ 240 and 241 will **not** apply to routine maintenance. However, Labor Law § 200, which is a codification of the common law duty of an owner or contractor to provide employees with a safe place to work, the application of which is not limited to construction work, does not exclude maintenance personnel.

Court held that expansive definition of "construction" work under Industrial Code § 23-1.4 (b) (13) only applies where the work affects the structural integrity of the building or structure or was an integral part of the construction of the building or structure.

F. "Cleaning" Broadly Defined Under Labor Law

Koenig v. Patrick Constr. Corp., 298 N.Y. 313, 83 N.E.2d 133 (Court of Appeals 1948). Window washing found to be protected under Labor Law.

Brown v. Christopher Street Owners Corp., 641 N.Y.S.2d 221 (Court of Appeals, 1996). 11 [C]leaning" under Labor Law § 240 (1) does not include routine, household window washing of a single cooperative apartment by an individual engaged by the apartment owner. See also, *Aviles v. Crystal Management, Inc.*, 650 N.Y.S.2d 638 (1st Dep't 1996).

Cruz v. Bridge Harbor Heights Associates, 671 N.Y.S.2d 72 (1st Dep't 1988). Cleaning windows of newly constructed residential building, commissioned by a commercial entity for the commercial enhancement of the premises, is not "routine," "household," or "truly domestic" cleaning to which § 240 (1) does not apply.

Chapman v. International Business Machines Corp. 673 N.Y.S.2d 578 (Sup. Ct., Broome Co. 4/15/98) Employee of janitorial services contractor injured while cleaning buildings, overhead fluorescent lights was engaged in "cleaning" of a building under 240(l). Court states that neither the Legislature nor the Court of Appeals has, expressly or by interpretation, limited Labor Law § 240(l) protection to construction sites.

Vernum v. Zilka, 660 N.Y.S.2d 599 (3d Dep't 1997) Worker's removal of snow and ice from roof of building was not "maintenance" or "repair" but was "cleaning" activity as that term is used in scaffolding law since work was performed to protect or enhance the value of commercial property. Although there was no mention of a construction or renovation context, the Court determined that the task plaintiff was carrying out was a form of "cleaning," i.e., the "rid[ding] of dirt, impurities, or extraneous material," [citing Webster's Ninth New Collegiate Dictionary (1988)] and the plain language of the statute affords protection to those injured while cleaning a building. The Court saw a distinction between "routine maintenance," which is not encompassed by the statute, and "painting, cleaning or pointing," which are; also it restricted the applicability of *Brown*, *supra*, to "truly domestic" household cleaning, while adopting the holding that workers performing other types of cleaning activity are protected. See, *Buendia v. New York National Bank*, 637 N.Y.S.2d 70 (1st Dep't 1996), *lv. app. dsmd.* 647 N.Y.S.2d 715 (1996) (plain language of Labor Law § 240(l) refers to "cleaning . . . of a building" and thus covers routine maintenance cleaning not incidental to structural construction, repair, or alteration).

III. When Is a Party Entitled to Contractual Indemnification?

As a general rule, a claim for indemnification does not accrue until payment has been made by the party seeking indemnification. *See, McDermott v. City of New York*, 50 N.Y.2d 211, 406 N.E.2d 460, 428 N.Y.S.2d 643 (1980); *Bay Ridge Air Rights v. State of New York*, 57 A.D.2d 237, 394 N.Y.S.2d 464; *aff'd* 44 N.Y.2d 49, 375 N.E.2d 29, 404 N.Y.S.2d 73 (1978).

Departure from the general rule *may* be warranted where the interests of justice and judicial economy so dictate. See, *Bay Ridge Air Rights*.

The issuance of a conditional judgment of indemnification, pending the outcome of the main action, is appropriate in order that the indemnity obtain the earliest possible determination as to the extent to which it may expect to be reimbursed. *O'Brien v. Key Bank*, 223 A.D.2d 830, 636 N.Y.S.2d 182 (3d Dep't 1996).

Sprague v. Peckham Materials Corp., 658 N.Y.S.2d 97 (2d Dep't 1997). Where owner is held statutorily liable under Labor Law, but did not direct or control the plaintiff's work, owner will be entitled to indemnification.

See, also, Milewski v. Caiola, 654 N.Y.S.2d 738 (1st Dep't 1997) and *Dawson v. Pavarini Const. Co.*, 644 N.Y.S.2d 285 (2d Dep't 1996).

These cases affirm that summary judgment on issue of indemnification is appropriate under such circumstances and that there is no need to await a final determination of liability in order to award indemnification where a viable claim for such relief exists.

Conditional judgment of indemnity is appropriate. See, *Richardson v. Materese*, 614 N.Y.S.2d 426 (2d Dep't 1994) ; *Rice v. PCM Development Agency*, 646 N.Y.S.2d 856 (2d Dep't 1996); *Gange v. Tilles Investment Co.*, 632 N.Y.S.2d 808 (2d Dep't 1995).

Even where genuine issues of fact exist regarding plaintiff's claim under the Labor Law, including how, when and where the plaintiff's injury occurred, where there is no question that the party seeking indemnification neither controlled nor directed the plaintiff's work and the questions of fact have nothing to do with that party's involvement, a conditional judgment of indemnification is appropriate. *See, Lopez v. Markos*, 665 N.Y.S.2d 646 (1st Dep't 1997); *Clark v. 345 East 52d Street Owners Corp*., 668 N.Y.S.2d 599 (2d Dep't 1997).

State v. Syracuse Rigging Co., 671 N.Y.S.2d 801 (3d Dep't, April 1998).

Recent 3d Dep't decision, although on its face, states that a *separate* action brought for indemnification was premature because no payment was made by party seeking indemnification, a close look reveals that factual issues existed regarding the indemnity's potential negligence arising out of its supervision and control of work site, based upon which the Court refused to depart from the general rule that a claim for indemnification does not accrue until payment has been made by the party seeking indemnification.

Book Review

By Paul S. Edelman

BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS

West Group, Publishers

Robert L. Haig, a partner in the New York City law firm of Kelley, Drye & Warren, LLP, is the Editor-in-Chief of this six-volume work. Although the chapters are intended to cover all aspects of a commercial practice, the various authors represented in the book cover areas that anyone would need in practicing in the federal courts. These topics are of particular interest to those who may not be too familiar with procedures in the federal courts, or who face types of cases in which federal courts are exclusive or which provide benefits not available in state court practice.

Among the 152 authors are a who's who of famous litigating attorneys and judges. They provide the background of each type of case and procedural advice. Those attorneys who practice primarily in personal injury or insurance litigation will find Volume 1 especially important. There, the whole issue of federal subject matter jurisdiction, personal jurisdiction, venue problems, forum selection and the like are covered. More than once some lawyers will be faced with removal to a federal court or a class action.

Volume 2 covers valuable tips on discovery procedures, motion practice and problems of admissibility of expert witnesses among other challenging features, as well as problems before and during trial. *Daubert* issues now come up in almost all important cases.

Volume 3 covers the problems during trial of evidence, expert witnesses, damages and appeals. Volume 4, along with other chapters, covers professional liability and insurance issues of interest to our *Journal* readers, along with admiralty cases and enforcement of judgments. Volume 5, among other chapters, covers products liability, RICO claims and employment discrimination. The chapter in Volume 6 is devoted entirely to environmental claims, but the rest of the volume has the tables of cases, statutes and forms and the index. Surely, the insight into these subjects will be helpful to everyone. Furthermore, the procedural chapters (1-50) have checklists and forms. The other substantive law chapters also have checklists of essential allegations and defenses, checklists for sources of proof, as well as forms for use in litigation, including jury charges. All these many forms (349) plus jury instructions (319) are included in two computer disks which come with the set.

These volumes are written in conjunction with the American Bar Association Section on Litigation. As I have said, there is much in these volumes that will help all trial practitioners in the federal courts, even those who only occasionally will have commercial litigation there. Learn how a computer database you create for your own documents might be discovered by the other side. Learn how to handle invasions of privacy or irrelevant matters during a deposition. There are valid tips on oral arguments and on the writing of briefs.

Among the roster of star quality who will be known to our readers are: Hon. Harold Baer, Jr., on alternative dispute resolution; Benjamin R. Civiletti, former U.S. Attorney General, on damages; Hon. Warren W. Eginton, district court judge in Connecticut, on products liability; and Marvin E. Frankel, former district court judge, on interrogatories; Frederick B. Lacey, former district judge and U.S. Attorney in New Jersey, on judges, magistrates and special masters; and other judges and partners in leading law firms throughout the country, including James C. Moore, former N.Y. State Bar Association President and former Chair of this Section (construction law).

A set of books of this high caliber and completeness is recommended highly. The fact that 17,299 cases are cited shows how very authoritative these volumes must be. Yet the volumes contain practical insight into the common headaches faced in litigation.

Important Recent Cases

The following Important Recent Cases, a regular feature of the *TICL Journal*, was prepared by Martin M. McGlynn of Klein, DiSomma & McGlynn, New York City. It was edited by Co-Editor of the Journal, Kenneth L. Bobrow of Felt, Evans, Panzone, Bobrow & Hallak, LLP, Utica, New York.

ATTORNEY DISQUALIFICATION—ASSOCIATE CONFLICT

In ***Kassis v. Teacher's Insurance and Annuity Assn.***, 93 N.Y.2d 611, the Court of Appeals held that the Manhattan firm of Thurm & Heller was disqualified as defense counsel in a property damage case because it hired an associate who had been extensively involved in representing the plaintiff in the same case while working at Weg & Meyers. The hiring of the associate occurred as the case was nearing trial. The associate had assisted the lead plaintiff's counsel in conducting five depositions, attending two mediation sessions as sole counsel for the plaintiff, and talking with the plaintiff on a regular basis. The Appellate Division, First Department, denied the motion to disqualify on a 3-2 vote, with the majority holding that the "Chinese Wall" Thurm & Heller erected around its new associate would protect against disclosure of his former client's confidences.

The Court of Appeals reversed, holding that screening efforts by Thurm & Heller were inconsequential because the firm had failed to rebut the presumption that the associate had acquired material confidences while he was employed at Weg & Meyers.

The flexible rule the Court of Appeals adopted in ***Solow v. W.R. Grace & Co.***, 83 N.Y.2d 303, allows a law firm to use screens to avoid disqualification when one of its members is disqualified because of confidential information acquired at a former law firm. But, as a first step, the firm must prove that information obtained by the disqualified lawyer is unlikely to be significant or material in the litigation.

The Court said that if no significant client confidences are involved, then screening measures to isolate the disqualified attorney are necessary to eliminate the appearance of impropriety. But, if the lawyers hold material confidences, screens are irrelevant and disqualification is required as a matter of law. Defendants' conclusory averments that the associate did not acquire such confidences during the prior representation failed to rebut that presumption, as a matter of law, and the erection of a "Chinese Wall" in this case, was therefore inconsequential.

DISCLOSURE—MEDICAL EXPERT

In ***Hubbard v. Beth Platzer***, 688 N.Y.S.2d 672, the Second Department held that the trial court providently exercised its discretion in precluding the plaintiff from producing expert medical testimony based on her failure to comply with CPLR 3101(d)(1)(i), since the plaintiff did not respond to disclosure demands until after the trial began, and failed to include the substance of the expert testimony sought to be precluded by the defendant.

EVIDENCE—PLAINTIFF'S MEDICAL EXPERT

In ***Nuzzo v. Castellano***, 254 A.D.2d 265, 678 N.Y.S.2d 118, the Second Department held that the trial court committed reversible error in a personal injury trial by allowing plaintiff's expert, who had not physically examined the plaintiff, to testify as to a diagnosis of the plaintiff's back injury based, for the most part, on MRI films which were not in evidence. The court said that contrary to plaintiff's contention, the MRI was not used merely to confirm the expert's opinion formed out of information from other sources, but instead was used as a basis for her opinion.

EVIDENCE—PRIOR ACCIDENT

Bounds v. Western Regional Off Track, 256 A.D.2d 1165, 684 N.Y.S.2d 105. Proof of a prior accident, whether offered as proof of the existence of a dangerous condition or as proof of notice thereof, is admissible only upon a showing that the relevant conditions of the subject accident and the previous were substantially the same (***Hyde v. County of Rensselaer***, 51 N.Y.2d 927). In this case the Fourth Department held that evidence of prior accidents at an off-track facility was not admissible in a pedestrian's slip and fall action against the facility, where the pedestrian made no showing that the conditions existing at the time of prior incidents were substantially similar to the conditions existing at the time of his accident.

INDEMNITY—COMMON LAW—CONSTRUCTION ACCIDENT

In ***Walker v. Trustees of University of Pennsylvania***, 692 N.Y.S.2d 68, the First Department held that a laborer's employer, a subcontractor, had supervised and controlled the laborer's work at the time of the work-related injury, and thus the site owner and the general contractor were entitled to common law indemnification from the subcontractor in the laborer's personal injury action, even though under the general contractor's contract with the owner it was required to

enforce general safety standards, since the subcontractor's contract contained an express assumption of primary responsibility for worker safety.

INDEMNITY

1. Construction Accident

2. Premises

In ***Guiga v. JLS Const. Co. Inc.***, 255 A.D.2d 244, 685 N.Y.S.2d 1, the First Department held that fault apportioned to a subcontractor's employee in an employee's personal injury suit against the general contractor for injuries he sustained at a construction site, based upon the employee's failure to heed a warning not to use a defective ladder, was properly imputed to the subcontractor under respondeat superior principles, for purposes of the general contractor's third-party claim against the subcontractor for indemnification. In ***Torino v. KLM Construction, Inc.***, 257 A.D.2d 541, 685 N.Y.S.2d 24, the First Department held that the employer of a worker who was injured in a fall from a scaffold, which was owned by the employer, had actual responsibility for the accident, and thus was required to indemnify the owner and general contractor at the work site where the injury occurred with respect to the worker's claim under 240(1) of the Labor Law. Even though the owner had a representative at the work site observing the progress and method of the work it did not establish supervision of the kind which would render the owner liable for common law negligence.

In ***Parra v. Ardmore Management Co., Inc.***, 685 N.Y.S.2d 36, the First Department held that the terms of an indemnity clause in the lease of a parking garage, which required the lessee to indemnify the owner of the building where the garage was located for any accident, injury or damage which shall happen in or about the demised premises, obligated the lessee to indemnify the owner with respect to claims asserted by a parking garage employee who was injured when his leg was caught between the elevator platform and the wall of the elevator shaft.

INDEMNIFICATION—GENERAL CONTRACTOR'S GENERAL DUTY TO SUPERVISE WORK

In ***Hoelle v. New York Equities Co.***, 258 A.D.2d 267, 684 N.Y.S.2d 539, the First Department held that the general contractor was entitled to indemnification from the acoustical subcontractor as to claims of a worker who, while performing ceiling work for the subcontractor, was injured when the scaffold on which he was working fell into an opening on a raised platform, since the indemnification provision required that the subcontractor indemnify the general contractor for any claims arising out of its work, and there was no evidence that the general contractor was itself negligent. The court said that the general duty to supervise the work and ensure compliance with safety regulations did not amount to supervision and control of the work site such that the supervisory entity would be liable for the negligence of the contractor who performs the day-to-day operations (citing ***Martin v. Paisner***, 253 A.D.2d 798, 677 N.Y.S.2d 502).

INDEMNITY—EXECUTION OF CONTRACT

In ***Beckford v. City of New York***, 689 N.Y.S.2d 98, the First Department held that the general contractor did not have a viable claim for contractual indemnification against a subcontractor which employed the injured worker, where the contract between the general contractor and the subcontractor was not executed until two days after the worker's accident.

INDEMNITY—VOLUNTARY SETTLEMENT

Jemal v. Lucky Ins. Co., Ltd., 687 N.Y.S.2d 717. Where a party voluntarily settles a claim, he must demonstrate that he was legally liable to the party whom he paid and that the amount of settlement was reasonable in order to recover against an indemnitor (***Dunn v. Uvalde Asphalt Paving Co.***, 175 N.Y. 214). In this case, the Second Department held that genuine issues of material fact of whether the landlord was legally liable to the plaintiff and whether the amount of settlement was reasonable precluded summary judgment as to the tenant's duty to contractually indemnify the landlord for the settlement with the plaintiff.

