# TICL Journal

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## TICL NEWSLETTER *(Cover to Cover)*

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# Message from the Section Chair

In the Spring 2002 message from our former Chair, Dennis R. McCoy, he posed the question: "Why would anyone want to be a member of the TICL Section?" Many of those on the Executive Committee took the question to heart and at the beginning of this year I was determined to continue the momentum begun by Dennis and hopefully provide answers to what has now become a mission question. In speaking with members, the consensus is that the TICL Section would be best served by providing opportunities to all members for professional enrichment. Consider this message, therefore, to be a help wanted ad.

Before providing specific areas in which we need your help, you should be aware that the first step to having the widest range of opportunities is to join a substantive committee. The list of substantive committees and the respective Chairs are on our Web page, which we hope by now you have integrated into your practice, and in the front of this publication.

Additionally, every substantive committee now has a list serve which all members have at their disposal. The list serve is an extraordinary opportunity for members of the substantive committees to share recent decisions, to ask practice questions, to provide announcements of interest, to post employment opportunities and to express interest in teaching, writing or any other opportunities.

## CLE Programs and Teaching Opportunities

For those who wish to pursue teaching opportunities, and obtain CLE credit in the process, there is no better opportunity than the CLE programs. This year we have made a point to provide a preference for speaking opportunities to members of the substantive committee which is sponsoring a specific CLE program. If teaching opportunities are appealing to you contact Laurie Giordano, Esq., CLE Chair, and the Chair of the substantive committee with which you wish to be involved. We encourage you to use the list serve for this purpose.

## CLE Liaisons

Each substantive committee needs a CLE Liaison. The function of this person is to assist the Chair of a given substantive committee in coordinating CLE programs and to prepare monthly case updates to share with fellow committee members via the committee list serve—and with the general membership, through the Section Web page. If you wish to explore this opportunity, contact the Chair of the substantive committee with which you would like to be involved.

## Writing Opportunities

The TICL *Journal* is always searching for new material ranging from substantive articles, case updates, book reviews, etc. As is the case with CLE opportunities, those submitting articles to the TICL *Journal* qualify to apply for CLE credit. If you are interested, please contact Paul Edelman at pedelman@kreindler.com.

## *Cover to Cover*

*Cover to Cover* is the TICL Section Newsletter. It offers the opportunity to communicate Section activities and opportunities. If you wish to assist in this publication or submit items of interest, please contact Rob Glick at rglick@jhcb.com.

## Vice Chairs

For those who have an interest in future Executive Committee opportunities, perhaps a position as a Vice Chair of a substantive committee is for you. Contact the Chair of the substantive committee in which you have an interest.

## Executive Committee Nominations

Each year at the Annual Meeting of the Section, officers and district representatives are presented and voted upon. Under the bylaws, "[T]he Section shall solicit nominations from the membership of the Section by placing an announcement in the TICL *Journal* and communicating with the membership in such other manner as the Nominating Committee may determine." If you wish to submit a name for consideration, please submit it to me so that I may then submit it to the Nominating Committee.

As you can see, there are many opportunities for Section members to take an active role. On behalf of the Executive Committee I hope you pursue these opportunities so that our Section may continue to play a relevant and vital role in our practice.

**Respectfully submitted,**
**Eric Dranoff**

# Remarks of Annual Meeting Dinner Speaker: Honorable Judith S. Kaye

**Rainbow Room, 30 Rockefeller Plaza, New York City • January 22, 2003**

When I accepted Judge Boyers' invitation to address you this evening, I asked him to suggest a topic. I thought that, after a long day of listening to speeches, you'd appreciate hearing something light and breezy—always my own favorite kind of speech. Much to my surprise Sy said, absolutely not—we'd like you to talk about *Frye* and *Daubert*. Wow! What an amazing audience! What gluttons for punishment! And, by the way, you've chosen a wonderful watering hole at which to satisfy your thirst for knowledge.

So I will move right to my assigned topic: *Frye* and *Daubert*. And you can all thank Sy Boyers for this. Anyway, I think that for his otherwise generally good deeds Sy deserves a round of applause.

*"Frye looks to consensus within the scientific community as an indicator of reliability, while Daubert requires judges to evaluate both the validity of the expert reasoning and its application to the case."*

We are, of course, bombarded daily with news about developments in technology and science. Just recently, for example, the scientists had us convinced that alcohol consumption is not a good idea. Now they tell us that two glasses a day every day are even better than exercise for a healthy heart. And we all want healthy hearts, don't we? Thankfully, science and technology are not static subjects. Thankfully, neither is the law.

For more than half a century, New York courts have been applying the *Frye* test when asked to consider the admissibility of expert testimony based on a novel scientific theory. You, of course, are all well familiar with the *Frye* test. The *Frye* test requires courts to determine whether the theory has been generally accepted by the relevant scientific community. In the past decade, however, the federal courts have fashioned a new standard—the *Daubert* test—which requires courts themselves to assure whether all types of expert evidence are founded on reliable principles and methods, and whether they can validly be applied in the case at hand.

The difference, in a nutshell, is that *Frye* looks to consensus within the scientific community as an indicator of reliability, while *Daubert* requires *judges* to evaluate both the validity of the expert reasoning and its application to the case. Many state courts—including the courts of New York—have been wrestling with whether to adopt the federal standard.