INSURANCE—ADDITIONAL INSURED COVERAGE

In ***Consolidated Edison Company of New York, Inc. v. United States Fidelity And Guaranty***, 693 N.Y.S.2d 31, a DJ action, where in the underlying action there was a verdict of $750,000, apportioned 30 percent against Con Ed which was affirmed, Con Ed was named as an insured under the policy issued to City Wide "with respect to liability arising out of "your work for that insured by or for you." "Your work" was defined to mean: "(a) work or operations performed by you or on behalf; and (b) material, parts or equipment furnished in connection with such work or operations. The term "further" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a or b above."

The First Department rejected the argument of the carrier for City Wide that the language of the additional endorsement operated to exclude injuries arising out of Con Ed's negligence, citing ***Consolidated Edison Co. v. Hartford Ins. Co.***, 203 A.D.2d 83. To the contrary, the First Department had consistently held that any negli-

gence by the additional insured in causing the accident underlying the claim was not material to the application of the additional insured endorsement. As the First Department stated in ***Tishman Constr. Corp. v. CNA Ins. Co.***, 236 A.D.2d 211, the focus of the clause is not the precise cause of the accident but upon the general nature of the operation in the course of which the injury was sustained. Since Con Ed's liability in this matter clearly arose out of the work performed on its behalf by City Wide, it was therefore within the scope of the additional insured endorsement of the policy.

INSURANCE—ADDITIONAL INSURED COVERAGE—INSURED CONTRACT

In ***State Insurance Fund v. Hermitage Insurance Company***, 256 A.D.2d 329, 681 N.Y.S.2d 354, the Second Department held that a liability insurer was not obligated to defend a school district in a third-party action which was brought by a child care service identified as an additional insured and named as defendant in the underlying personal injury action, while the clause in the policy provided that an otherwise applicable exclusion would not apply if the school district's liability arose under an "insured contract," the lease between the school district and the child care service did not constitute an "insured contract," within the meaning of the exception to the policy exclusion.

1. Insurance—Additional Insured Coverage

2. Indemnification—Labor Law

Kennelty v. Darlind Const., Inc., 688 N.Y.S.2d 584. An agreement to purchase coverage is clearly distinct from and treated differently from the agreement to indemnify (***Kinney v. G.W. Lisk Co.***, 76 N.Y.2d 215). In this case, the Second Department held that the ladder owner and the electric subcontractor breached their contracts with the general contractor and the site owner by failing to purchase general liability insurance, and they were liable to the site owner and general contractor for all resulting damages, including their liability to an injured electrical worker who fell from a ladder. The Court said that submission by the ladder owner of a certificate of insurance, which expressly stated that it was a "matter of information only" that "conferred no rights upon the certificate holder" was not sufficient to show that the ladder owner had purchased general liability insurance, as required in the contract (***American Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc.***, 248 A.D.2d 420. Because the insurance procurement clause was entirely independent of the indemnification provisions in the contracts, a final determination of the liability of the ladder owner and the electrical subcontractor for their failure to procure the insurance need not await a factual determination as to whose negligence, if anyone's, caused the electrical worker's injuries (***McGill v. Polytechnic Univ.***, 235 A.D.2d 400).

The Court also held that the site owner was entitled to contractual indemnification from the electrical subcontractor, where there was no evidence of the site owner's negligence, since the injured employee acknowledged that at the time of the accident he was following the instructions and direction of his foreman, and there was no proof that the site owner directed, controlled, or supervised the manner in which the employee performed his work. However, it was also held that the site owner was not entitled to common law indemnification from the ladder owner, where there was no evidence that the ladder owner had the authority to direct, supervise, or control the injured employee's work. As to the general contractor, it was held that there was a genuine issue of material fact as to the extent to which they exercised direction, control, and supervision over the injured employee precluding summary judgment for the general contractor on its contractual indemnification claim against the subcontractor, because one of its superintendents on the work site testified at his deposition that he made daily inspections of the work site and could stop work if there was an unsafe condition. He also acknowledged that the general contractor supervised the electrical subcontractor's employees with respect to the performance of its work. Finally, it was held that the ladder owner was not entitled to summary judgment dismissing the general contractor's claim for contractual indemnification, because the contract provided that the ladder owner would indemnify the general contractor for the negligence of other subcontractors, regardless of whether or not it was actually negligent.

INSURANCE—ALL-RISK POLICY—WATER DAMAGE

In ***525 Fulton Street Holding Corp. v. Mission National Ins. Co.***, 256 A.D. 243, 682 N.Y.S.2d 166, the First Department held that the insured suing to recover for water damage under its all-risk policy failed to satisfy the burden of proving that the water damage was caused by a "fortuitous" event in the nature of pipe corrosion, given the testimony that, if pipe corrosion had caused the leak, it would have resulted in a slow leak detectable as it gradually grew larger, and not the gushing of water that admittedly occurred, and given the evidence that a valve at or near the source of the leak had been smashed with a blunt instrument. The court said that the burden was on the insured to prove that the water damage was caused by a "fortuitous" event within the meaning of the policy and not on the insurer to prove the contrary.

INSURANCE—ANTI-SUBROGATION—POLICY FOR RENTAL COMPANY

In ***Alinkofsky v. Countywide Ins. Co.***, 257 A.D.2d 70, 691 N.Y.S.2d 479, the First Department held that an

insurance company that issued a policy covering a car rental company and a rental customer is not entitled to partial indemnification from another carrier that insured a driver under her parents' policy. In so holding, the court said that it was reinforcing the anti-subrogation rule, which bars insurers from suing their own insureds, noting that the First Department has treated the anti-subrogation rule as fundamental, and has rejected exceptions in a variety of circumstances.

The carrier for the rental company, which provided coverage of $1 million for the company and $10,000 for the driver, asserted that the carrier for the driver's parents should be responsible for losses in excess of the $10,000 of coverage under the rental agreement. Applying the anti-subrogation rule, the court rejected the carrier's arguments that it was not actually suing its insured, the driver, since it was looking to the second carrier to provide the second layer of coverage in connection with a personal injury case arising from a collision involving the driver. The court said that whether or not the carrier actually expects indemnification from its insured on behalf of another insured for an event arising from the same risk is not dispositive, since the conflict exists the moment the competing coverages are triggered.

Noting that the attorneys for the carrier had failed to make a demand on the carrier on the driver's behalf, and they had characterized her as the "actively negligent tort-feasor," the court concluded that the lawyers had shown that their greatest loyalty was to the carrier. The carrier's failure, through its attorneys to satisfy all of its duties to each insured, the court observed, raises the very concerns that underpin the application of the anti-subrogation rule.

INSURANCE—BAD FAITH

In ***Ansonia Associates Limited Partnership v. Public Service Mutual Ins. Co.***, 257 A.D.2d 84, 692 N.Y.S.2d 205, the First Department, holding that insurers cannot place their own financial interest above those of their insured, affirmed the trial judge's refusal to dismiss the bad faith action. The court said that an insurer's cavalier indifference to a potentially ruinous punitive damage award could operate to destroy the insured's right to receive the "fruits" of its insurance contract, and an insurer is not relieved of its duty to fairly represent an insured's interests merely because the insured may be guilty of wrongful conduct that results in punitive damages. In this case, the insured ended up having to pay $1.5 million of its own funds to settle a claim after a jury declared in the liability phase that it was subject to punitive damages. Finding that the carriers had rejected all settlement offers in the case as a part of an apparently deliberate strategy to avoid payment on the claim, the court said that the carriers had maneuvered the insured into entering the settlement on its own, and in so doing the carriers had used economic duress to deprive the insured of the very insurance coverage for which the insured contracted.

The dispute stemmed from the collapse of the roof in the Ansonia hotel which killed one person and injured several others. As a result , wrongful death and personal injury actions were brought against 11 defendants including Ansonia, part owner of the building. Ansonia had a general liability insurance policy and excess coverage of $20 million. The parties worked a tentative settlement well within the limits of the coverage under which Ansonia's proposed contribution was $375,000, but the carriers refused to pay anything and the co-defendants settled for just over $152,000. A liability trial was then held in which the jury found Ansonia to be 80 percent liable and answerable in punitive damages. Ansonia then settled for $1.5 million and sued the carriers in bad faith. The Appellate Court rejected the carriers contention that they could not have acted in bad faith since an award of punitive damages could not be recovered from them on public policy grounds.

INSURANCE—EFFECT OF BINDER

Crouse West Holding v. Sphere Drake Ins., 248 A.D.2d 932, 670 N.Y.S.2d 640, ***aff'd***, 92 N.Y.2d 1017. A binder is a temporary contract of insurance that binds the insurer according to its terms, and where those terms are ambiguous, they must be construed in favor of the insured. (***Kula v. State Farm Fire and Cas.* Co.**, 212 A.D.2d 16). This rule is enforced even more strictly when the language at issue purports to limit the insurer's liability. In this case, the Fourth Department held that a binder which specifically noted an assault and battery exclusion from the insured bar owner's commercial general liability coverage, but not from its liquor liability coverage, created confusion and ambiguity, and thus the insured was entitled to liquor liability coverage for a claim arising out of a bar fight that occurred before the policies were issued to replace the binder, even though both policies as issued contained the exclusion and the insurer customarily included the exclusion in its policies. However, the court also held that the liability insurer's untimely disclaimer of coverage did not obligate it to defend and indemnify the insured against the underlying claim under the commercial general liability policy, where the claim fell within the exclusion in the CGL policy but was covered under the separate liquor liability policy. The court said that coverage is the net total of policy inclusions minus exclusions, and the failure to disclaim based on an exclusion will not give rise to coverage that did not exist. The Court of Appeals affirmed for the reasons stated in the memorandum of the Appellate Division (92 N.Y.2d 1017).

INSURANCE—EXCLUSION EXPECTED OR INTENDED INJURY

In ***Hodgson v. United Services Auto. Ass'n***, 691 N.Y.S.2d 137, the Second Department held that exclusions in an insured's general liability and umbrella policies for expected or intended injury barred coverage for a defamation action premised on allegations of malice and intent to injure. The court said that the duty of the insurer to defend the insured rests solely on whether the complaint alleges any facts or grounds which bring the action within the protection purchased.

INSURANCE—RESPONSIBILITY OF LESSEE—ABSENT FROM VAN TO LESSOR

In ***Hertz v. Government Employees Ins.***, 250 A.D.2d 181, 683 N.Y.S.2d 483, the First Department held that an indemnity clause in an automobile rental agreement required the lessee who was absent from the van to reimburse the self-insured lessor for its payments that exceeded the statutory minimum for liability insurance and covered the bodily injury associated with the lessee's use of the rental vehicle, since the agreement required the lessee to hold the lessor harmless for liability in excess of the statutory limits arising from the use of the car. The court said that the van lessee who was not present in the vehicle nonetheless used it within the meaning of her liability coverage for an injury arising out of the "use" of a non-owned auto, since the lessee had the right to supervision and control, had an agreement with an authorized driver for the use of the van for transportation to a family reunion, and entrusted the van to the driver.

The Court also held that the lessor did not voluntarily settle the injured parties' claims by paying amounts in excess of the limits of its liability as set forth in the rental agreement and, therefore, was entitled to recovery from the lessee's automobile liability insurer, since the lessor timely apprised the insurer of the lawsuit and the settlement efforts, but the insurer declined to participate.

MOTOR VEHICLES—LOADING AND UNLOADING AS CONSTITUTING USE AND OPERATION OF THE VEHICLE

In ***Argentina v. Emery World Wide Delivery Corp.***, 93 N.Y.2d 554, 693 N.Y.S.2d 493, the Court of Appeals held that loading and unloading a truck constitutes "use or operation" of the vehicle under Vehicle and Traffic Law section 388(1), which imposes vicarious liability on owners for the negligence of persons they allow to use their vehicles. It also held the vehicle need not be the proximate cause of injury to trigger the statute. While the Court disagreed with defendant's contention that a New York Department of Insurance regulation (11N.Y.C.R.R. 60-1.1 [c] [3] [iii]) compelled a different result, because under the regulations, an owner, as the named insured is covered for accidents arising out of the use or operation by permissive users of a motor vehicle, it held that the policy need not cover the liability of a third party for accidents occurring in the loading or unloading of the vehicle. Thus, in this case, neither plaintiff's employer, nor the company who loaded the truck, needed to be an "insured" under the vehicle's policy, but the regulation still required the accident to be covered under the vehicle owner's policy from the standpoint of the vehicle's liability. However, the Court noted that the scope of the policy under the regulations did not define the reach of vicarious liability under section 388(1).

As to the proximate cause issue, the Court of Appeals held that the Federal District Court had mistakenly relied on ***Walton v. Lumbermens Mutual Casualty Co.***, (88 N.Y.2d 211) because in that case the Court interpreted a provision of the no-fault insurance law—for loss arising out of the use or operation of a motor vehicle, holding that where a person's injuries while unloading a truck were produced by an instrumentality other than the vehicle itself, first party benefits under the no-fault insurance law were not available. The Court said that the no-fault law's linguistic resemblance to section 388(1) was not enough to compel the conclusion that the vehicle must be the instrumentality that causes or contributes to the injury, since the two laws are distinct, with different purposes. The proximate cause limitation in Walton was necessary to avoid an over broad application of the no-fault law, but no similar concern arises regarding section 388(1) since it comes with a built-in limitation: negligence in the use of the vehicle must be shown, and that negligence must be a cause of the injury.

In a footnote the Court points out that mere preparatory and preliminary activity antecedent to loading or unloading of the vehicle would, however, fall outside of section 388(1) (citing ***Frontuto v. Ray Burgun Truck Co.***, 78 N.Y.2d 938).

MUNICIPALITY—PRIOR WRITTEN NOTICE OF DEFECT

Woodson v. City of New York, 93 N.Y.2d 936, 693 N.Y.2d 69. State law authorizes municipalities to require prior written notice of defects in a street, highway bridge, culvert, sidewalk and crosswalk. In ***Walker v. Town of Hempstead***, 84 N.Y.2d 360, the Court of Appeals held that the scope of the notice requirement is strictly limited to the six specified types of public installations. In this case, the Court of Appeals overturned a $381,071 personal injury award to a man who fell while descending a defective concrete stairway from a city

park to the sidewalk. Although stairway is not mentioned in the state law, the City broadly defined sidewalk in its Pothole Law to include a boardwalk, underpass, pedestrian walk or path, step and stairway. The Court of Appeals stated that the city's Administrative Code reasonably recognized that when stairs are integrated with or serve as part of a standard sidewalk, they plainly fall within the meaning of that already existing category. According to the Court, the stairway in this case functionally fulfilled the same purpose that a standard sidewalk would serve on flat topography, except that it is vertical instead of horizontal.

NEGLIGENCE—CONTRACTUAL INDEMNITY—LABOR LAW § 240(1)

In ***Pope v. Supreme-K.R.W. Const. Corp.***, 690 N.Y.S.2d 632, the Second Department held that a contractual agreement entered into by a subcontractor on a construction project, which required the subcontractor to defend and indemnify the general contractor and site owner, for any claims arising from work performed pursuant to the contract, whether performed by the subcontractor or sub-sub-contractor and did not condition the duty to defend and indemnify on findings that the subcontractor was negligent, obligated the subcontractor to indemnify the general contractor and site owner with respect to a Labor Law section 240(1) claim by an employee of the sub-sub-contractor (citing ***Martin v. Paisner***, 253 A.D.2d 796).

NEGLIGENCE—FIREFIGHTER'S RULE

1. Conduct of Fellow Officer

2. Violation of Statute or Rule

In ***Gonzalez v. Iocovello***, 93 N.Y.2d 539, 693 N.Y.S.2d 486, the Court of Appeals upheld a $3.3 million jury award to a former New York City police officer, who suffered career-ending injuries in a collision when her partner drove through a red light while responding to a burglary in progress. The suit against the City was brought under General Municipal Law section 205-e, a statutory exception to the "firefighter's rule," which precluded common-law negligence claims by police and firefighters for injuries resulting from risks inherent in their work. section 205-e gives officers a cause of action when a defendant's violation of a statute or government rule or regulation causes a line-of-duty injury. section 205-e was enacted in 1989 specifically to overrule the 1988 Court of Appeals ruling in ***Santangelo v. State of New York***, (71 N.Y.2d 393), which for the first time applied the "firefighter's rule" to bar negligence suits by police officers. This began a struggle between the courts and the Legislature, where the courts interpreted the statute narrowly and the Legislature amended the statute repeatedly to expand it. Prior to the most recent amendment in 1996, the Court of Appeals and the Appellate Division restricted the statutory cause of action to violation of statutes or rules that do more than simply codify common-law duties and to cases where the violation increases the risks normally faced by police officers. The amendment gave officers the right to sue regardless of whether the violation involves a provision which codifies a common-law duty or increases the dangers already inherent in the work. [The generous contributions of the police and firefighter's unions to the campaigns of the members of the Legislature has been a factor in the amendments to the statute].

In this case, the Court said that the City should present its concerns to the Legislature. It also held that a violation of Vehicle and Traffic Law section 1104(e) can provide the basis for a claim under section 205-e, since while section 1104(e) allows emergency vehicles to run stop lights and violate other traffic laws in emergency situations, it leaves drivers liable for reckless disregard for the safety of others. [It appears that the driver of the police vehicle subsequently married the plaintiff].

In another case heard under this appeal, ***Cosgriff v. City of New York***, the Court upheld a $50,000 award to a police officer who tripped and fell on a defective sidewalk while chasing drug dealers, stating that violation of City Charter and Administrative Code provisions which impose a clear legal duty on the City to take appropriate steps to keep sidewalks in safe repair provide a sufficient basis for suit under section 205-e. The decision notes that Administrative Code section 7-201 provides that an action for damages arising out of a defective sidewalk cannot be maintained unless the City had prior written notice of the defect, but City Charter section 2903(b)(2) while it places the burden for paying for repairs on a sidewalk on the property owner, the overall duty to keep sidewalks in sake repair is sufficient to support a police officers action. [Incredibly, it appears that a non-police officer or firefighter could not maintain such an action unless prior notice is proved].

NEGLIGENCE—FIREFIGHTERS RULE—SANITATION WORKER

In ***Ciervo v. City of New York***, 93 N.Y.2d 465, 693 N.Y.S.2d 63, the Court of Appeals held that the "firefighters rule," which bars police officers and firefighters from recovering damages for line-of-duty injuries, does not apply to sanitation workers. The unanimous opinion affirmed a First Department decision, which reinstated a $483,260 judgment for a city sanitation worker who was injured when he stepped into a hole in a sidewalk while carrying two bags of garbage to his truck. The Court said the firefighter's rule is not based on the

assumption of risk doctrine, but on the public policy that police officers and firefighters should not recover damages for negligence in the very situations that create the occasion for their services. Extending this rule to New York City sanitation workers—whose employment does not entail securing public interests at an increased risk of injury to themselves—would abrogate the rule's underlying policy rationale.

NEGLIGENCE—GENERAL MUNICIPAL LAW § 205-A—LIABILITY OF DEMOLITION CONTRACTOR

In ***Grawin v. Tudor Place Associates***, 689 N.Y.S.2d 79, the First Department held that genuine issues of material fact, as to whether a partial building collapse allegedly caused by a demolition contractor's violation of the Administrative Code in failing to properly shore up the building had a practical or reasonable relationship to a firefighter's use of a defective ladder in attempting to rescue the contractor's worker precluded summary judgment dismissing the firefighter's claim under section 205-a of the General Municipal Law affording a right of action to injured firefighters. The court noted that section 205-a imposed liability for violations of regulations relating to the safety of premises regardless of the violator's ownership or occupancy of the premises, and thus, the fact that a violation for failing to properly shore up a building was not issued to the demolition contractor, but rather, to an entity affiliated with the general contractor, was not determinate of the demolition contractor's liability to the firefighter. The court also held that genuine issues of material fact as to whether the ladder the firefighter used was defective, and whether the demolition contractor was its owner or had notice of its presence on the rubble, precluded summary judgment for the demolition contractor on the firefighter's common law negligence claim.

NEGLIGENCE—FORESEEABILITY

In ***Miller v. Hannaford Brothers Company,*** 252 A.D.2d 436, 675 N.Y.S.2d 436, the Third Department held that an injury to a shopper, which occurred when a bottle of carpet cleaner fell over and squirted in her eye as the cashier scanned items at the grocery store checkout counter, was not foreseeable by the grocery store, and thus the store was not liable in negligence for injury to the shopper's eye, where the bottle was not improperly handled by the store personnel before it was placed on the checkout counter's conveyor belt, the bottle was designed to prevent accidental spraying in the event it was dropped or mishandled, the bottle's top had not been loosened and its safety device had not been deactivated, and the store personnel were unaware of any prior incident of a bottle accidentally spraying a customer.

NEGLIGENCE—ICE AND SNOW—SNOW REMOVAL CONTRACTOR—PARKING LOT

In ***Kampf v. Bank of New York***, 259 A.D.2d 439, 687 N.Y.S.2d 348, the First Department held that a maintenance company's limited contractual duty for snow removal from the bank's sidewalk, driveway and parking area did not obligate the company to monitor the entire property under all conditions, including eliminating ice formed from a snowbank melt-off on which a pedestrian fell while crossing the bank's parking lot. The court said that the pedestrian was not a third-party beneficiary under the bank's snow-removal contract with the maintenance company.

In ***Tiwari v. EAB Plaza***, 690 N.Y.S.2d 624, the Second Department held that the contractor responsible for snow removal in the parking lot owed no duty to a pedestrian who slipped and fell on ice in a parking lot, where neither the contract nor the surrounding circumstances indicated that the contractor had assumed a duty to the pedestrian to maintain the property in reasonably safe condition, or that the pedestrian had detrimentally relied upon the contractor's continued performance of its obligations under the contract.

NEGLIGENCE—LABOR LAW § 240(1)—ASBESTOS INSPECTION WORK NOT SUBJECT TO PROTECTION OF LABOR LAW

In ***Martinez v. City of New York***, 93 N.Y.2d 322, 690 N.Y.S.2d 524, the Court of Appeals held that an inspector who fell from a desk while measuring a ceiling pipe in preparation for an asbestos removal project of a New York City school was not covered by Labor Law section 240(1). The Court stated that they had repeatedly indicated that section 240(1) was to be construed as liberally as possible for the accomplishment of the purpose for which it was framed, however, the statutory language must not be strained in order to encompass what the Legislature did not intend to include. The decision points out that while the reach of section 240(1) was not limited to work performed on actual construction sites, the task in which an injured employee was engaged must have been performed during the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure, and here, plaintiff's work as an environmental inspector was merely investigatory, and was to terminate prior to the actual commencement of any subsequent asbestos removal work. In fact, none of the activities enumerated in the statute were underway, and any future repair work would not even be conducted by plaintiff's supervisor, but by some other entity, and thus, plaintiff was not a person employed to carry out the repairs as that term was used in section 240(1). Two judges had dissented in the Appellate Division decision (Second Department) and, significantly, the Court of Appeals rejected the dissenters' analysis

which focused on whether plaintiff's work was an integral and necessary part of a larger project within purview of section 240(1), since such a test improperly enlarged the reach of the statute beyond its clear terms.

NEGLIGENCE—LABOR LAW § 240(1)—GRAVITY—LADDER

In ***Ross v. Threepees Realty Corp.***, 258 A.D.2d 575, 686 N.Y.S.2d 448, the Second Department held that injuries sustained by a worker when he fell from a ladder after being stung by a bee while caulking a leaking window, were the sole result of his reaction to the bee sting, rather than any purported violation of section 240(1) of the Labor Law.

In ***Vouzianas v. Bonasera***, 693 N.Y.S.2d 59, the Second Department held that the lower court properly determined that there are triable issues of fact as to whether there was a violation of Labor Law section 240(1) and, if so, whether it proximately caused the accident, since a question of fact existed as to whether the injured plaintiff's conduct in disassembling the extension ladder at issue, and in using only the top half which lacked non-skid pads, constituted an unforeseeable, independent, intervening act which was a superseding cause of the accident.

In ***Adams v. Owens-Corning Fiberglass Corp.***, 688 N.Y.S.2d 788, where an electrician fell from a ladder while working on the exterior of defendant's building, the Third Department denied plaintiff's motion for partial summary judgment as to the Labor Law section 240(1) cause of action, finding that plaintiff directed a co-worker to kick the ladder out from under him to prevent his electrocution.

In ***Anderson v.Schul/Mar Const. Corp.***, 258 A.D.2d 605, 685 N.Y.S.2d 753, the Second Department held that the evidence supported the jury's conclusion that the improper placement of a ladder was not a proximate cause of the injury sustained by a worker, who fell while descending the ladder, as required to support imposition of liability on the site owner, since one of the employees at the work site testified that he observed the worker descend the ladder with coffee and a donut in hand, and that as the worker was going down the ladder he "misfooted" and fell backwards. [In this case tried in Supreme Suffolk, Judge Tanenbaum had set aside the jury's verdict on liability].

In ***Guzman v. L.M.P. Realty Corp.***, 691 N.Y.S.2d 483, where plaintiff testified at a deposition that after his fall that he noticed one of the ladder's legs was bent, but defendants challenged that allegation with photographic evidence that the legs of the ladder were still quite straight, with the swiveling rubber anti-skid footpads still intact, and further offered the testimony of the subcontractor's president to the effect that plaintiff had been observed "skipping" the ladder, i.e., trying to move it by jerking his body, the First Department held that the hearsay observations of plaintiff's activities on the ladder, accompanied by the photographic evidence contradicted plaintiff's assertion of defective equipment. The plausible defense theory, supported by evidence, had thus placed plaintiff's credibility in issue, rendering the action inappropriate for summary disposition in his favor.

NEGLIGENCE

1. Labor Law § 241(6)

2. Open and Obvious Condition

In ***Isola v. JWP Forest Elec. Corp.***, 691 N.Y.S.2d 492, the First Department held that an iron worker injured when he tripped over a section of electrical conduit lying on the corrugated metal decking of a building under construction could not bring an action against the general contractor for violation of Industrial Code regulation 12 N.Y.C.R.R. 23-1.7(e)(1) & (2) under Labor Law section 241(6) of the Labor Law, where the worker was injured while working in an open area and the electrical conduit over which he fell was an integral part of the floor being constructed. [These sections provide that all passageways shall be kept free from debris and from other obstructions or conditions which cause tripping]. The court also held that under a common law negligence cause of action, the general contractor had no duty to warn the iron worker of the danger of tripping over the section of electric conduit because the danger was open and obvious.

NEGLIGENCE—LABOR LAW § 241(6)—VIOLATIONS OF INDUSTRIAL CODE

In ***Schiulaz v. Arnell Construction Corp.***, 690 N.Y.S.2d 226, the First Department held that plaintiff's attempt in their reply papers, in support of their motion for summary judgment, to raise for the first time violations of sections 23-5.1(f) and 23-1.2(b) was improper and plaintiff's claim under section 241(6) should be dismissed. The court added that in any event, neither section constituted a concrete or specific standard of conduct sufficient to support a 241(6) claim.

NEGLIGENCE—LABOR LAW

1. **Section 240—Height—Moving Duct Lift Up Permanent Stairway**
2. **Section 240—Height—Dismantling Air Conditioner;**
3. **Section 200**
   a) **General Contractor's Notice of Subcontractor's Unsafe Methods**
   b) **Liability of Steel Supplier**

In ***Turchioe v. AT&T Communications, Inc.***, 256 A.D.2d 245, 682 N.Y.S.2d 378, the First Department held that section 240(1) did not apply to back injuries allegedly sustained by a subcontractor's employee when a co-worker who was helping the employee transport a duct lift up a stairway from the basement to the first floor allegedly caused the weight of the duct lift to shift to the employee's shoulder, since the injuries did not result from a hazard created when the work site is either elevated or positioned below the level where the materials are hoisted or secured.

In ***Piccinich v. New York Stock Exchange, Inc.***, 257 A.D.2d 438, 683 N.Y.S.2d 517, the First Department held that the injury a laborer sustained when a component of the air conditioner he was dismantling fell two to three inches onto his hand was not caused by an elevation-related-risk contemplated by the Labor Law, and the allegedly defective internal support beam that fell through the bottom of the unit, causing the component to fall, was not a "brace" within the meaning of 240. The court also held that summary judgment was properly granted in a contractor's favor where it submitted an affidavit from a vice president that its records indicated it did not perform any work at the accident site prior to or at the time of the accident, and the laborer countered with mere expressions of hope that further disclosure might uncover information linking it to the accident.

In ***Colon v. Lehrer, McGovern & Bovis, Inc.***, 259 A.D.2d 417, 687 N.Y.S.2d 130, the First Department held that mere notice of unsafe methods of performance was not enough to hold the owner or general contractor vicariously liable under section 200 of the Labor Law. A question of fact, however, remained as to whether the general contractor, whose allegedly defective plans were used by the subcontractor in installing the safety cables from which the worker fell, exercised such on-site supervision, where the worker testified as to one instance where an employee of the general contractor was actively involved in placing netting around the safety cables. The court also held that the steel supplier was not liable to the worker under section 200, since the supplier's only responsibility was to provide steel materials, and there was no evidence that the supplier exercised any supervisory control of the work.

NEGLIGENCE—LABOR LAW § 240(1)—HEIGHT:

1. **Temporary Staircase**
2. **Fall From Iron Grid Twelve Inches Above Ground**
3. **Fall From Flatbed Trunk**
4. **Lifting Water Pump Out of Underground Tank**
5. **Injury in Ground Level Dumpster**
6. **Angle Clip Slipped Down Temporary Tube Column**

1. In ***Frank v. Meadowlakes Development Corp.***, 256 A.D.2d 1141, 686 N.Y.S.2d 540, the Fourth Department held that while a temporary staircase that was used for access to and from the upper levels of a house under construction was the functional equivalent of a ladder and fell within the designation of "other devices" within the meaning of section 240(1) of the Labor Law, a fact issue existed as to whether the alleged statutory violation was the proximate cause of the accident, which occurred when the worker fell backwards down the temporary staircase while carrying a large bag of insulation, precluding summary judgment in favor of the worker.

2. In ***Sousa v. American Ref-Fuel Co. of Hempstead***, 258 A.D.2d 514, 685 N.Y.S.2d 279, the Second Department held that an accident in which a worker fell while standing atop an iron grid, which was at most 12 inches above the ground, was not caused by an elevation-related hazard, but resulted from a peril that workers are commonly exposed to at construction sites, and thus did not come within the scope of section 240(1) of the Labor Law.

3. In ***Tillman v. Triou's Custom Homes, Inc.***, 253 A.D.2d 254, 687 N.Y.S.2d 506, the Fourth Department held that the surface of a flatbed truck did not constitute an elevated work surface for purposes of section 240(1) of the Labor Law, and thus the section did not apply to the truck driver's accident in falling from the flatbed truck while unloading cement blocks because there was no exceptionally dangerous condition posed by an elevation differential between the flatbed portion of the truck and the ground, and there was no significant risk inherent in the particular task the driver was performing because of the relative elevation at which he was performing the task.

4. In ***Fills v. Merit Oil Corp.***, 258 A.D.2d 556, 685 N.Y.S.2d 472, the Second Department held that an accident in which the worker injured his back while lifting

a water pump weighing approximately 100 pounds out of an underground tank vault as he leaned over a waist-high foundation wall was only tangentially related to the effects of gravity and did not come within the scope of section 240(1) of the Labor Law, even if, as the worker alleged, the injury occurred when the coworker who was helping him lost his footing and dropped his end of the pump.

5. In ***Sluchinski v. Corporate Property Investors***, 258 A.D.2d 306, 685 N.Y.S.2d 179, the First Department held that a construction worker's injury that occurred when he stepped on a piece of sheet rock while standing on some debris inside a ground-level dumpster did not result from exposure to an elevation-related risk, and thus, he had no cause of action under section 240(1) of the Labor Law.