As with so many things we experience as lawyers and judges, even after a full decade of debate the last word has not yet been spoken on the relative merits of the old and new tests. As *Daubert* has itself been tested in the crucible of litigation, it has become apparent that what was originally seen as a "liberalizing" test, in actual practice has not necessarily turned out to be one, and in many respects the tests have taken on new shadings and nuances that bring them closer to one another. Obviously, it would be inappropriate for me, as a sitting judge, to express an opinion as to which is the better test. But I can, and would like to, say just a word about the ongoing process.

At bottom, the renewed interest in re-evaluating the test for technical and scientific evidence reflects a much broader social development. It reflects that science and technology increasingly have pervaded every facet of our lives. That has brought many wonderful benefits, including the opportunity judges and juries now have to consider helpful opinion evidence about problems of causation, identity and damages that they could never before have explored. Take DNA evidence, for example, which has proved so central both in procuring convictions and in freeing the innocent, even from death row. But with all this dazzling new evidence, comes the greater risk that triers of fact will be led astray by unreliable testimony dressed up in the language and trappings of true science.

The choice between *Frye* and *Daubert* is important precisely because the more science and technology become essential to our every activity, the greater the potential benefit—and the potential danger—of such evidence in the courtroom.

While I can't say which is the better test, I can say that we will—judges and lawyers—continue this fascinating dialogue, and that we will together find a good balance, so that the great discoveries of modern science and technology will remain an aid, and not an obstacle, to truth-finding and the delivery of justice.

As the law develops on so many fronts, lots of debates like this are raging in the courts. Issues involving mass torts and punitive damages come immediately to mind, where the consequences of how we—judges and lawyers—strike the balance in the law are of enormous consequence not just to individual litigants but also to society at large. And isn't it great to be at the center of these exploding issues, using our time and talents to assure both justice in individual cases and the law's responsiveness to the demands of a new and changing world.

*"The choice between* Frye *and* Daubert *is important precisely because the more science and technology become essential to our every activity, the greater the potential benefit—and the potential danger—of such evidence in the courtroom."*

And speaking of courts and law, I'd like to talk a little about the life I left when I joined the Court of Appeals, and the life I have.

This year I will reach my tenth anniversary as Chief Judge, my twentieth as a Judge of the Court of Appeals. That translates into twenty years since I left the delights of practicing as a trial lawyer alongside you here in New York City—delights like dutifully recording every six minutes of my day on time sheets; dealing with sometimes difficult partners and clients, and even some difficult judges; and visiting warehouses of documents in exotic places like Bayonne, New Jersey, and Kingsport, Tennessee. Technology unquestionably has made many things better in a litigator's life—like keeping time records, and instantaneously accessing documents stored around the world, and PowerPoint presentations. But then again, technology has unquestionably also made some things harder, like expectations of courts and clients for immediate turnaround, and workdays that are even longer and more demanding than they were when "cut and paste" involved actual scissors and jars of rubber cement.

But it seems to me that the rewards of being a litigator remain as great as they always were.

*"[O]ne of my major regrets is that I did not follow the advice of my Uncle Charlie on the day I was sworn in as a Judge of the Court of Appeals. He said: 'Get your portrait painted right away.'"*

I think of the deep-down satisfaction of creating and counseling a successful dispute resolution strategy, maybe even one that wholly avoids litigation; a cross-examination that pulls the legs out from under an adversary's case; a summation or oral argument that exhausts every personal and professional skill. There's discovering the smoking-gun document; obtaining a result that improves the client's life, ends an injustice, secures a right, makes new law, makes the world a little better; a compliment from the judge; a grateful client.

Unforgettable moments like these make everything else worthwhile. Those are surely unforgettable moments—even for me, even after nearly twenty years of the most glorious life imaginable, as a Judge of the Court of Appeals.

Those of you who have visited us in Albany know our magnificent courtroom. It is to my mind the perfect setting for the presentation of serious argument on serious law questions. I have seen no other courtroom like it. As the years go by, one of my major regrets is that I did not follow the advice of my Uncle Charlie on the day I was sworn in as a Judge of the Court of Appeals. He said: "Get your portrait painted right away."

I have to admit, I have at times during oral argument glanced up at those portraits, especially the portrait of Benjamin Cardozo. Gazing into Cardozo's saintly countenance I can appreciate a story I heard recently that speaks volumes about him. It seems that a New York City lawyer some years ago showed up at the State Law Library to do a bit of research just before afternoon argument. He handed his list of items to a gray-haired fellow at the desk, who returned a short time later with everything that had been requested. The attorney thanked the man for his help, completed his reading and went to lunch. At 2 p.m., the attorney was in the courtroom when the judges filed in. The gray-haired gentleman from the Law Library took his place

in the Chief Judge's chair, nodded to the attorney and the arguments began.

After nearly twenty years on the Court, I can tell you the presence of those portraits has a definite impact on us. I'm sure you all feel it, too. That parade of portraits, beginning with John Jay and James Kent, for me represents a progression of the law and a powerful reminder that it is the institution that is enduring and not any of us fortunate enough to be part of it.

*"The Third Branch of government—the Least Dangerous Branch—continues to provide a fair and rational forum for the peaceful resolution of disputes. And it does this hand in glove with a vigorous corps of attorneys advocating with civility and zeal in the interests of their clients."*

Often I wonder what the old gents, looking down on the proceedings, think of all of us today. Quite frankly, I have never felt a moment's skepticism, disapproval or disdain from any of them—not even when I moved several bottles of red nail polish into Judge Cardozo's desk.

If every now and again there may be a raised eyebrow up there, I think that is attributable more to the shocking change in the subject of the cases than any criticism of us. Back 150 or more years ago, the issues before the Court were overwhelmingly private property disputes—wills, deeds, mortgages, pledges, promissory notes, contracts, land use.