NEGLIGENCE—LABOR LAW § 240(1)—LADDER—WHERE ELEVATION-RELATED RISK IS OVER

In ***Nieves v Five Boro Air Conditioning***, 93 N.Y.2d 914, 690 N.Y.S.2d 852, the Court of Appeals reversed the First Department decision and granted the general contractor's motion for summary judgment stating that the core objective of section 240(1) of the Labor Law in requiring protective devices for those working at heights was to allow them to complete their work safely and prevent them from falling, but where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists. Here, the Court notes that the ladder was effective in preventing plaintiff from falling during performance of the ceiling sprinkler installation, and thus the core objective of section 240(1) was met. Plaintiff's injury resulted from a separate hazard wholly unrelated to the danger that brought about the need for the ladder in the first instance—an unnoticed or concealed object on the floor—and there was no evidence of any defective condition of the ladder or instability in its placement, hence the risks to plaintiff were the result of the usual and ordinary dangers at the construction site. The reason there was such a quick decision on this case was that the Court of Appeals reviewed the case on submissions pursuant to section 500.4 of the Rules which allows the Court to examine the merits of selected appeals, on its own motion and where the review is based mainly on the Appellate Division record and briefs.

NEGLIGENCE—LABOR LAW § 240(1)—LESSEE

In ***Guzman v. L.M.P Realty Corp.***, 691 N.Y.S.2d 483, the First Department held that a lessee in a commercial building in which renovations were being performed lacked control over the work being performed by an employee of a subcontractor, and thus was not liable under Labor Law section 240(1) for injuries sustained by the employee in a fall from a ladder, where the landlord hired the general contractor, and the lessee neither contracted for nor supervised the renovation work, had no authority over the safety measures, and did not supply any safety devices.

NEGLIGENCE—LABOR LAW—RECALCITRANT WORKER DEFENSE

Job v. 1133 Building Corp., 251 A.D.2d 459, 674 N.Y.S.2d 710. The recalcitrant worker defense is premised upon the principle that the statutory protection under section 240 of the Labor Law does not extend to workers who have adequate and safe equipment available to them and refuse to use the equipment. In this case, the Second Department held that a genuine issue of material fact existed as to whether a worker, injured in a fall from scaffolding at a construction site, had been provided with a proper safety harness, or whether he was a recalcitrant worker who refused to wear the harness provided to him, where the foreman testified that the safety harness had been provided for the worker and that the worker had access to the harness and was instructed in its proper use.

In ***Kulp v. Gannett Company, Inc.***, 687 N.Y.S.2d 840, where plaintiff submitted proof that the safety harness and lanyard provided by his employer could not be tied off while he was performing his work and that no other safety devices were available to prevent him from falling, but the employer submitted proof that plaintiff was able to tie off to a safety line or a beam and that plaintiff was instructed at weekly safety meetings to tie off at all times when working at a height, the Fourth Department held that genuine issues of material fact as to whether the safety harness and lanyard provided to the plaintiff afforded proper protection and whether the plaintiff was a recalcitrant worker, precluded summary judgment to the plaintiff.

In ***Harrington v. State of New York***, 255 A.D.2d 819, 681 N.Y.S.2d 122, where the evidence was that the worker was provided with the proper safety device in the form of a harness and lanyard which he declined to use on the date of the accident, and that if a worker was seen working at an elevated height without such a safety device in place, he or she would be told to attach it and that refusal of such an order would result in the worker's expulsion from the work site, the Third Department held that material issues of fact as to the availability of safety devises and practices in place at the work site, and as to whether the worker was a recalcitrant worker, precluded summary judgment for

the employee, in his action under Labor Law 240 for injuries sustained when he fell from a bridge.

NEGLIGENCE

1. Labor Law section 240(1)—Routine Maintenance

2. Labor Law section 241(6)—Construction Work

3. Out-of-Possession Owner

In ***Urbano v. Plaza Materials Corporation***, 692 N.Y.S.2d 86, the Second Department held that repairing a latch on the doors of an asphalt bin, an activity for which the worker brought no tools, was routine maintenance which was not covered under section 240(1) of the Labor Law and that the owner of the premises on which the workman was found dead was not liable under section 241(6) of the Labor Law, where the worker was not engaged in construction work. The court also held that the out-of-possession owner was not liable under the common law for injuries on the premises, where the owner did not control the premises at the time of the worker's death.

NEGLIGENCE—LABOR LAW § 240—UNFORESEEABLE INTERVENING ACT

In ***Vouzianas v. Bonasera***, 693 N.Y.S.2d 59, the Second Department held that a question of fact existed as to whether an injured worker's conduct in disassembling an extension ladder and using only the top half, which lacked non-skid pads, was an unforeseeable, independent, intervening act which was a superseding cause of the action, precluding summary judgment for the worker in an action under Labor Law 240.

NEGLIGENCE

1. Labor Law section 240(1)—Work Outside Scope of Employment

In ***Higgins v. 1790 Broadway Associates***, 691 N.Y.S.2d 31, the First Department held that the owners of a building in which the plaintiff porter was employed by a management company to mop and wax floors were not liable under section 240(1) of the Labor Law for injuries the porter suffered in a fall from a defective ladder while attempting to repair an elevator, as the porter was clearly acting outside the scope of his employment, in attempting the repair and the employer had not requested that he perform the repair. However, the court also held that genuine issues of fact, as to whether the building owners had actual or constructive knowledge of the defective condition of the ladder they supplied for the building, precluded summary judgment on the Labor Law section 200 and common law claims arising from the injuries suffered by the porter. The court said that liability for an injury resulting from a dangerous condition at the work site (the presence of a defective ladder in the building constituted a dangerous condition, as it was reasonably foreseeable that a worker might use the defective ladder and sustain an injury) may be imposed on the owner under section 200 of the Labor Law 200 where the owner either exercised supervision and control over the work or had actual or constructive notice of the unsafe condition.

NEGLIGENCE—MUNICIPALITY—PRIOR WRITTEN NOTICE STREET OR SIDEWALK DEFECTS

In ***Amabile v. City of Buffalo***, 93 N.Y.2d 471, 693 N.Y.S.2d 77, the Court of Appeals held that local ordinances requiring written notice of street or sidewalk defects as a condition for municipal liability must be strictly enforced. It refused to recognize a constructive notice exception, saying that the Legislature had made plain its judgment that the municipality should be protected from liability in these circumstances until it had received written notice of the defect or condition. In this case, plaintiff tripped and fell on a street corner where a car had sheared off a stop sign six to twelve months earlier. About 10 inches of the steel sign post protruded from the ground, at an angle, and the concrete sidewalk was severely cracked and broken around its base. The plaintiffs were unable to prove Buffalo had received prior written notice of the hazard, as the City Charter required, but they argued the city had constructive notice, because city records showed that one of its sign inspectors had repeatedly driven by the street corner since the sign was destroyed. In rejecting constructive notice, the Court stated that judicial recognition of a constructive notice exception would contravene the plain language of the statute and serve only to undermine the rule.

NEGLIGENCE

1. Premises—Liability for Criminal Act

2. Security Company—Liability for Criminal Act

In ***Four Aces Jewelry Corp. v. Smith***, 257 A.D.2d 510, 684 N.Y.S.2d 224, an action by a jewelry business located in a diamond district building, to recover damages resulting from the burglary of its premises, the First Department held that material issues of fact as to whether a building owner's posting of a lone, unarmed lobby security guard during daytime business hours satisfied the owner's duty to take minimal security precautions to protect the tenants from criminal acts of third parties and as to whether any demonstrated failure by the owner proximately caused harm to the jewelry store, precluded summary judgment for the owner (citing ***Rudel v. Natl. Jewelry Exchange Co.***, 213 A.D.2d

301). The Court also held that the security company retained by the building owner to provide unarmed security guard for the building lobby had no duty of care to the jewelry store, and therefore the company was not liable in connection with the burglary of the store, in view of the undisputed testimony establishing that the company's undertaking was made to the building owner's, not to the tenants, and was limited to provision of a guard for the lobby during weekday business hours.

NEGLIGENCE

1. Premises—Open and Obvious Danger

2. Third-Party Beneficiary—Duty of Security Company to Plaintiff

In ***Tarrazi v. 2025 Richmond Ave. Associates***, 688 N.Y.S.2d 220, the Second Department held that neither the landowner nor its security company owed the plaintiff a duty to warn of the inherent danger of descending an unlit stairway, since the danger was open and obvious, and plaintiff had actual notice, in the form of a comment by a coworker, of the danger posed by the darkened stairway. The court also held that even if the contract between the landowner and its security company conferred upon the security company the duty to inspect the stairways in the course of its regular patrols, the contract was not intended to confer a direct benefit on the plaintiff who fell while descending the unlit stairway, and thus plaintiff could not bring an action against the security company under a third-party beneficiary theory.

NEGLIGENCE—PREMISES—SLIP AND FALL—BANANA PEEL

In ***Faricelli v. TSS Seedman's Inc.***, 1999 WL818714, ***affirming***, 686 N.Y.S.2d 85, it was held that the blackened condition of a banana peel was insufficient to establish that a store owner had actual or constructive notice of the peel's presence on the floor prior to the customer's slipping and falling on the peel.

NEGLIGENCE—SCHOOL'S RESPONSIBILITY TO STUDENTS DEPARTING SCHOOL

In ***Ernest v. Red Creek Central School District***, 93 N.Y.2d 664, the Court of Appeals held that schools have a continuing duty of care toward students when they are released from school custody into a foreseeably hazardous setting. The decision reinstated claims on behalf of a second grader who was struck by a truck while off school property, because the school allegedly violated its own policy by allowing students to begin walking home before all of its buses had left the area. The accident occurred five years after school officials began urging county and town officials to eliminate hazards on the student's route home by extending a sidewalk 250 feet along the highway to the front of the school, where a crosswalk would give them a safe place to cross. Without a sidewalk, students wandered along the highway until they found an opening to cross it. Despite two letters and repeated verbal pleas, the county took no action.

The school district adopted its own safety policy of waiting until all of its buses had left the area before allowing students who walk home to leave the school grounds. It did not follow that policy on the day of the accident, when the student was struck as he tried to dodge across the highway behind a passing bus. The Court of Appeals stated that although a school's duty to protect students generally ends when it relinquishes custody, it relied on a 1941 decision, ***McDonald v. Central School District No. 3***, 179 Misc. 333, ***aff'd without opinion*** 264. App Div. 943, ***aff'd without opinion*** 289 N.Y. 300, which held that the duty continues when a student is released into a hazardous situation the school itself created. ***McDonald*** held that a school district's duty of care requires continued exercise of control and supervision in the event that release of the child poses a foreseeable risk.

In this case, the Court held that while a school has no duty to prevent injury to schoolchildren released in a safe and anticipated manner, the school breaches a duty when it releases a child without further supervision into a foreseeably hazardous setting it had a hand in creating. The Court said a jury must determine whether the district was negligent in failing to respond to the school's repeated warnings about the need for a sidewalk and crosswalk.

NEGLIGENCE—SIDEWALK—LIABILITY OF ABUTTING OWNER STATUTE IMPOSING LIABILITY

Pardi v. Barone, 257 A.D.2d 42, 690 N.Y.S.2d 315. Where an ordinance, statute or municipal charter specifically imposes both a duty to maintain the sidewalk and liability to injured third parties for failure to do so the adjoining owner must assume the duty or face liability. However, if only a duty and no liability is imposed, the adjacent landowner generally may not be held accountable (***Willis v. Parker***, 225 N.Y. 159). In this case, the Third Department held that under a city ordinance requiring that an owner of lands abutting any street keep sidewalks adjoining those lands free and clear of snow and ice, and providing that any owner failing to do so would be subject to liability for any injury arising out of that failure, the fact that a six-foot strip of municipal property lay between the landowners' parcel and the municipal sidewalk did not relieve landowners of either statutory duty or liability for

injuries sustained by a pedestrian in a slip and fall accident.

NEGLIGENCE—SIDEWALK—ABUTTING OWNER—ICE AND SNOW

1. Time to Clear Snow

2. Out-of-Possession Owner

In ***Baum v. Knoll Farm***, 259 A.D.2d 456, 686 N.Y.S.2d 83, the Second Department held that a pedestrian's claim that she slipped on ice under freshly fallen snow was insufficient to establish a prima facie case of negligence against the property owner absent any proof of the origin of the icy condition or proof that the owner had notice or sufficient time to remedy the condition. The court said that a property owner may not be held liable for snowy or icy conditions unless it has had a reasonably sufficient time from the cessation of the precipitation to remedy the conditions caused thereby.

In ***Quiles v. 200 W. 94th Street Corp.***, 692 N.Y.S.2d 59, the First Department held that summary judgment should have been granted to an out-of-possession owner of the delicatessen premises where a pedestrian slipped and fell on ice and snow on the abutting sidewalk and the lease with the delicatessen owners specifically provided that the latter would be responsible for keeping the sidewalk and curb in front thereof clean at all times and free from snow and ice. The court said that plaintiff's assertion that the landowner's right of reentry for repairs or improvements created a triable issue of fact as to liability was without merit given the reentry provision's clear reference to permanent structures as opposed to snowfall, a transient condition specifically addressed by the lease.

NEGLIGENCE—SIDEWALK—SPECIAL USE

In ***Tyree v. Seneca Center-Home Attendant Program, Inc.***, 689 N.Y.S.2d 61, the First Department held that the mere receipt of ordinary deliveries of office supplies did not suffice to show a special use of the sidewalk by tenants, and it made no difference whether plaintiff tripped on a hole or slipped on leaves, nor whether she fell near the curb or closer to the loading dock, as in either event the tenants were not liable for her injuries under a special use theory of extended liability. The court said that the owner or occupier of land abutting a public sidewalk does not owe a duty to the public, solely arising from the location of the premises, to maintain the sidewalk in a safe condition. Rather, liability arises only if the abutting owner or lessee created the defect or used the sidewalk for a special purpose, such as when an appurtenance was installed for its benefit or at its request, contemplating a purpose different from that of the general public.

NEGLIGENCE—TRIVIAL DEFECT

In ***Burstein v. City of New York***, 259 A.D.2d 579, 686 N.Y.S.2d 492, where plaintiff was injured when she tripped on the edge of a terrazzo floor in the entryway of a store and the terrazzo floor was raised less than one inch above the abutting sidewalk, the Second Department held that the lower court properly determined that, as a matter of law, based on the dimensions and appearance of the alleged defect and the circumstances of the injury, the slight difference in elevation between the terrazzo floor and the sidewalk did not constitute a dangerous or defective condition (citing ***Trincere v. County of Suffolk***, 90 N.Y.2d 976). The court said that the condition was open and apparent and did not have any of the characteristics of a trap or nuisance.

In ***Maloid v. N.Y. State Elec. and Gas Corp.***, 257 A.D.2d 712, 682 N.Y.S.2d 734, the Third Department held that an unspecified rift, and a one-half to three-quarter inch height differential, between the sidewalk and a steel grate embedded therein, which gave the electric company access to an underground transformer vault, were too trivial to be actionable as a matter of law (citing the ***Trincere*** case). The court said that the minimal rift and height differential posed no unreasonable risk, and were in any event clearly visible to pedestrians.

In ***Riser v. New York City Housing Authority***, 688 N.Y.S.2d 645, the Second Department held that an alleged defect in a sidewalk, which measured a few inches in length and was raised, at its highest point, approximately one inch above the adjacent segment of the sidewalk, was too trivial to be actionable, and thus a pedestrian who tripped and fell over an allegedly defective sidewalk, could not bring an action against the owner of the property upon which the sidewalk ran. The court said that scrutiny of the photographs identified by the plaintiff as accurately reflecting the condition of the sidewalk at the time of plaintiff's fall supported the grant of summary judgment.

NEGLIGENCE—SLIP AND FALL—WATER ON FLOOR RESTAURANT

In ***Spagnola v. Trump Taj Mahal, Inc.***, 690 N.Y.S.2d 715, where at approximately 10:30 A.M. plaintiff slipped on what she believed to be an accumulation of water on a tile floor of a restaurant, and the defendant in support of a motion for summary judgment submitted evidence which established that no "wet mopping" had been done between the hours of 6:30 a.m. and 10:30 a.m. and that "wet mopping" was instead routinely performed during the "graveyard shift," prior to the opening of the restaurant at 6:30 a.m., the Second Department held that the restaurant had neither created the wet floor on which plaintiff slipped and fell, nor had actual or con-

structive notice of such a condition, and thus the restaurant was not liable for the injuries sustained by plaintiff in the fall, even though a restaurant employee was observed using a mop in the area where the fall occurred prior to the accident. The court said that there was inadequate evidence to associate that mopping, which may have been "dry mopping," with the accumulation of water upon which the plaintiff later slipped.

NEGLIGENCE—LIABILITY OF SNOW REMOVER CONTRACTOR

In ***Genen v. Metro-North Commuter Railroad***, 690 N.Y.S.2d 213, the First Department, by a 3-2 vote, held that plaintiffs can directly sue snow removers for their alleged negligent performance of contracts with property owners. The majority declared that a snow remover should not be able to escape liability for its own affirmative negligent acts by asserting the contract with the property owner. But in reaching that conclusion, the judges acknowledged that they were not following a line of cases holding that injured plaintiffs could not effectively become third-party beneficiaries of snow removals agreements between contractors and landowners (citing among other cases: ***Saraceno v. First National Supermarkets***, 246 A.D.2d 638 (2d Dep't) and ***Rebell v. Emigrant Sav. Bank***, A.D.2d, 684 N.Y.S.2d 216 (1st Dep't)). The Court said that such opinions were not controlling since those cases did not involve claims of affirmative negligence against snow removers. Instead, the majority concluded that a snow remover could be liable to a plaintiff if its negligent acts created or increased a hazard and were the proximate cause of plaintiff's injuries. The dissenters asserted that a snow remover does not assume a duty to exercise reasonable care to prevent harm to the public merely by contracting to remove snow and ice. Such liability can only be imposed when a snow remover assumes a comprehensive and exclusive property maintenance obligation that leaves it with the landowner's duty to keep the property safe. Because two judges dissented this decision may be reviewed by the Court of Appeals.

1. Negligence—Third-Party Beneficiary Cleaning and Security Service

2. Insurance Waiver of Subrogation

Cresvale Intern. v. Reuters America, 259 A.D.2d 502, 684 N.Y.S.2d 219. A breach of a contractual obligation will give rise to tort liability vis-a-vis injured third parties only in limited circumstances (***Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.***, 76 N.Y.2d 220). To avoid potentially limitless liability arising out of contractual breaches, injured non-contracting parties must show that performance of contractual breaches has induced their detrimental reliance on continued performance by the contracting parties and inaction would result not merely in withholding a benefit, but positively or actively in working an injury (***H.R. Moch Co. v. Rensselaer Water Co.***, 247 N.Y. 160). Further, the nexus between the defendant's contractual obligation and the non-contracting plaintiff's reliance and injury must be direct and demonstrable, not incidental or merely collateral before a tort duty arises (***Palka v. Servicemaster Mgmt. Servcs. Corp.***, 83 N.Y.2d 579). In this case, the First Department held that an alleged breach of contract between the landlord and a cleaning and security service provider did not give rise to tort liability on the part of the service provider for fire-related damage caused to the non-contracting tenant by the service provider's employee's failure to report a fire promptly. The Court said that the contract did not mention firefighting or prevention duties, the service provider's contractual duties were unrelated to the type of injury suffered by the tenant, and the service provider assumed no special duty of care to the tenant.

The Court also held that the attempt by the commercial tenant's property insurer to recover fire-related business interruption losses from the landlord was inconsistent with the express provisions of waiver of subrogation clause in the lease regarding claims for loss or damage to tenant's property resulting from fire, where the waiver clause provided that landlord was not required to obtain insurance against the interruption of tenant's business and that the tenant was required to obtain insurance. (Citing ***Kaf-Kaf v. Rodless Decorations***, 90 N.Y.2d 654.)

PREMISES—SIDEWALK—SNOW & ICE

Rector v. City of New York, 686 N.Y.S.2d 426. A failure to get all the snow and ice off the sidewalk is not negligence. To recover it must be shown that the hazard was increased by what was done in the process of removing snow and ice (***Spicehandler v. City of New York***, 303 N.Y.946). In this case the majority in the First Department held that a genuine issue of material fact existed as to whether the action's of a store owner's employees in removing several inches of accumulated snow from the adjacent sidewalk, leaving a hard sheet of ice covered by a light dusting of snow increased the hazard to those using the sidewalk, precluding summary judgment in the pedestrian's action against the store. The two dissenting judges held that a plaintiff must show that the manner of removing the snow and ice actually made the condition of the sidewalk more hazardous. The dissenting opinion points out that the majority's finding of a triable issue based on plaintiff's theory that the store had increased the hazard by sweeping away the snow and uncovering a slippery sheet of ice had been rejected as a legally insufficient basis to find an abutting property owner liable for neg-

ligent snow removal (citing the ***Spicehandler*** case). The dissenters stated that ***Glick v. City of New York***, 139 A.D.2d 402 cited by the majority was factually distinguishable because the property owner in that case did more than merely expose pre-existing ice, but rather it was alleged that defendant shoveled snow and ice into piles that obstructed the pedestrian walkway. There is not in this case the prerequisite "final order" so there is not an automatic appeal to the Court of Appeals, but since the are two dissenting judges a motion to the Appellate Division to appeal might be granted and the Court of Appeals might hear the case because both sides cite a Court of Appeals decision as authority.

PREMISES—SLIP & FALL

1. Wax

2. Liquid Substance

In ***Guzman v. Initial Contract Services***, 681 N.Y.S.2d 325, the Second Department held that plaintiff in a slip-and-fall action failed to establish defendant's negligence, since plaintiff failed to identify the substance which allegedly caused her to fall or to present any evidence demonstrating that defendant was negligent in applying floor wax. The court said the fact that a floor is slippery by reason of its smoothness or polish, in the absence of negligent application of wax or polish, does not give rise to an inference of negligence.

In ***Funt v. Saul Rubenstein Trust***, 686 N.Y.S.2d 111, the Second Department held that evidence that only restaurant employees carried beverages on to the dance floor on the night the customer was injured in a slip and fall on the dance floor was insufficient to rebut a prima facie showing that the restaurant did not create the alleged hazardous condition which caused the fall, since it would have been sheer speculation to conclude that a liquid substance that caused the customer to fall was spillage from such a beverage.

PREMISES—SLIPPERY FLOOR—EXPERT OPINION

In ***Mroz v. Ella Corp.***, 692 N.Y.S.2d 156, where plaintiff who was a guest in defendant's hotel, slipped and fell in the bathroom and contended that he had fallen due to the dangerous slippery nature of the defective floor tiles, the Second Department held that the IAS Court properly granted defendant's motion for summary judgment, since the mere fact that a smooth floor may be slippery does not support a cause of action to recover damages for negligence. The court said that while the plaintiffs opposed the motion for summary judgment with the affidavit of a safety consultant who found that the friction coefficient of the floor tiles in the hotel bathrooms did not meet industry standards, the expert's opinion essentially concluded that the tiles were slippery due to their smoothness, which is not an actionable defect.

PRODUCTS LIABILITY

1. Corporate Successor

2. Subsequent Modification

3. Failure to Warn

In ***Vergara v. Scripps Howard, Inc.***, 691 N.Y.S.2d 392, the First Department held that to find liability of a corporate successor to the manufacturer of a newspaper conveyor machine for injuries to a worker whose pants snagged on a conveyer track required a showing of the successor's superior knowledge of the risk of personal injury created by operating the machine without proper safeguards. The court said that the corporate successor was not presumed to have knowledge of the publisher's removal of safety guards along the conveyor track, for purposes of a products liability claim asserted by the injured worker, as the dangerous condition arose after the product left the manufacturer. The Court went on to say that modification of the conveyor machine was not foreseeable for the purposes of a failure to warn claim where the original metal mesh safety guard was welded onto the machine and required substantial effort to remove. The Court also held that the evidence was insufficient to support a finding that the successor to the manufacturer had either constructive or actual notice, based on sporadic service calls by the successor's engineer that the machine had been modified and therefore the worker could not recover from the successor for failure to warn, since there was no general maintenance contract, and there was no evidence as to which parts of the conveyor had been examined by the engineer or how close the machines were to the accident site.

In ***Barnes v. Pine Tree Machinery***, 691 N.Y.S. 398, the First Department held that the removal of safety guards from a wire stripping machine, after it was sold by a trading company to the worker's employer, constituted a subsequent modification and thus the trading company could not be held liable under a strict products liability theory for injuries sustained by the worker whose hands were drawn into the machine, even though the safety guard could be moved on a hinge for cleaning and maintenance purposes and was not permanently affixed, where there was no showing that its removal increased the machine's functionality or that the machine was purposely designed so that it could be used without the safety guard in place. The court said that the danger posed by removal of the safety guard was obvious and any warning as to the danger would not have given the worker any better knowledge of the machine's danger than he already had from prior use or

than was readily discernible from observation, and thus the trading company could not be held liable under a failure to warn theory.

In ***Mangano v. United Finishing Service Corp.***, 690 N.Y.S.2d 680, the Second Department held that a manufacturer's failure to warn of the hazards of removing a safety guard from a stone grinding wheel was not the proximate cause of the injuries sustained by the plaintiff when the wheel fractured as he was using it, where the plaintiff was experienced in the use of the grinding wheel and was well aware of the dangers associated with using the wheel without a safety guard.

In ***Coleman v. Chesebro-Whitman Co.***, 690 N.Y.S.2d 729, the Second Department held that a ladder manufacturer was not liable for strict products liability based on a failure to warn, where the plaintiffs failed to allege what the labels would have warned against and in what way the lack of such warnings was approximate cause of the accident.

PRODUCTS LIABILITY—DEFECTIVE DESIGN

In ***Scarangella v. Thomas Built Buses Inc.***, 93 N.Y.2d 655, a defective design claim was brought by a school bus driver who was injured when she was struck in her bus company's lot by a bus that was not equipped with a backup alarm, although it was offered as an optional safety feature on its buses. The bus company declined to order the alarms for its buses because of concern that the alarms would be too loud for the residential neighborhood surrounding the lot. The Court of Appeals held the manufacturer was not liable, stating that a product sold without an optional safety device is not defective when the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available, when there exists normal circumstances of use in which the product is not unreasonably dangerous without the option, and when the buyer is in a position to balance the benefits and the risks of not having the safety device in the specially contemplated circumstances of the buyer's use of the product. The Court said that in such a case the buyer, not the manufacturer, is in the superior position to make the risk-utility assessment, and a well-considered decision by the buyer to dispense with the optional safety equipment will excuse the manufacturer from liability.

PRODUCTS LIABILITY—STATUTE OF REPOSE

Tanges v. Heidelberg North America, Inc., 93 N.Y.2d 48, 687, N.Y.S.2d 604, was a product liability action, brought in the Southern District of New York, by a New York resident who was injured while operating a printing press at a shop in Connecticut. Connecticut applies a 10-year statute of repose to product liability actions and the printing press was sold by the manufacturer 10 years and three months before the accident. The District Court dismissed the claim against the manufacturer. The Second Circuit asked the Court of Appeals to determine whether Connecticut's statute of repose should bar the claim in New York.

In a unanimous opinion the Court of Appeals held that the Connecticut statute was a substantive rather than a procedural law and therefore should be enforced. Although statutes of limitations are generally regarded as procedural under New York law, the Court said that statutes of repose have a different purpose. They are meant to reduce the liability costs of manufacturers, rather than to prevent stale claims, and they act to block causes of action before they accrue and this purpose places statutes of repose in the substantive law class.

STRUCTURED JUDGMENTS

In ***Bryant v. NYC Health & Hospitals Corp. and Depradine v. NYC Health & Hospitals Corp.***, 93 N.Y.2d 592, the Court of Appeals held that under CPLR 50-A and 50-B, which require that future damages exceeding $250,000 be paid in periodic installments, annuity payments for future damages must be based on their full value rather than on an amount discounted to present value. The Court also held that the statutory 4 percent increment that must be added to the future damage award for each year of the payment period must also be added to the attorney fee, even though the fee is paid immediately in a lump sum. In a ruling in favor of defendants, the Court held that Social Security survivor benefits can be applied to offset a portion of future economic damages, but it appears that the Social Security offsets will have a much smaller fiscal impact than the Court's rulings on discounting and the 4 percent increment.

On the structuring issue, the city argued that because a primary purpose underlying the tort reform statutes was to ease a liability insurance crisis by holding down the cost of damage awards, the Legislature intended that periodic payments of or future damages would be based on their discounted present value. In rejecting this, the Court of Appeals said that the language, history and context of the structured judgment statutes supported the plaintiffs' view that payments for future damages should be based on their full future value, since CPLR 5031 and 5041 consistently refer to payment of future damages in periodic installments, and compensation for the full amount of the remaining future damages.

SUMMARY JUDGMENT—TIMELINESS OF MOTION

In ***Rosario v. D.R. Kenyon & Son, Inc.***, 685 N.Y.S.2d 38, the First Department held that a cross-motion for summary judgment was properly denied as untimely where it was not served within the time frame set by the court and where the movant failed to demonstrate good cause for consideration of the late cross-motion.

WORKERS' COMPENSATION

1. Injury in Course of Employment—Off-Duty Athletic Activity

2. Employee's Right to Health Care Benefits

In ***Dorosz v. Green & Seifter***, 92 N.Y.2d 672, where the widow of an accountant sought Workers' Compensation benefits after her husband suffered a fatal heart attack while bowling for a client's team after working hours, the Court of Appeals unanimously rejected her claim, finding that benefits for off-duty athletic activity are generally available under the statute only if the activity constitutes part of the employee's work-related duties. The Court said the restriction applied even if participation in the activity provides a substantial benefit to the employer. The decision states that there was no evidence of overt encouragement by the employer, and that the employer may have known of the activity and even acquiesced in it, does not constitute overt encouragement, let alone formal sponsorship of the activity.

In ***Eddy v. Rochester-Genesee Regional Transp.***, 669 N.Y.S.2d 699, the Third Department held that substantial evidence supported the Workers' Compensation Board finding that the employer exercised sufficient control and sponsorship over a softball team such that injuries sustained by claimants while playing on the team were compensable, since the team's participation in the softball league was financed by a fund which obtained its moneys from a percentage of the fund's committee took place during work hour's on the employer's premises, any deadlocks with respect to the fund's actions were decided by the employer's executive director, the executive director had authority to terminate funding of the team if the fund's rules for the team were violated, team members were required to wear uniforms paid for by the fund, hats supplied to the players bore the employer's logo, uniforms remained the property of the employer, and practice schedules and printed materials encouraging employees to play softball were displayed at the employer's premises.

In ***American Manufacturers Mutual Insurance Co. v. Sullivan***, 97-2000, the United States Supreme Court ruled that state Workers' Compensation system insurers cannot be sued for withholding health care benefits for work-related injuries while they decide whether the treatment is reasonable and necessary. The Court stated that the law expressly limits an employee's entitlement to reasonable and necessary medical treatment, and workers do not have a property interest in having their providers pay for treatment that has yet to be found reasonable and necessary.

OMNIBUS WORKERS' COMPENSATION ACT—THIRD-PARTY ACTION BASED ON CONTRACT

In ***Santos v. Floral Park Lodge of Free and Accepted Masons***, 690 N.Y.S.2d 634, the Second Department held that the Omnibus Workers' Compensation Act of 1996 did not bar a third-party action against an employer premised upon the employer's alleged breach of an agreement to procure liability insurance.

Recent Premises Liability/Labor Law Cases

The following cases of note relating solely to premises liability over the past year were compiled by Harold Kenneth King and Patrick Hoey, Esqs. of Hoey, King, Toker & Epstein and edited by Committee Chairman, Glenn A. Monk, Esq., of Harrington, Ocko & Monk, LLP.