Today we have guns, murder and mayhem, even by children; Internet crimes, domestic violence, child sexual abuse and family dysfunction; suits against government for entitlements; what, and who, defines the end of a person's life; who has the right to frozen embryos in a dispute between former spouses.

No, on second thought, I doubt the old gents up there on our courtroom walls are even surprised by any of this. They have, after all, watched the steady flow of cases—snapshots of society documenting our advance from simpler times to the wonders of modern life. I have to think—I *like* to think—that they are on the whole satisfied because they can see that the system is working, indeed working well. The subjects have changed; the law we apply has changed, becoming increasingly statutory. Our predecessors didn't need to lose any sleep over the application of *Frye* or *Daubert* to evidence regarding the stability of recreational vehicles, toxic mold, or the correlation between Viagra and cardiovascular disease.

But what has changed is not nearly as significant as what has endured. The Third Branch of government—the Least Dangerous Branch—continues to provide a fair and rational forum for the peaceful resolution of disputes. And it does this hand in glove with a vigorous corps of attorneys advocating with civility and zeal in the interests of their clients.

I invite all of you to drop by—as soon as our courthouse renovation is completed later this year. Come join us on the day, surely not long into the future, when we are finally asked to choose between *Frye* and *Daubert*. While I can't promise that I will personally retrieve books for you like some Chief Judges, I guarantee that you will feel both welcome and proud to be part of a profession that helps keep our law relevant to modern-day challenges and our nation true to its founding ideals of liberty and justice for all.

# *In Memory of Sheldon Hurwitz*

Sheldon Hurwitz was active in our Section for about thirty years and served as Chairman. He was a well-known and respected insurance law and trial attorney, and a founder of Hurwitz & Fine, P.C. He died October 11, 2002, after a lengthy illness, at the age of 72.

Known as "Shelly" to family and friends, he was born in Buffalo, where he attended Bennett High School, the University at Buffalo, and the University at Buffalo School of Law, where he also later taught Insurance Law as an adjunct professor. He also received a Master of Law Degree from George Washington University.

Retired from Hurwitz & Fine, P.C. since 1999, he stayed on as counsel and continued to work diligently as a Master Arbitrator for the American Arbitration Association. He concentrated his practice in insurance law and civil litigation, lectured and wrote extensively on those subjects, with particular emphasis on insurance coverage, defense strategy, product and toxic substances liability, and risk management.

He was indefatigable in his zeal for the law. He was an extremely quick thinker who would rapidly come to a conclusion without appearing to go through the logistical steps necessary to get there. He could be tough and was always direct in his approach, frequently very animated. He was also a gentleman. Physically, Shelly was a handsome, distinguished-looking man. Tall, slender, with a great shock of salt-and-pepper hair, he was always meticulously dressed, with a handkerchief in the breast pocket of his suit coat.

Shelly was a very active man who loved to play tennis and to ski. He and his wife, Lynda, enjoyed traveling and particularly loved Europe, where he served as an officer in the JAG Corps in the late 1950s. Throughout his life and career, he was always concerned with and trying to improve world affairs.

Later in his life, he took up golf and birding. Every summer, he and Lynda would spend two weeks at the Chautauqua Institute, where he loved the mental challenges presented by the various speakers, experts in their field. Shelly was an engaging conversationalist with a great sense of humor.

Shelly took great pride in his family and their accomplishments. He has been a wonderful dad to Andrew, an attorney in New York City; Rick, an investment entrepreneur married to Sarah; and to Cindy, a schoolteacher married to Jay Matthews. He adored his four grandchildren and talked about them with a huge smile on his face and obvious love.

He was very well regarded in the legal community. He was honored by the New York State Bar Association, receiving the John E. Leach Award for outstanding accomplishments in Insurance Law, and extraordinary contributions to the legal profession, and was named the 1995 "Defense Trial Lawyer of the Year" by The Defense Trial Lawyers Association of Western New York.

He was special counsel to the New York State Assembly Committee on Insurance, a past Director of the Bar Association of Erie County, and President of the Trial Lawyers Association of Western New York.

He held several State Bar Association chairmanships including Chair of the Insurance, Negligence and Compensation Law (now called the Torts, Insurance and Compensation Law) Section and Chair of the State Bar Insurance Programs Committee. He served on the Executive Committee of the International Association of Defense Counsel and chaired its Continuing Legal Education Board. He was also past Chair of the Environmental Law Committee of the Defense Research Institute.

A Master Arbitrator of the New York State No-Fault Insurance Program since 1977, Hurwitz completed the Advanced Mediation Program at Hamline University Law School's Dispute Resolution Institute, and was a founding member of the Alliance for Dispute Resolution. He was also active in many Jewish charities and was a former president of the Foundation for Jewish Philanthropies and the Bureau of Jewish Education.

He has left many of us with his lessons, his love for life, learning and the law. We will all miss him deeply. Godspeed, Shelly.

**Paul S. Edelman**

# The *Daubert* Debacle

By Henry G. Miller

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] is considered by some to be a dyslexic decision. It rules one way but goes the other way.

Justice Blackmun, writing for the Supreme Court, found the 1923 decision *Frye v. United States*[2] too restrictive. *Frye*, decided by the Court of Appeals for the District of Columbia, had long been the Rosetta Stone of deciphering whether expert opinion was admissible or not. *Frye*, a remarkably short case free of citations, had been cited over and over throughout the country. It upheld the exclusion of expert testimony on a new procedure called the systolic blood pressure deception test. Since the test lacked "general acceptance," it was inadmissible. *Frye* concluded that "Courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle . . ." However, ". . . the thing from which the deduction is made must be sufficiently established to have gained general acceptance . . ." Thus, general acceptance was the decisive element for seventy years.

Then along came *Daubert*. The children-plaintiffs sued the makers of Bendectin, an anti-nausea drug, for birth defects they allegedly sustained as a result of their mothers' ingestion of that product. The District Court for the Southern District of California granted the company's motion for summary judgment and the Court of Appeals affirmed. The standard of admissibility used by the lower courts was *Frye's* "general acceptance."

The Supreme Court reversed, holding that "general acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence. Justice Blackmun wrote that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence. Specifically, he held Rule 702 does not incorporate the general acceptance standard and such a requirement would be "at odds" with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to opinion testimony." Judge Jack Weinstein, a prolific and highly regarded thinker on the subject, is quoted by the Court: "The Rules were designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts." Justice Blackmun further referred to the "permissive backdrop" of the Rules.

If Justice Blackmun had stopped there, there probably would be no *Daubert* controversy.

However, Justice Blackmun continued to write. We now have, depending on your viewpoint, the *Daubert* Disaster or the *Daubert* Delight. In either case, it's a . . .

## Revolution

Justice Blackmun went on to say the Court's ruling does not mean there are no limits on the admissibility of scientific evidence. Judges must ensure that scientific evidence is not only "relevant," but "reliable." He added, "many factors will bear on the inquiry and we do not presume to set out a definitive checklist . . . " He then went on to list four considerations which bear on the admissibility of opinion evidence based on a scientific theory or technique: 1) whether the theory or technique has been tested; 2) whether it has been subjected to peer review and publication; 3) whether it gives rise to a significant rate of error; and 4) amazingly, whether it has general acceptance. Back to *Frye* we go. Thus, in a ruling designed to liberalize *Frye,* the Court actually added factors over and above general acceptance.

The Court added that Rule 702 is a flexible one. The Court should focus on methodology, not conclusions. The Court further cited Rule 403, which states that relevant evidence may be excluded if its probative value is outweighed by unfair prejudice.

Those representing the manufacturer were concerned that the abandonment of "general acceptance" would result in a free-for-all in which befuddled juries would be confounded by absurd pseudo-scientific assertions. Those representing the children worried that such a screening role for the judge would allow for the exclusion of too much evidence, creating a stifling and repressive atmosphere inimical to the search for truth.

Justice Blackmun anticipated that a balance would be struck by the "gatekeeping role" of the judge. He argued that "vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." In addition, he pointed out that the court remains free to direct a judgment or grant summary judgment in weak cases. Justice Blackmun concluded, "these conventional devices rather than wholesale exclusion under an uncompromising 'general acceptance' test are the appropriate safeguards where the basis of scientific testimony meets the standards of rule 702."

## The Aftermath

Which view, plaintiffs' or defendants', was most prophetic? Those representing the children turned out to be prescient. The lawyers for the injured children won the battle but lost the war.

In the first fifty years after *Frye* was decided, it was cited in only 96 cases, according to Michael J. Saks.[3] In the six years after *Daubert*, federal courts published 1,065 opinions on expert admissibility, 871 of which involved civil cases, according to D. Michael Risinger.[4] Risinger points out that civil defendants won nearly 70 percent of the time.

Some believe this trend favoring defendants will become even more pronounced. They note that corporate-funded reform groups are on the attack about what they claim to be junk science. The Defense Research Institute is urging defense lawyers to file *Daubert* motions whenever possible.

The factors on the checklist in *Daubert* have been increasing. By one count, there are at least 50 different hurdles that have been directed by various courts for experts to surmount, this according to Ned Miltenberg, speaking at the ATLA Annual Convention in the year 2000. Not happy about this trend, he entitled his paper, "Out of the Fryeing Pan and Into the Fire."

## The *Joiner* Juggernaut

The benevolent gatekeeping of *Daubert* turned into what one commentator called, less kindly, Checkpoint Charley. Opponents of *Daubert* have argued that gatekeeping is a euphemism for industry safekeeping. No matter what view is espoused, four years after *Daubert*, a stricter interpretation of judicial gatekeeping followed.

In *General Electric Co. v. Joiner*,[5] the Supreme Court addressed the *Daubert* issue once again. The main holding is bland enough. Much delegation of authority to the lower courts is given. The District Court will only be reversed for admitting or excluding expert opinion when it abuses its discretion.

In *Joiner*, an electrician suffering from lung cancer sued the manufacturers of PCBs and other products. The defendants removed the case to federal court. The District Court excluded the testimony of the electrician's experts and granted defendant's motion for summary judgment. The Eleventh Circuit Court of Appeals reversed, holding that such a wholesale exclusion was contrary to the liberal policies of admissibility that had long been the policy of the federal courts. The Circuit Court said there is a preference for admissibility under the Federal Rules of Evidence. The court also said there should be a more stringent standard of review, particularly when evidence is excluded, and it is wiser to leave to the jury the correctness of competing expert opinions.

The Supreme Court differed. It held that while the austere *Frye* standard of general acceptance is not carried over, a trial judge is not disabled from screening such evidence. It was not an abuse of discretion to exclude plaintiff's evidence.

How reliable was plaintiff's evidence? Plaintiff had identified relevant animal studies showing a link to cancer and directed the court's attention to four epidemiological studies on which the experts had relied. In short, there was a production of considerable evidence which some judges might find relevant and reliable.