LABOR LAW §§ 240 and 241(6) UPDATE

PERMANENT STRUCTURES

Brennan v. RCP Associates, 257 A.D.2d 389, 683 N.Y.S.2d 69 (1st Dep't 1999)

In order to repair a cooling system on the roof of a building, plaintiff had to stand on permanently affixed metal gratings that were 6 feet above the roof. The gratings were there to facilitate repair and maintenance for the cooling system. One of the gratings tipped, causing plaintiff to fall. The trial court had found that this was not a Labor Law § 240(l) claim since the gratings were part of the permanent structure akin to a passageway and not one of the safety devices enumerated by the statute. The appellate court reversed and pointed out that the permanence of the structure is not determinative but rather whether it served as a narrow appurtenance or whether it was designed to protect workers from elevation-related risks. Since the gratings were constructed to facilitate repairs to the cooling system, plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim.

NO GRAVITY-RELATED HAZARD

Fills v. Merit Oil Corporation, 258 A.D.2d 556, 685 N.Y.S.2d 472 (2d Dep't 1999)

Plaintiff was injured when he leaned down but did not fall into an underground vault to help a co-worker lift a 100-lb. water pump. Because plaintiff lost his footing and dropped the pump, his Labor Law § 240(1) claim was dismissed because he was not injured due to a gravity-related hazard as contemplated by the statute.

LADDER NOT ENOUGH

Ross v. Threepees Realty Corp., 258 A.D.2d 575, 686 N.Y.S.2d 448 (1st Dep't 1999)

While on a ladder caulking a window, plaintiff was stung by a bee and fell off the ladder. Plaintiff's Labor Law § 240(l) claim was dismissed because the injuries solely resulted from the reaction to the bee sting, not from a violation of the statute.

MINIMAL ELEVATION NOT ENOUGH

Sousa v. American Ref-Fuel Company of Hempstead, 258 A.D.2d 514, 685 N.Y.S.2d 279 (2d Dep't 1999)

Plaintiff fell while standing atop an iron grid twelve (12) inches above the ground. Twelve inches is not an elevation-related risk under Labor Law § 240(1).

DELIVERY PERSONS COVERED

Simms v. Elm Ridge Associates, 259 A.D.2d 538, 686 N.Y.S.2d 469 (2d Dep't 1998)

Plaintiff was injured in a slip and fall while delivering a washer/dryer to a construction site where new condominiums were being built. The Court found that "the delivery . . . was an integral part of the construction process" and thus plaintiff was within the class of persons protected by Labor Law § 241(6).

"CONSTRUCTIVE" OWNER

Deloach v. The City of New York, 258 A.D.2d 384, 685 N.Y.S.2d 696 (1st Dep't 1999)

Although the City was not a party to the road repair contract between the State and plaintiff's employer, it was held to be an "owner" for Labor Law §§ 240(1) and 241(6) purposes, "because it at all times shared concurrent responsibility with the State for the safety of this arterial highway and had the right to approve all the plans, designs and specifications for its reconstruction. . . ."

NOT AN OWNER

Guzman v. LMP Realty Corp., 262 A.D.2d 99, 691 N.Y.S.2d 483 (1st Dep't 1999)

Tenant leased space from defendant landlord and landlord hired contractors to perform renovations of the space [the case is silent as to whether the tenant was actually in possession but it appears not]. Plaintiff, a contractor's employee, fell from a ladder and brought an action under Labor Law § 240(l) against the landlord and tenant based on their status as "owners." The Court determined that the tenant was not an "owner" under the statute thus, not subject to Labor Law § 240(1) liability. Specifically, the Court reasoned that because the tenant did not contract for, nor supervise the work, nor have authority over safety measures, nor supply any safety devices (e.g., the ladder) there were insufficient indicia of ownership.

PARTIAL FALL COVERED RISK

Becerra v. The City of New York, 261 A.D.2d 188, 690 N.Y.S.2d 52 (1st Dep't 1999)

Plaintiff was doing demolition work on an elevated makeshift platform made of plywood boards. Part of his job required him to remove beams and throw them onto an adjacent trash pile. After plaintiff threw one of

the beams, another beam in the pile shifted toward him. In attempting to avoid it, he moved, causing a separation in the boards of the platform. He partially fell through the separation, resulting in his being stuck with only his head and shoulders above the platform. The Court found that the partial fall was a height-related risk covered by Labor Law § 240(1).

UNSECURED LADDER

Wasilewski v. Museum of Modern Art, 260 A.D.2d 271, 688 N.Y.S.2d 547 (1st Dep't 1999)

Plaintiff fell off an eight (8) to ten (10) foot A-frame ladder while engaged in construction-related work. Plaintiff, the sole witness to the accident, testified that the ladder shook just before he fell. Finding that the failure to properly secure the ladder and to ensure that it remained steady and erect while being used constituted a violation of Labor Law § 240(l), the Court held that plaintiff was entitled to summary judgment.

UNAUTHORIZED ELEVATED WORK

Higgins v. 1790 Broadway Associates, 261 A.D.2d 223, 691 N.Y.S.2d 31 (1st Dep't 1999)

Plaintiff, a porter employed by the building owner's managing agent, attempted to repair a malfunctioning freight elevator and used a ladder to gain access to the roof of the elevator cab. The ladder broke and plaintiff fell and was injured. Plaintiff's Labor Law § 240(l) claim was dismissed because: plaintiff was acting outside the scope of his duties in undertaking this task (his duties were to wash and wax floors); and there was no evidence that plaintiff was requested or authorized to perform the repair.

However, plaintiff's Labor Law § 200 claim was not dismissed as the Court found that the presence of a defective ladder on the premises created an issue of fact as to whether the owner met its duty to maintain the premises in a reasonably safe condition.

TRUCK BED WORK PLATFORM COVERED

Gale v. Running Brook Builders, Inc., 261 A.D.2d 436, 690 N.Y.S.2d 89 (1st Dep't 1999)

As part of a project involving the construction of new homes, plaintiff, an employee of a subcontractor, fell off the back of a truck while seeding lawns. The Court found that plaintiff had a viable Labor Law § 240(l) claim because the work plaintiff was engaged in "was a part of the overall site construction" and thus, was activity protected by the statute.

INSPECTION WORK NOT COVERED

Martinez v. City of New York, 93 N.Y.2d 322, 712 N.E.2d 689, 690 N.Y.S.2d 524 (1999)

Plaintiff, an environmental inspector, fell from a desk while inspecting an asbestos condition in a building. The Court of Appeals dismissed plaintiff's Labor Law § 240(l) claim because the job he was doing was not within the statute's protection. Specifically, the Court pointed out that plaintiff's work was investigatory only and it was done before and was separate from the actual removal of the asbestos, as none of the activities enumerated in the statute was underway.

Hernandez v. The Board of Education of the City of New York, __ A.D.2d __, 694 N.Y.S.2d 752 (2d Dep't 1999)

Plaintiff fell from a height while performing a "field inspection survey" for the Board of Education. His Labor Law § 240(1) cause of action was dismissed, as he was not engaged in work protected by the statute.

DEFECTIVE FIRE ESCAPE COVERED

Bataraga v. Burdick, 261 A.D.2d 106, 689 N.Y.S.2d 86 (1st Dep't 1999)

Defendant restaurant, a tenant in a building, hired plaintiff to "clean" its rooftop exhaust system. Plaintiff was directed by a restaurant employee to use the building's fire escape to access the roof. After finishing the job, plaintiff fell off the fire escape due to a defect in the device. The Court held that since routine cleaning is work protected by Labor Law § 240(l), plaintiff presented a valid claim under the statute. However, the Court dismissed plaintiff's claim pursuant to Labor Law § 202 [This statute protects workers involved in the cleaning of windows and building exteriors] as plaintiff was not engaged in work covered by this statute. Finally, the Court dismissed plaintiff's common law negligence cause of action, finding that the record showed that: it was not the restaurant's duty but rather that of the building owner to maintain the fire escape; and there was no proof that the restaurant had any notice of the defect.

CEILING TILE REPAIR COVERED

Turisse v. Dominick Milone, Inc., 262 A.D.2d 305, 691 N.Y.S.2d 94 (2d Dep't 1999)

Plaintiff fell from a ladder or scaffolding while repairing an acoustical ceiling tile damaged by a water leak. Repair of damaged acoustical tile ceiling was work protected by Labor Law § 240(1).

ROUTINE MAINTENANCE

Urbano v. Plaza Materials Corporation, 262 A.D.2d 307, 692 N.Y.S.2d 86 (2d Dep't 1999)

Repairing a broken latch on an asphalt bin in a factory is not an activity protected by Labor Law § 240(1), as this constitutes routine maintenance.

FALLING MATERIAL WITHOUT ONGOING WORK NOT COVERED

Goss v. State University Construction Fund, 261 A.D.2d 860, 690 N.Y.S.2d 811 (4th Dep't 1999)

Plaintiff was injured on a construction site when the jib of a boom crane fell on plaintiff from its storage location. The Court found that since the crane was not being used at the time of the accident, there was no work being performed at an elevated work site and hence no violation of Labor Law § 240(l).

WALLPAPERING VERSUS PAINTING WORK

La Fontaine v. Albany Management, Inc., 257 A.D.2d 319, 691 N.Y.S.2d 640 (3d Dep't 1999)

The Third Department held that, although "painting" is an activity protected by Labor Law § 240(l), wallpapering is not.

OSHA REGULATION DOES NOT SATISFY INDUSTRIAL CODE REQUIREMENT

Schiulaz v. Arnell Construction Corp., 261 A.D.2d 247, 690 N.Y.S.2d 226 (1st Dep't 1999)

In this case the Court restated the rule that in order for a plaintiff to present an actionable Labor Law § 241(6) claim he must set forth that a "concrete or specific standard" of the Industrial Code was violated. A violation of an OSHA regulation is insufficient.

STORAGE AREA VERSUS PASSAGEWAY

Dacchille v. Metropolitan Life Insurance Company, 262 A.D.2d 149, 692 N.Y.S.2d 47 (1st Dep't 1999)

Plaintiff relied on a section of the Industrial Code (23-1.7 (e)(1) that required "passageways" be kept clear as a basis for his Labor Law § 241(6) claim. Although this section was a 'concrete or specific' standard, the Court found that the location where plaintiff was injured was a storage area not within the definition of a passageway and dismissed plaintiff's claim.

STAIRWAY LANDING NOT ELEVATION-RELATED RISK

Barrett v. Ellenville National Bank, 255 A.D.2d 473, 680 N.Y.S.2d 634 (2d Dep't 1998)

Plaintiff was standing on a landing at the top of an interior stairway, handing a bucket of tools up through a hatchway in the roof, when a railing he was leaning on broke, causing him to fall down the stairs. The Court found that plaintiff's injuries did not result either from working on an elevated work site or being struck by a falling object. Thus, since an "elevation-related hazard" as contemplated by the statute was not involved, plaintiff's Labor Law § 240(1) claim was dismissed.

GROUND LEVEL COLLAPSE OF UNDERGROUND VAULT NOT COVERED

Daly v. The City of New York, 254 A.D.2d 214, 679 N.Y.S.2d 128 (1st Dep't 1998)

In order to stop a leak in a steam main, plaintiff, a utility company employee, was fixing a ground level joint, which was located on top of an underground vault. The ceiling of the vault collapsed, causing plaintiff to be injured. Plaintiff's Labor Law § 240(l) claim was dismissed because plaintiff's accident was not caused by an "elevation-related hazard."

FALLING PORTION OF COMPLETED STRUCTURE NOT COVERED

Dias v. Stahl, 256 A.D.2d 235, 682 N.Y.S.2d 383 (1st Dep't 1998)

Plaintiff was injured when a section of an air conditioning duct fell on him when a metal supporting bracket affixed to the ceiling broke. The appellate court dismissed plaintiff's Labor Law § 240(l) claim, finding that the accident did not result from an elevation-related hazard within the statute's protection but, rather, resulted from "a typical construction site hazard" and found that " . . . the fact that the injury-causing debris fell from a height has been held to be irrelevant." The Court rejected plaintiff's argument that had proper safety devices been provided the accident would not have happened, because, " . . . the metal strapping was not a safety device used in connection with an elevated work site, but a device used to lend support to a completed structure."

The Court also held that defendant construction manager was entitled to conditional summary judgment on common law indemnity grounds against third-party defendant subcontractor employer because the employer directed and controlled the work that resulted in plaintiff's injury.

SHIFTED LOAD BEING CARRIED NOT COVERED

Turchioe v. AT&T Communications, 256 A.D.2d 245, 682 N.Y.S.2d 378 (1st Dep't 1998)

Plaintiff was injured when he and two co-workers were carrying a heavy piece of equipment up a flight of stairs. The load shifted and plaintiff hurt his back. Plaintiff's Labor Law § 240(1) claim was dismissed, as the injury did not result out of an elevated-related risk. Plaintiff's Labor Law § 241(6) claim was also dismissed because he failed to offer any evidence to show that the

Industrial Code violations he claimed were violated had any causal relation to plaintiff's accident.

ROUTINE MAINTENANCE NOT COVERED

Molloy v. 750 7th Ave. Associates, 256 A.D.2d 61, 681 N.Y.S.2d 253 (1st Dep't 1998)

In dismissing plaintiff's Labor Law § 241(6) claim, the Court held " . . . Plaintiff's work changing elevator contacts and cables, putting new chips in computer boards and painting and cleaning the elevator room was mere routine maintenance activity and, as such, not akin to the significant structural work involved in ***Joblon v. Solow***, 672 N.Y.S.2d 286." (In ***Joblon***, the Court of Appeals determined that if work affected a significant structural change to the building or structure, the work was protected activity under Labor Law §§ 240(1) and 241(5).)

WINDOW WASHING MAY BE COVERED

Williamson v. 16 West 57th Street Co., 256 A.D.2d 507, 683 N.Y.S.2d 548 (2d Dep't 1998)

A divided Second Department held that a professional window washer who fell from a height due to a defective safety device was entitled to the protection of Labor Law § 240(1). It rejected defendant's argument that since this was cleaning in a non-construction context, Labor Law § 240(1) did not apply. Rather, the Court found that the statute applies to cleaning in a commercial (but not a purely domestic) context. It also rejected defendant's contention that since window washers are covered by another section of the Labor Law [§§ 202], Labor Law § 240(1) could not apply.

Retamal v. Miram Osborne Memorial Home Association, 256 A.D.2d 506, 682 N.Y.S.2d 409 (2d Dep't 1998)

This case reached the same result as ***Williamson*** above, as to a window washer being protected by Labor Law § 240(l). However, plaintiff's Labor Law § 241(6) claim was dismissed because the Court found that window washing did not come within the purview of this statute, which protects workers engaged in construction, demolition and excavation activities.

ELEVATED MEANS OFF THE GROUND

Puckett v. County of Erie, 262 A.D.2d 964, 693 N.Y.S.2d 780 (4th Dep't 1999)

Plaintiff, operating a cherry picker-type crane, was lifting a 50-foot by 20-foot steel plate. After hoisting the plate into a position perpendicular to the ground with the bottom of the plate still in contact with the ground, one of the chains which secured the plate broke, causing the plate to fall crushing the crane's cab and injuring plaintiff. Finding that since the plate was not elevated above the work site there was no height-related risk, the Court dismissed plaintiff's Labor Law § 240(1) claim.

The Court further held that plaintiff was not entitled to summary judgment on his Labor Law § 241(6) claim. Evidently, plaintiff established a violation of the Industrial Code sufficient to support his Labor Law § 241 (6) claim. However, the Court found that this was not a basis to grant summary judgment. The Court's rationale was that although the violation of a statute may constitute negligence as a matter of law, violation of a *code* or rule only constitutes some evidence of negligence. Thus, the ultimate question of whether Labor Law § 241(6) was violated, was a question for a jury to determine at trial.

ROUTINE MAINTENANCE VERSUS REPAIRS

Jehle v. Adams Hotel Associates, __ A.D.2d __, 695 N.Y.S.2d 22 (1st Dep't 1999)

Plaintiff was working on an air conditioner on defendant's premises. Plaintiff was "correcting the airflow, replacing the filters, cleaning the coil, replacing a broken belt and adjusting a worn pulley." While performing this work part of the floor surrounding the unit collapsed and plaintiff fell through. In dismissing plaintiff's Labor Law § 240(1) claim, the Court drew a distinction between routine maintenance (which is not protected by the statute unless done in the context of construction or renovation) and repair or alteration (which are): ". . . replacement of parts that wear out routinely should be considered maintenance. . ." and ". . . replacement of non-functioning components of a building or structure [is a repair or alteration]. . ." The Court found that since the work here ". . . merely involved replacing or repairing relatively small components that suffered from normal wear and tear, not major structural work," Labor Law § 240(1) was not violated.