One such jurist was Justice Stevens, who concurred with the holding about using the abuse of discretion standard, but dissented on the question of whether abuse had taken place. He felt it was not something the Supreme Court could decide without a closer review of the record. Justice Stevens pointed out that plaintiff's experts relied on the studies of at least 13 different researchers who referred to several reports of the World Health Organization that addressed the question of whether PCBs cause cancer. This was hardly junk science.

In any event, Justice Stevens, in a footnote, stated this was not the kind of junk science which should be excluded as unreliable. As an example of junk science, he cited the case of a phrenologist who would prove a defendant's future dangerousness based on the contours of that defendant's skull. That was hardly this case. Stevens asked quite pointedly: When qualified experts have reached relevant conclusions on the basis of an acceptable methodology, why are their opinions inadmissible? He emphasized again that *Daubert* forbids trial judges from assessing the strength of an expert's conclusions. That's for the jury. In a footnote, he again cites Justice Blackmun: vigorous cross-examination, presenting contrary evidence, and careful instruction on the burden of proof are the traditional means of attacking shaky but admissible evidence.

Thus, it is *Joiner* which truly endorses the revolution that *Daubert* most likely never intended to initiate.

## The *Kumho* Coup

In *Kumho Tire Co., Ltd. v. Carmichael*[6] plaintiff sued the manufacturer of a tire for injuries brought about when the right rear tire failed. The District Court granted the defendant summary judgment. The Eleventh Circuit reversed. The Supreme Court reversed and held that *Daubert's* gatekeeping obligation requires an inquiry not only into scientific testimony, but to all expert testimony, including "technical" testimony.

This case, unexceptional on its face and in its main ruling, is of greater import when one looks closely at the facts.

That close look suggests a few questions. Are judges deciding questions of fact? Are they invading the province of the jury? Has there been a coup to diminish the role of jurors and advocates in favor of a more powerful judiciary? Are there special interests that would favor that transfer of power?

In *Kumho*, plaintiff's expert testimony seemed shaky. Justice Breyer carefully analyzed the facts in great detail before sustaining the exclusion of that expert's testimony. Plaintiff's expert had a masters degree in mechanical engineering, worked for ten years at Michelin America and had testified many times as a tire failure consultant.

But his testimony was weak. Justice Breyer noted that plaintiff's expert testified that the tire was bald, should have been taken out of service, had been repaired inadequately for punctures, and showed evidence of overdeflection. Justice Breyer noted that plaintiff's expert concluded that the depth of the tire tread was 3/32 inch while the opposing expert's measurements indicated the depth ranged from .5/32 to 4/32 inch. Justice Breyer dug deeply into the minutiae of the many facts before sustaining the conclusion that the testimony should not be heard by the jury.

In the pre-*Daubert* era, this expert testimony most likely would have been admissible. There would have been a cross-examiner to attack these shaky opinions. There would have been a jury to resolve the dispute. There would have been a judge to evaluate the result.

This apparent invasion of the factual province of the jury has continued apace. It seems to have reached a level of acceptance perhaps only because it is denominated as a necessary *Daubert*-type analysis as to the reliability of expert opinions.

## The Codification

The *Daubert* Revolution resulted in its being codified in Rule 702 as of December 1, 2000. The Rule applies to all expert opinion. To be admitted, the testimony must be: 1. based upon sufficient facts; 2. the product of reliable methods, and 3. the methods must have been reliably applied to the facts.

Note the word "reliable" is used twice. It remains the key. It takes us back to *Daubert*. Needless to say, reliability is often in the eyes of the beholder. And the beholder in the first instance is the judge. The issue of reliability has thus been largely shifted from jury to judge.

## The Expanding Judicial Role

In 1999, in *In re TMI Litigation*,[7] the Third Circuit excluded eleven of plaintiffs' twelve experts. The court wrote a scholarly opinion of more than fifty pages, with an in-depth analysis of multiple scientific disciplines. The court determined that the testimony of a dose exposure expert was unreliable because the expert violated an elementary principle of credible dose reconstruction in estimating dose exposure. This seems to be the kind of factual analysis traditionally done by a jury. If it was truly junk science, would it have taken 55 pages to reach that conclusion? In truth, the courts seem to be excluding more than junk science.

In the case of *In re Hanford Nuclear Reservation Litigation*,[8] a case arising out of the Eastern District of Washington in 1998, the court excluded all but one of plaintiff's thirteen causation and dose exposure experts. This case involved three thousand plaintiffs in a consolidated litigation, who claimed personal injuries as a result of exposure to radioactive emissions from the nuclear reservation in the state of Washington. It took the court 762 pages to render its summary judgment opinion, finding the methodology on which the experts relied unsound. To be blunt, has the *Daubert* analysis, on occasion, gotten a little silly in its depth and length?

This deep involvement in factual issues not only constitutes an incursion into what was formerly decided by jurors, but also threatens the very efficiency of our courts. Days are spent on hearings. How many hours are spent in writing opinions of twenty pages or more. Jurors, of necessity, decide quickly. Judges may spend months on a decision.

Those who argue that *Daubert* has reached levels of absurdity have found a recent case which, they submit, removes all doubt. It deals with . . .

## Fingerprinting

Nothing quite prepared the legal community for the startling decision in *U.S. v. Llera Plaza*.[9] A highly-regarded federal jurist held, ". . . the parties will not be permitted to present testimony expressing an opinion of an expert witness that a particular latent print matches or does not match, the rolled print of a particular person . . ." In short, fingerprint identification of a particular person would not be allowed. This, despite decades of general acceptance of fingerprint identification.

In a decision of some 25 pages, the court exhaustively analyzed fingerprint evidence. It described in detail many technical areas. It discussed the ACE-V process, an acronym standing for analysis, comparison, evaluation and verification. It went into ridgeology, the study of ridges. It dealt with Galton points, which are characteristics of the fingerprint ridges.

The court, as judicial gatekeeper, shut out the fingerprint evidence because it did not meet the requirements of *Daubert*. The court concluded that the ACE-V does not meet *Daubert's* testing and peer review criteria. Its rate of error is in limbo and ultimately it is a subjective test. The court, therefore, concluded the parties would only be able to present expert fingerprint testimony describing how the prints were obtained, placing the prints before the jury and pointing out observed similarities, but would not be permitted on whether the print is that of a particular person. This despite about a century of general acceptance of fingerprint testimony by experts.

Following a highly public reaction to that decision of January 7th, the court held a hearing based on a motion to

reconsider. It was conducted on February 26 and 27, 2002. On March 13, 2002, in another extremely conscientious and lengthy decision of over 20 pages, the court reversed itself.[10]

The court again went into great factual detail. There was even an historical note, describing Francis Galton, a multi-talented English scientist who was a cousin of Darwin. The opinion goes on to discuss other great historical names in the fingerprinting field.

The court, on reconsideration, concluded that the fingerprint community's general acceptance of ACE-V should not be discounted. The Judge also concluded there was no evidence that the error rate was unacceptably high. The court further concluded that the subjectivity involved in the process is not such as to render the evidence excludable.

As to general acceptance, the court pointed out that the first English appellate endorsement of fingerprint identification came in 1906. The first American court to consider the admissibility of such evidence was in Illinois in 1911 where it was accepted and a murder conviction affirmed.

The court cited Justice Felix Frankfurter: that wisdom too often never comes and so one ought not to reject it merely because it comes late. In a remarkable expression of great modesty, the Judge added, "On further reflection, I disagree with myself." The court then denied the motion to preclude the government from introducing the fingerprint evidence which would allow the identification of a particular person.

The scholarliness and humility of the decision are exemplary and admirable. However, there is a deeper question: Was all that effort necessary? What lessons can we learn?

## Lessons for Bench and Bar

### For the Bar

Much depends on which side of the issue a lawyer stands. Those representing corporate defendants accused of manufacturing dangerous products will, of course, try to go to federal court and make as many *Daubert* motions as they can. This is an enormous new weapon in the defendant's arsenal. It is, as they say, "outcome determinative." In short, one can win the case as a defendant with a successful *Daubert* motion. It must be remembered, however, that *Daubert* is a weapon which further empowers the powerful.

For those representing the injured consumers, it is a much more difficult world. They will not want to be in federal court. They will try to create non-diversity whenever they can. They will be better off staying in state courts that still apply the supposedly stricter *Frye* rule which, ironically, has proven to be more permissive. Such a state is New York. In *People v. Wernick*,[11] Judge Bellacosa, speaking for the state's highest Court in 1996, makes clear that the Court has often endorsed and continues to apply the well-recognized rule of *Frye.* This was even more recently set forth in *People v. Johnston*,[12] which indicates that the court continues to apply the "general acceptance test of *Frye.*"

### For the Bench

Intending no presumption and with respect, there is a lesson for our judiciary. Those imbued with the traditional attitude of the Federal Rules of Evidence will favor the more liberal introduction of evidence. They will let jurors decide the issue after vigorous advocacy on both sides. They will take to heart Justice Blackmun's decision that vigorous cross-examination under the overview of the court and a basic trusting of the jury is the way to go.

The ultimate issue is: Do we, or do we not, trust our juries to resolve these factual issues?

It would seem that *Daubert* has had consequences never intended by Justice Blackmun. It was never intended to have judges with overloaded calendars expending untold effort holding hearings and writing lengthy decisions on the details of expert evidence. Certainly, all agree that junk science should be excluded. The judges have always been the gatekeepers. They should continue that role.

However, it was never intended for judges to supplant jurors. It was never intended for judges to write decisions of 20 or 50 or 100 pages to hold it is clear that this opinion evidence is unreliable as a matter of law.

In my view, and it is only my view, correction is urgently needed to achieve the balance that Justice Blackmun envisioned.

## Endnotes

1. 509 U.S. 579 (1993).
2. 293 F. 1013.
3. 49 Hastings L.J. 1069, p. 1076 (1998).
4. 64 Alb. L. Rev. 99 (2000).
5. 522 U.S. 136 (1997).
6. 526 U.S. 137 (1999).
7. 193 F.3d 613 (1999).
8. 1998 WL 775340.
9. 179 F. Supp. 2d 492 (E.D. Pa. Jan. 7, 2002).
10. *U.S. v. Llera Plaza*, 2002 WL 389163.
11. 89 N.Y.2d 111.
12. 273 A.D.2d 514 (3d Dep't 2000).