Rogala v. Van Bourgondien, __ A.D.2d __, 693 N.Y.S.2d 204 (2d Dep't 1999)

Plaintiff, a handyman, fell from a ladder while installing and/or replacing window screens. Plaintiff's Labor Law § 240(l) cause of action was dismissed because the work was not an "alteration" or "repair," but rather was regular maintenance, which is not actively protected by the statute.

Goad v. Southern Electric International, Inc., __A.D.2d __, 693 N.Y.S.2d 301 (3d Dep't 1999)

Plaintiff fell from a height while installing a safety valve on equipment at defendant's power plant. This work was part of the "annual shutdown of the facility for the maintenance and modification of certain equipment." Plaintiff's Labor Law § 240(1) claim was dismissed because the work was "routine maintenance."

PREMISES LIABILITY

A. NEGLIGENT SECURITY AND CRIMINAL ACTS OF THIRD-PARTIES

Burgos v. Aqueduct Realty Corp., 92 N.Y.2d 544, 706 N.E.2d 1163, 684 N.Y.S.2d 139 (1998)

Gomez v. New York City Housing Authority, 92 N.Y.2d 544, 706 N.E.2d 1163, 684 N.Y.S.2d 139 (1998)

In these two cases consolidated for appellate purposes, the New York Court of Appeals substantially lessened plaintiff's burden of proof in premises security cases on the issue of proximate cause. The general rule in premises security suits is that once a landlord is aware of or should have been aware that criminal acts have occurred on his premises a duty to take minimal security measures (e.g., install and maintain functioning exterior door looks) is owed to the landlord's tenants to protect them from foreseeable criminal acts. Once the duty accrues and a tenant becomes the victim of a criminal attack on the premises, there is proof that the duty was breached. But in order to recover, plaintiff must establish that the breach was a proximate cause of his injury. Specifically, plaintiff has had to show that the assailant was an intruder to the building (and not another tenant, guest or other person properly on the premises) and that the assailant gained entry due to inadequate security. The existing case law squarely placed the burden of affirmatively proving that the attacker was an intruder and not a person entitled to be on the premises on the plaintiffs. In considering the two cases before it, the Court determined that this burden unnecessarily punished plaintiffs and benefited negligent landlords. In adjusting the balance the Court held:

> . . . a plaintiff . . . can satisfy the proximate cause burden at trial even where the assailant remains unidentified, if the evidence renders it more likely or more reasonable than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance.

In ***Burgos***, plaintiff was the victim of a push-in robbery. Although her assailants were unmasked, she could not identify them. The building was a five-story walk-up with 25 apartments. Plaintiff claimed to know all the tenants and claimed that she complained to management a several occasions about the lack of security. None of the exterior doors had functioning locks. Applying the above standard, the Court of Appeals held that plaintiff had made a sufficient showing to raise an issue of fact to allow the issue to be determined by a jury.

In ***Gomez***, a 12-year-old girl, waiting for the elevator, saw an unidentified man enter the building through the back door, which did not fit its frame and remained in an open condition. There were other tenants in the lobby who did not recognize the man. The assailant got on the elevator with plaintiff, forced her to the roof and raped and sodomized her. After the jury returned a verdict for plaintiff, defendant moved to dismiss the Complaint. The motion was granted on the insufficiency of proof that the assailant was an intruder. The Appellate Division affirmed the dismissal. The Court of Appeals reversed the two lower courts finding that there were sufficient facts before the jury to support the determination that the assailant was an intruder.

Garrett v. Twin Parks Northeast Site 2 Houses, Inc., 256 A.D.2d 224, 682 N.Y.S.2d 349 (1st Dep't 1998)

The majority opinion in this case can be read to expand the duty of landlords in premises security suits. Generally, a landlord owes a duty to his tenants to take "minimal" security measures to protect them from foreseeable harm. The opinion here suggests that the duty should be whether the measures were "adequate" under the circumstances, a more difficult standard for a landlord to satisfy. Briefly, defendant-housing complex hired plaintiff's employer, a security firm, to patrol the complex with unarmed guards. While on patrol, plaintiff was the victim of an assault by an unidentified person. The evidence showed that the complex had a high crime rate, that security devices were regularly vandalized and apparently, that the security company was hired due to the ongoing problems. There was also evidence that in a letter the security company had recommended that the guards be armed and that dogs be used in patrol. Plaintiff contended that the issue was not whether the landlord provided minimal security but rather was the security reasonable or adequate under the circumstances. The majority (a concurring opinion of two judges and a separate concurring opinion by another) adopted plaintiff's position and noted that whether security was "adequate" was almost always a jury question. In a sharply worded opinion, the dissent predicted that:

> To submit the issue of whether security was "adequate" to a jury is to virtually direct a verdict against the landowner. The adequate security formula would cast these defendants in the role of insurers.

The dissent added:

> The existence of a duty to keep tenants safe in their home should not be expanded to posit a duty to those who have no justifiable expectation that they would be provided such security and from whom the cost of these security measures cannot be recovered.

Travieso v. 3908 Bronx Blvd. Corp., 259 A.D.2d 276, 686 N.Y.S.2d 42 (1st Dep't 1999)

Plaintiff, who had rented a parking space in defendant's indoor parking garage for two years, was assaulted in the garage by two unidentified persons. The evidence established that the garage's exterior electrical door had been broken for several months and had been removed but not replaced. Plaintiff testified that she did not know her assailants as tenants. In reversing an order of summary judgment granted to the defendant, the appellate court found that the above evidence created an issue of fact sufficient for a jury to determine whether inadequate security was the proximate cause of plaintiff's injuries.

Evans v. 141 Condominium Corp., 285 A.D.2d 293, 685 N.Y.S.2d 191 (1st Dep't 1999)

Plaintiff, a resident of defendant's apartment building, was assaulted on the public sidewalk in front of the building. Plaintiff's action was dismissed, as the landlord did not owe plaintiff a duty to protect her from criminal activity that occurred on public property.

Roberts v. Jam Realty Co., 260 A.D.2d 230, 688 N.Y.S.2d 69 (1st Dep't 1999)

Defendant landlord's residential building sustained severe fire damage which resulted in the municipal authorities cutting off all gas and electrical power which required a lengthy evacuation of all the building's tenants. The landlord notified each tenant to remove all valuables and lock their respective apartment doors. The landlord locked the exterior doors of the building. While the building was closed, unidentified individuals broke into plaintiff's apartment through a security gate on a window after gaining access via a fire escape and allegedly stole various valuables from plaintiff's apartment. Plaintiff sued the landlord on an inadequate security theory. The appellate court dismissed the complaint. Since there was no credible evidence in the record of prior criminal activity in the building, plaintiff did not establish foreseeability and, accordingly, plaintiff failed to establish a breach of duty by the landlord. The Court also pointed out that the landlord's acts—notifying the tenants to remove valuables and secure their apartments and locking the exterior entrances—met its duty to exercise reasonable care.

Novikova v. Greenbriar Owners Corp., 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dep't 1999)

Plaintiff's decedent, a guest of a tenant of defendant condominium corporation, entered the building vestibule and as the tenant was unlocking the inner vestibule door, a man emerged from bushes adjacent to the building entrance and attempted to steal decedent's wife's purse. Decedent struggled with the attacker and was shot and killed. Suit was brought against the condominium on the theory that the failure to provide 24-hour-a-day doorman service was a breach of defendant's duty to provide minimal security. The Court restated the rule that an owner of premises owes a common law duty to provide minimal security measures to protect tenants and those persons lawfully on its premises from foreseeable harm.

In support of his claim, plaintiff relied on a security expert's affidavit which asserted that there had been 21 reported crimes within a 6-month period in the "immediate vicinity" of the building. The Court found the affidavit insufficient to meet plaintiff's burden. None of these were "ambush-style robberies." Moreover, many of these occurred during hours in which the building had a doorman on duty. The Court acknowledged that the prior criminal acts need not be in the "exact location" but pointed out that "ambient neighborhood crime is insufficient to establish foreseeability."

Concerning the doorman issue, the Court observed that the only cases it found concerned commercial premises and cases where a residential landlord agreed to provide a doorman but negligently failed to do so. It ruled that there was no sound reason to expand on this precedent, for to do so would render owners to be insurers of the safety of tenants and their guests. The Court remarked that the act here occurred in an area accessible to the public and, that under such circumstances, the landlord's ability to control such conduct was limited and that to impose a duty in such situations would expose a landlord to unlimited liability. The Court awarded defendant summary judgment.

B. TRIP/SLIP AND FALL

Pardi v. Barone, 257 A.D.2d 42, 690 N.Y.S.2d 315 (3d Dep't 1999)

Under New York law the owner of property that abuts or adjoins a public sidewalk can be held liable to a person who trips and falls on the sidewalk due to a snow/ice condition, if a local ordinance not only requires the abutting owner to remove the snow but also makes him liable to third persons who are injured due to his failure. In this case there was such an ordinance but the owner argued that it was not an abutting owner and thus not liable. Specifically, between the owner's property and the sidewalk there was a six-foot strip of land (a municipal right of way) owned by the municipality. The owner contended that abutting or adjoining meant "touching" which was not the case here. The Third Department, admitting that this was a "novel" question, reviewed precedent and dictionary definitions, and was of the view that the terms were ambiguous and that there was no precise meaning of the terms. Noting that the Court's duty is to ascertain the legislative intent underlying the statute, it found

that the statute was applicable to these circumstances and denied defendant's motion to dismiss the Complaint.

Cortes v. City of Mount Vernon, 262 A.D.2d 441, 692 N.Y.S.2d 148 (2d Dep't 1999)

Fact that owner of property that abuts a public sidewalk made repairs to a portion of the sidewalk but not in the spot where plaintiff fell, does not subject the owner to liability.

Rose v. Da Ecib Usa, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dep't 1999)

Plaintiff fell on a grease spot in defendant's restaurant. Although plaintiff could not show how long the condition was present, she did establish that for approximately 15 minutes beforehand the only individuals in the vicinity of the spot were restaurant employees. The Court denied defendant's summary judgment motion finding that there were issues of fact on the issue of notice.

Pianforini v. Kelties Bum Steer, 258 A.D.2d 634, 685 N.Y.S.2d 804(2d Dep't 1999)

Plaintiff fell on "something" near the salad bar in defendant's restaurant. She had observed lettuce leaves on the floor, but not where she fell. Defendant was entitled to summary judgment because plaintiff neither identified what caused her to fall nor proved how long the condition existed.

Rector v. City of New York, 259 A.D.2d 319, 686 N.Y.S.2d 426 (1st Dep't 1999)

Defendant, owner of abutting property, shoveled a layer of new snow off a public sidewalk. Underneath the snow was a layer of ice that covered the entire sidewalk. Plaintiff fell on the ice. In opposition to defendant's summary judgment motion plaintiff contended that by clearing away the snow and exposing the ice defendant increased the hazard. On appeal, a majority opinion (3 to 2) adopted plaintiff's position.

Baum v. Knoll Farm, 259 A.D.2d 456, 686 N.Y.S.2d 83 (2d Dep't 1999)

During a snowstorm, plaintiff fell on snow that covered a layer of ice on a walkway on defendant's property. The suit was dismissed because a property owner cannot be held liable for a snow/ice condition unless it had a reasonably sufficient time from the end of the precipitation to remedy the condition. The Court also rejected plaintiff's claim that defendant was negligent due to the existence of the ice underneath the snow, finding that the allegations were insufficient to establish a *prima facie* case of negligence in the absence of any proof of the origin of the icy condition or proof that the defendant had notice or sufficient time to remedy the condition.

Mroz v. Ella Corp., 262 A.D.2d 465, 692 N.Y.S.2d 156 (2d Dep't 1999)

Plaintiff slipped on the floor of defendant's hotel bathroom allegedly due to slippery tiles. In opposition to defendant's summary judgment motion, plaintiff submitted an affidavit from an expert safety consultant who, after measuring the friction coefficient of the floor, stated it was not up to industry standards. Citing the well settled rule that absent proof of negligent application of wax or polish, the mere fact that a floor is slippery is not negligence, it granted defendant summary judgment. The Court rejected the expert affidavit because all it proved was that the floor was smooth - which was not actionable.

Robinson v. Lupo, 261 A.D.2d 525, 690 N.Y.S.2d 640 (2d Dep't 1999)

Where plaintiff's deposition testimony was that she did not know what caused her to fall, defendant was entitled to summary judgment.

Duncan v. New York City Transit Authority, 260 A.D.2d 213, 686 N.Y.S.2d 702 (1st Dep't 1999)

During the course of a rainstorm, plaintiff tripped on an accumulation of water in a subway car. In granting defendant summary judgment the Court noted that since it was raining, the water could have resulted from drops from other passengers coats, umbrellas, etc., and thus, there was no proof of notice. Additionally, the Court stated that it would be unreasonable to expect the defendant to constantly clean the floors during an ongoing storm.

Rosenbloom v. City of New York, 254 A.D.2d 474, 680 N.Y.S.2d 262 (2d Dept 1998)

Defendant property owner was entitled to summary judgment where plaintiff fell on an icy condition on an unpaved area which was, ". . . not intended to be a public walkway, particularly when nearby sidewalks provided an adequate means of access."

Thomas v. Triangle Realty Company, 255 A.D.2d 153, 679 N.Y.S.2d 394 (1st Dept 1998)

In reversing a lower court's denial of defendant abutting owner's summary judgment motion, where plaintiff tripped on half-inch raised brickwork, the appellate court found that where defendant did not install the brickwork and there was no proof that defendant derived a "special benefit" from its presence, defendant was entitled to dismissal.

Kruimer v. National Cleaning Contractors, Inc., 256 A.D.2d 1, 680 N.Y.S.2d 511 (1st Dep't 1998)

Where plaintiff slipped on a terrazzo floor and her only offer of proof of negligence was an expert's affidavit based on an observation made two years post

accident, which indicated that the surface was inherently slippery, it was proper to dismiss plaintiff's case.

Santiago v. United Artists Communications, Inc., __ A.D.2d __, 693 N.Y.S.2d 44 (lst Dep't 1999)

Plaintiff tripped on a depression on a step within defendant's premises. The trial court denied defendant's summary judgment motion. The Appellate Division reversed. The Court pointed out that Plaintiff's expert affidavit failed to raise a triable issue of fact because the expert never stated when his inspection of the site was performed; never compared his inspection results to photos taken of the step; and never stated that the condition of the step at the time of the inspection was the same as it was on the accident date. The Court further concluded that plaintiff never established that a dangerous condition existed since at no time prior to her accident had there been complaints about a dangerous condition in the well trafficked area; there were no other complaints about the step; no repairs were done and no building code violations issued regarding the step. Finally, the Court noted that the defect was a 1/2-inch depression, which was shallow and gradual and thus trivial and not actionable.

Peretich v. The City of New York, A.D.2d, 693 N.Y.S.2d 576 (1st Dep't 1999)

Plaintiff was injured after falling on a defective public sidewalk and brought suit against the municipality and the abutting property owner, a supermarket. In denying the store's motion for summary judgment, the Court stated that since the evidence indicated that the store regularly received deliveries from trucks that drove up on the sidewalk and the evidence indicated that the sidewalk damage was at least in part due to the truck traffic, there was an issue of fact as to whether the defendant enjoyed a "special use" of the sidewalk [if an abutting owner is found to have a special use of a public sidewalk and it is found that the special use caused an accident, the abutting owner can be held liable for the resulting injuries].

C. SCHOOL DISTRICT & MUNICIPAL LIABILITY FOR UNSAFE CONDITIONS

Ernest v. Red Creek Central School District, 93 N.Y.2d 664, 695 N.Y.S.2d 531 (1999)

Immediately after being released from school at the end of the day, the infant plaintiff was struck by a car as he attempted to cross a county road that ran in front of the school. Plaintiff sued the driver, the county, the school district and the town. There was no sidewalk along the school side of the road, and there was no crosswalk or traffic signals in the vicinity. The school board, citing safety concerns, had requested that the county extend the sidewalk. The school also adopted a policy that it did not release children to walk home at the end of the day until all school buses had exited the parking lot. On the day of the accident the school did not follow its policy.

The issue before the Court of Appeals was whether the county, school district and town were entitled to summary judgment. Citing the rule, ". . . although a school district's duty of care to a student generally ends when it relinquishes custody of the student, the duty continues when the student is released into a potentially hazardous situation, particularly when the hazard is partly of the school's own making," the Court reasoned that there were facts present to allow a jury to find that the school released plaintiff into a potentially hazardous situation and thereby breached a duty.

Applying the precedent that if the state is made aware of a dangerous highway condition and fails to remedy it, the state can be liable for resulting injuries, the Court determined that there was sufficient evidence that the county was on notice of the danger to students posed by the absence of sidewalks, crosswalks or traffic signals so that a jury could impose liability on the county.

The Court dismissed the action against the town since it neither owned nor had a duty to safely maintain the road nor had it assumed a duty to do so.

Schuster v. McDonald, A.D.2d, 692 N.Y.S.2d 721 (2d Dep't 1999)

Plaintiff pedestrian was seriously injured as a result of a two-car intersection accident; plaintiff sued the respective drivers and the county (which maintained one of the roads) and the municipality (which maintained the other road). Plaintiff's claim against the governmental entities was they failed to meet their non-delegable duty to maintain safe roads, i.e., that better traffic signs or a traffic light should have been installed. Noting the exception to the non-delegable duty rule that a governmental body is entitled to qualified immunity arising out of a highway safety planning decision unless its study is inadequate or there is no reasonable basis for its traffic plan, the Court after reviewing the governments' studies and plans and plaintiff's experts affidavits, dismissed the claim against the county and the municipality. The Court opined that, at best, plaintiff's submissions offered a conflicting opinion and "something more than a mere choice between conflicting opinions of experts is required before the state or one of its subdivisions may be charged with a failure to discharge as duty to plan highways for the safety of the travelling public."

Tushaj v. The City of New York, 258 A.D.2d 283, 685 N.Y.S.2d 64 (1st Dep't 1999)

The 2 1/2-year-old plaintiff, left unsupervised by his grandparents, fell off a wall and over a cliff in a city

park. In dismissing the suit against the City, the Court stated "because it is clear that the cliff was an open and obvious natural feature of the landscape, the City had no duty to post warning signs or erect additional barriers to protect park visitors from it. . ."

Amabile v. City of Buffalo, 93 N.Y.2d 471, 715 N.E.2d 104, 693 N.Y.S.2d 77 (1999)

New York General Municipal Law § 50-(e)(4) authorizes municipalities to enact prior notification statutes as a prerequisite for the filing of a personal injury claim arising from an accident due to a defective street/sidewalk. A plaintiff can avoid this requirement in only two circumstances: (1) where the municipality created the condition or (2) where the municipality enjoyed a "special use." In this case the municipality had a pre-notification law but had never received notification. Plaintiff contended that the Court should adopt a third exception, constructive notice of the condition. The Court rejected the argument and held that such an exception "would contravene the plain language of the statute and serve only to undermine the rule."

D. SECURITY/MAINTENANCE CONTRACTOR'S LIABILITY TO NON-CONTRACTING TENANTS

Cresvale International Inc. v. Reuters America, Inc., 257 A.D.2d 502, 684 N.Y.S.2d 219 (1st Dep't 1999)

The insurance carrier for plaintiff, a commercial building tenant, sued the landlord owner, the managing agent and the building security/maintenance contractor for property damage and business interruption losses paid arising out of a fire in the tenant's space. The lease included a waiver of subrogation clause which applied to "any loss or damage, to (tenant's) property. . ." The clause also stated that the landlord was not required to obtain business interruption insurance for the tenant. The thrust of the plaintiff's claim was that the contractor unreasonably delayed the reporting of the fire to the Fire Department and that, although the tenant was not a party to the maintenance contract, the maintenance contractor and the other defendants breached a duty owed to plaintiff. In dismissing the suit against the security/maintenance contractor, the appellate court found that in order for the non-contracting tenant to assert a viable claim based on an alleged contractual breach, the tenant must show that it relied to its detriment on the performance of the contractual duties and that a direct, not incidental, injury resulted from the detrimental reliance.

In the Court's reading of the contract it did not discern any firefighting or fire prevention duty on the contractor's part, thus no breach existed. Moreover, even if a duty could be inferred from the contract, it was incidental in nature. Liability could only be imposed if the contract granted "comprehensive and exclusive" fire prevention duties to the contractor, which was not the case. Thus, given the limited contractual duties there was nothing to show that the tenant relied to its detriment on the contractor to perform fire prevention duties. Concerning the owner and managing agent, the Court determined that the broad waiver of subrogation language encompassed both property damage and business interruption losses. It found support for this interpretation from the fact that the same clause stated that the landlord was not required to purchase loss of business coverage and the fact that the tenant's carriers policy covered this exposure.

Four Aces Jewelry v. Smith, 257 A.D.2d 510, 684 N.Y.2d 224 (1st Dep't 1999)

Plaintiff, tenant in a diamond district building, sued the landlord and the building's security contractor for losses ensuing out of a theft of jewelry from plaintiff's space. The landlord's summary judgment motion was properly denied because the fact that there were prior reported burglaries in the building and the fact that the landlord's response was to place a lone security guard in the lobby during business hours, raised an issue as to the adequacy of security. However, the security company was entitled to dismissal as its ". . . limited undertaking did not give rise to a duty of care to a party such as plaintiff with whom [it] was not in Privily."

Falu v. 233 Associates, L.P., 258 A.D.2d 342, 685 N.Y.S.2d 230 (1st Dep't 1999)

Plaintiff fell on snow/ice in the parking lot of a mall. Defendant supermarket, a mall tenant, did not remove snow from the parking lot, had no duty to do so under its lease, but admitted that it would call the mall owner if snow was not removed. The lower Court denied defendant's summary judgment motion, finding that by calling the owner defendant had voluntarily assumed a duty. The appellate court reversed noting that for plaintiff to prevail on a voluntary assumption of duty theory, plaintiff was obligated to show that he relied on that assumption and that the reliance put him in a more vulnerable position.

Gonzalez v. National Corporation for Housing Partnerships, 255 A.D.2d 151, 679 N.Y.S.2d 395 (1st Dep't 1998)

Plaintiff's decedent was killed in a residential building and brought suit based on a negligent security theory against the building's security company on the grounds that plaintiff's decedent was a third-party beneficiary to the contract between the owner and the security company. In essence, plaintiff argued that, based on the contract, the security company owed and breached a duty to prevent plaintiff's decedent from being attacked. The Court found that a fair reading of the Contract did not establish any intent to confer such a benefit on plaintiff's decedent or other tenants and granted the security company summary judgment.

Riekers v. Gold Coast Plaza, 255 A.D.2d 373, 679 N.Y.S.2d 709 (2d Dep't 1998)

The fact that defendant contractor had a contract with defendant property owner to remove snow from the premises did not create a duty to plaintiff who was injured due to a snow/ice condition on the premises. The Court noted that this " . . . limited contractual undertaking was not a comprehensive and exclusive property maintenance obligation [by] which the parties could have expected to displace [the owner's] duty, as a landowner, to maintain the property safely."

Phillipe v. City of New York Board of Education, 254 A.D.2d 339, 678 N.Y.S.2d 662 (2d Dep't 1998)

Given that plaintiff's decedent was injured before the start of the school day, in a pick-up football game on the grounds of the school he attended, plaintiff's suit based on inadequate supervision, was properly dismissed.

Pitner v. Brentwood Union Free School District, 254 A.D.2d 340, 678 N.Y.S.2d 665 (2d Dep't 1998)

Plaintiff's personal injury claim, based on the theory that the school provided inadequate supervision where plaintiff was injured in a fight with another student, was dismissed because defendant had no notice of either student having behavior problems and thus, there was no breach of a duty. The Court also found that plaintiff assumed the risk of the injury by voluntarily engaging in the fight.

Conti v. Kimmel, 255 A.D.2d 201, 680 N.Y.S.2d 90 (1st Dep't 1998)

Proof of a violation of a specific safety statute can serve as a basis to find that an out-of-possession landlord had constructive notice of a dangerous condition and, thus, support a finding of negligence against the landlord for an injury arising out of that condition. Here plaintiff alleged violations of the ANSI code and OSHA regulations. Defendant, out-of-possession landlord, was granted summary judgment as neither set of rules are statutory in nature and thus cannot serve as a predicate for the imposition of liability.

Lantigua v. Mallick, A.D.2d, 693 N.Y.S.2d 619 (2d Dep't 1999)

New York City Administrative Code § 27- 2114(e) states that when a multiple dwelling has been declared a public nuisance, those persons who own more than 10% of the issued and outstanding stock of any corporation which is in operation and control of the multiple dwelling may be held jointly or severally liable to a person injured as a result of the nuisance. Here the infant plaintiff was injured due to exposure to lead paint dust and suit was brought against the sale shareholders of the corporation that owned and controlled the building. The Court upheld the denial of defendant's summary judgment motion due to defendant's failure to demonstrate the absence of triable issues of fact.

E. OUT-OF-POSSESSION OWNER

Gomez v. Walton Realty Associates, 1999 WL 66008 (1st Dep't 1999)

In 1995, the infant plaintiff was injured when he came into contact with an exposed radiator pipe in the apartment where he lived. The plaintiff mother had made complaints concerning the condition on various dates from 1990 up until the accident date. In 1992, the building went into receivership. The plaintiff sued the owner and the receiver. The receivership documents prohibited the owner from "interfering in any manner with the property." The lower court denied defendant owner's summary judgment motion finding that an issue of fact existed as to whether the owner had notice of the condition before the property went into receivership. The Appellate Division reversed, holding that an out-of-possession owner who has relinquished possession and control cannot be held responsible for a dangerous condition on the premises. The Court further stated that liability could not be found under New York Multiple Dwelling Law 78 [this provision imposes a non-delegable duty on the owner of an apartment building to maintain the premises in a safe condition) because the provision does not apply to a party who has completely surrendered possession and control of the promises and who has not retained a right of entry. Based on the receivership papers, the owner had no control or right to re-enter.

Davis v. HSS Properties Corporation, 257 A.D.2d 500, 685 N.Y.S.2d 16 (1st Dep't 1999)

An out-of-possession property owner may be charged with constructive notice of a dangerous condition on the property and thus face liability where the owner retains a right of re-entry to inspect and perform maintenance under the lease and where the dangerous condition violates a specific statutory provision. Here, the owner leased premises to plaintiff's employer but retained a right to re-enter in the lease. Plaintiff's employer installed a raised computer floor in the premises. Plaintiff fell through a portion of the floor where 2 or 3 tiles had been removed, a condition that had been present for approximately 3 to 6 months. There was evidence that a representative of the owner had been on the floor on several dates when the condition existed. Defendant was not entitled to summary judgment because the right of re-entry clause and the fact that plaintiff was able to produce 2 specific statutory provisions that the condition was violated were sufficient to charge the owner with constructive notice and because there was an issue of fact as to whether defendant had actual notice of the condition.

Gordon v. Foster Apartments Group, 260 A.D.2d 540, 688 N.Y.S.2d 234 (2d Dep't 1999)

Plaintiff was shot in a parking garage by an employee of the garage. Plaintiff's employer had leased the garage from the building owner. Plaintiff brought suit against the owner on an inadequate security theory. On appeal, defendant was able to obtain a dismissal of the complaint. The Appellate Court agreed with the owner's argument that the owner was out of possession and, although it had a duty under the lease to make certain repairs, defendant had relinquished control of the premises to the tenant under the lease and had no duty to provide security. Moreover, defendant established that it had no role in hiring or retention of the tenants' employees nor did it have any notice that the employee had any propensity for violence.

Matthews v. Tobias, 260 A.D.2d 608, 688 N.Y.S.2d 677 (2d Dep't 1999)

Liability for a dangerous condition on premises does not extend to a prior owner unless the condition existed at the time of transfer and the new owner has not had a reasonable time to discover the defect.

Tan v. Classic Malaysian Restaurant, Inc., 261 A.D.2d 533, 690 N.Y.S.2d 639 (2d Dep't 1999)

The owner of defendant restaurant became involved in an altercation with two patrons. One of the patrons pulled and shot a gun, striking the plaintiff. The Court dismissed plaintiff's negligent security suit against the owner and the restaurant holding that, "The shooting incident constituted an unexpected and unforeseeable occurrence which a reasonably careful and prudent person could not have anticipated or guarded against."

Judith M. v. Sisters of Charity Hospital, 93 N.Y.2d 932, 693 N.Y.S.2d 67 (1999)

Hospital was not responsible for its employee's sexual abuse of a patient where the employee acted outside the scope of his employment and his acts were not foreseeable.

F. DISCOVERY PROCEDURE

Ortega v. New York City Transit Authority, 262 A.D.2d 470, 692 N.Y.S.2d 131 (2d Dep't 1999)

In granting defendant summary judgment, the trial court properly refused to consider an affidavit from a notice witness and an expert offered by plaintiff in opposition, where the first time these witnesses were mentioned by plaintiff was when the affidavits were submitted which was 9 years after suit commenced, where plaintiff never identified these witnesses in response to defendant's discovery demands and where plaintiff had certified the case ready for trial by filing a Note of Issue which indicated that all discovery was complete.

Chambers v. Roosevelt Union Free School District, 260A.D.2d 594, 689 N.Y.S.2d 171 (2d Dep't 1999)

While playing on "monkey bars" at school, the infant plaintiff was kicked by another student, fell and was injured. Plaintiff sued the school on a negligent supervision theory. The Court dismissed the action because there was no evidence that the school was on notice of the other student's propensity to commit such dangerous conduct and therefore the school could not have anticipated or protected against the intentional acts of the assailant.

The Court also rejected plaintiff's alternative theory of liability, that the monkey bars were unsafe. Plaintiff submitted an expert's affidavit that opined that 9 inches of sand should have been on the ground to prevent injury but that, at the time he measured the site, sometime later, only 2 1/2 inches of sand were present. The Court found this affidavit totally defective because it failed to describe the conditions that were present on the accident date.

Alvero v. Allen, 262 A.D.2d 434, 692 N.Y.S.2d 116 (2d Dep't 1999)

Infant plaintiff was struck by a snowball while he was waiting for a Boy Scout meeting to start and brought suit against the adult scout leader on a theory of inadequate supervision. Quoting a Court of Appeals case, ***Lawes v. Board of Education***, 16 N.Y.2d 302, which stated:

> No one grows up in this climate without throwing snowballs and being hit by them. If snow is on the ground as children come to school, it would require intense policing, almost child by child, to take all snowball throwing out of play. It is unreasonable to demand or expect such perfection in supervision from ordinary teachers or ordinary school management; and a fair test of reasonable care does not demand it.

The Court dismissed plaintiff's suit.

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Preparing for and Litigating the Plaintiff's Personal Injury Case in New York,* 1999 Edition

Authors
James E. Reid, Esq.
Greene & Reid
Syracuse, NY

Arthur M. Greene, Esq.
Greene & Reid
Syracuse, NY

David M. Gouldin, Esq.
Levene Gouldin & Thompson, LLP
Binghamton, NY

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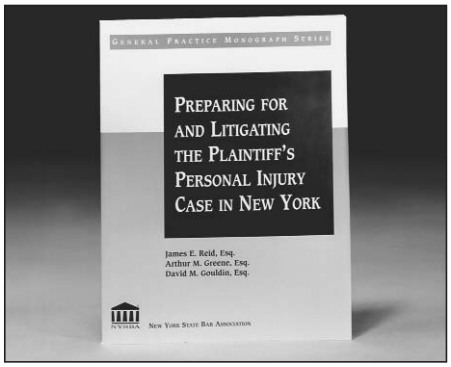

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