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# Expert Testimony in Low Speed Impact Motor Vehicle Litigation

By Richard R. Maguire

## Introduction

Expert testimony in all types of litigation is often controversial. Opinion testimony from engineers in motor vehicle litigation is no exception. Based upon an acknowledgment by trial attorneys that the outcome of a verdict may very well depend upon the use of experts, hotly contested disputes arise frequently relating to proposed expert testimony. An illustration of the controversy was set forth recently on September 30, 2002, in a published article in the *New York Law Journal* in which a well-regarded plaintiff's counsel from the Bronx described the testimony of a defense biomechanical engineer in a low speed impact to establish that the plaintiff could not have sustained a serious injury as testimony which "crossed the Rubicon of legitimate expert testimony into the morass of junk science."[1]

In either the representation of a plaintiff or a defendant, a lawyer must make the decision whether to retain one or more experts. Lawyers must now become well-versed in the laws of physics and other engineering and biomechanical principles to prosecute or defend such a case. The most common scenario for the use of expert testimony involves a low speed impact in which the plaintiff alleges a soft tissue injury as a result of the collision. Lawyers formerly relied almost exclusively upon medical experts in these cases. In addition to orthopedic surgeons, neurologists and radiologists, attorneys are more recently also calling biomechanical engineers as experts as well.

For example, Alfred L. Cipriani, P.E. is a mechanical engineer specializing in engineering accident analysis in motor vehicle accident reconstruction, vehicle dynamics, and speed and impact determination. Mr. Cipriani was present at the TICL Annual Meeting seminar in January to explain his qualifications and experience in litigation as an expert witness, particularly in the field of low speed impact analysis. In addition to the testimony of a mechanical engineer such as Mr. Cipriani, further expert testimony is also elicited from a biomechanical consultant with a unique specialty in injury mechanics and the way in which the human body responds to movement within a vehicle at the time of a crash. As a mechanical engineer and vehicle accident reconstructionist, an expert such as Mr. Cipriani will apply scientific engineering principles in the analysis of a motor vehicle impact. These principles include the equations of conservation of energy, conservation of momentum, restitution and change of speed, or delta v. Based upon the evaluation of the specific data pertaining to the facts of a case, the mechanical engineer will rely upon generally accepted data to determine the acceleration force of gravity. This "g force" will be expressed as a value to assess the extent of the impact. Although the forces of gravity in a motor vehicle accident are not directly analogous to everyday experiences, studies have established average forces for activities such as a sneeze or a cough, which may subject the head to as much as three (3) to three and one half (3½) g's or jumping off an eight-inch (8") step landing on both feet, which may subject the head to as high as eight (8) g's.[2]

The biomechanical engineer will then rely upon the calculations of the forces to determine the effect of those forces upon the human body. The biomechanical engineer will assess how that force is transferred to human tissue tolerances and related studies describing the way in which the body responds to forces.

Although it is difficult to define a bright line test for the involvement of engineering experts, a general rule of thumb may be that use of experts may be considered in cases in which the speed at impact is ten (10) miles per hour or less and which demonstrate minimal damage to the vehicles. Before an expert is consulted, an attorney, paralegal or investigator should gather basic information for evaluation.

Many items of investigation already exist at early stages of litigation. Photographs of the vehicles must be requested from the respective no-fault insurance carriers for each vehicle. Repair estimates and related documents will also itemize the location and extent of the impact. Police reports, photographs or statements from witnesses must also be evaluated. These items as well as litigation materials such as medical records, discovery responses and deposition transcripts will be analyzed by an expert once retained by counsel.

## CPLR 3101(d)—Expert Discovery

Engineering experts will provide an analysis and a detailed engineering report outlining the application of the laws of physics to the facts of the case. Once counsel has such a report along with other findings from the proposed experts, detailed expert witness responses must be drafted to comply with CPLR 3101(d).

Based upon extensive research, reliable studies, data and multiple calculations and equations, formulating or responding to expert witness disclosure is also challenging. An expert witness response from either party must reflect full compliance with CPLR 3101(d), describing sufficient details, theories of what a party will advance at

trial along with the basis for each opinion.[3] In *Cocca v. Conway*,[4] Frank Cocca, Jr. was the plaintiff involved in a motor vehicle accident in 1996 in which the plaintiff was the driver of a minivan that was struck on the right rear passenger side by the defendant's vehicle. The plaintiff suffered a herniated disc at C6-C7 as established by an objective MRI after the accident. Expert witnesses for the plaintiff at trial included a highly regarded orthopedic spinal surgeon who testified that the herniated disc was caused by the motor vehicle accident. Counsel for the defendant disclosed a mechanical engineer who testified at trial that the plaintiff's vehicle experienced a force of no more than 0.6 g's. A second expert for the defendant identified in the expert response was a biomechanical engineer who relied upon the 0.6-g force calculation and that it was not possible to sustain enough energy to cause the herniated disc or any of the injuries described by the plaintiff.

The plaintiff moved to preclude during motions *in limine*. The trial court denied the motion and the plaintiff appealed. The Third Department in *Cocca*[5] addressed the claim by the plaintiff that the experts for the defendant should not have been permitted to testify based upon the insufficiency of the expert witness responses from the defendant.[6] An initial expert discovery response from the defendant described general statements outlining the principles but without apparent reference to the actual calculations. However, a supplemental expert witness response included specific computations, impact analysis forces upon the plaintiff and the effect of the impact upon the human body.[7] The expert response further revealed that the opinions were based on "studies well known in the industry," among other things.[8] No apparent reference was made in the expert response to any particular studies, authors or publications. The court ruled that the expert responses from the defendant reflected full compliance with CPLR 3101(d) and the plaintiff's motion *in limine* at trial to preclude was properly denied by the trial court.[9]

Although a diversity jurisdiction case in U.S. District Court would result in the required complete production of the entire expert witness report, counsel for the party who intends to use an expert at trial in state court is cautioned to provide specific details in the expert witness response to avoid an order of preclusion. When confronted with an expert response that fails to identify the studies and data upon which the expert relied, the adverse party should insist upon more complete disclosure.[10]

## Insurance Law § 5102—Serious Injury Threshold Motions

Another important use of expert engineering proof is in the context of a motion for summary judgment on the serious injury threshold. Typical motions for summary judgment include expert affidavits from the treating care provider of the plaintiff compared to an examining physician retained by the defendant. Cases which involve low speed impact and engineering analysis should also include an affidavit from such a biomechanical expert as well.

In support of a motion for summary judgment in *Anderson v. Persell*,[11] a defendant submitted proof from not only a radiologist and an orthopedist but also a biomechanical engineer. The plaintiff opposed the motion with the submission of an affidavit from a neurologist as well as a biomechanical engineer. The Third Department ruled that the motion for summary judgment was properly denied based upon a question of fact which included the opinion from the plaintiff's biomechanical expert that the herniated disc was caused by the motor vehicle accident.[12]

However, an affidavit from an expert biomechanical engineer on behalf of the defendant was not rebutted by any similar expert proof from the plaintiff in *Gillick v. Knightes*.[13] The motion for summary judgment on the threshold was granted by the trial court, in which particular emphasis was placed upon the affidavit in support from the defense biomechanical engineering expert that was unrebutted. In a 4-1 decision, the Third Department concluded that the motion was properly granted and that the plaintiff failed to establish any serious injury. However, the dissenting justice commented that the plaintiff did refute the biomechanical engineer of the defendant, only not from a biomechanical engineering expert. In the dissenting opinion, Judge Lahtinen believed that the orthopedic surgeon that submitted an affidavit on behalf of the plaintiff should have sufficiently resulted in the denial of the motion based upon conflicting expert testimony between a biomechanical engineer and an orthopedic surgeon.[14]

## *Frye* Hearing

Upon receipt of an expert witness response that describes engineering expert testimony, the adverse party is likely to consider a timely request for a *Frye* hearing.[15]

New York follows the *Frye* standard first described in 1923, permitting expert testimony when "the thing from which the deduction is made must be sufficiently established to have gained *general acceptance* in the particular field in which it belongs" (emphasis added).[16]

Procedurally, a request for a *Frye* hearing must be made before the testimony is introduced. Although the plaintiff timely challenged the sufficiency of the expert responses in *Cocca v. Conway*,[17] the plaintiff was found to have failed to timely object and did not request a *Frye* hearing, which precluded further review.[18]

An interesting decision was rendered by Richmond County Supreme Court Justice Joseph Maltese in what appears to be the first published decision on the subject of the admissibility of testimony from a biomechanical engi-

neer in a motor vehicle accident case.[19] Judge Maltese describes not only the principles of physics but also a history of the court's role as a gatekeeper of evidence.

Deborah Clemente was the driver of a vehicle struck in the rear by a vehicle operated by the defendant. In addition to an orthopedic surgeon and a radiologist, the defense also identified an engineer. The plaintiff verbally moved *in limine* to preclude the testimony of the defense biomechanical engineer. After hearing defense counsel describe the expected testimony and after a judicial review of the report generated by the expert, a *Frye* hearing was conducted to assess whether the opinions and the methods were generally accepted in the engineering community.[20] Although the court found that the witness was qualified as an expert, the methods relied upon by the expert were deemed unreliable by the court. The expert apparently performed no calculations to assess g forces or in any way apply any scientific formulas. Instead, the expert apparently relied only upon photographs of the vehicle and repair estimates.[21] The studies relied upon by the expert which are specifically identified in the decision were described by the court as lacking independence and reliability.[22]

To prevent preclusion of expert testimony, counsel must ensure that a proposed biomechanical engineer relies upon more sufficient scientific studies and has a better method upon which to determine the forces and calculations. The *Clemente*[23] decision is worthwhile and helpful to determine what is likely to be insufficient expert proof.

*Clemente*[24] does not stand for the proposition that every biomechanical expert should be precluded because such testimony is "junk science."[25] *Clemente*[26] apparently has not been followed by any appellate division since *Clemente* was decided in 1999, although other jurisdictions outside of New York State have referred to or followed *Clemente*. [27] [28]

In a products liability action unrelated to motor vehicle accident testimony, a biomechanical engineer was also precluded under the *Frye* standard in a recent decision from Suffolk County.[29] In *Mulligan*,[30] a biomechanical expert was prepared to testify that there was a relationship between carpal tunnel syndrome and the use of an IBM keyboard. Scientific journals, studies and other submissions by the defendants at a *Frye* hearing convinced the court that there was no general acceptance in the medical or scientific community concerning whether keyboard use caused carpal tunnel syndrome.

The Second Department decided in 2001 that a biomechanical engineer should not have been precluded following the completion of a *Frye* hearing. In *Valentine v. Grossman*,[31] the court decided on appeal whether the trial court judge properly precluded the second of two proposed expert engineers on behalf of the defendant. Although the trial court judge ruled that the first expert would be permitted to testify, the court ruled that the second proposed engineer would not be permitted because that proposed testimony was not relevant. The plaintiff in *Valentine*[32] suffered a herniated disc. The first defense expert was permitted to testify that the plaintiff was subjected to a 3.6-g force. The evidence at the *Frye* hearing established that the second biomechanical engineering expert was prepared to testify that he relied upon studies and data that described a similar g force upon live human subjects and a separate study involving dummies or cadavers. The trial court found that the testimony of the second expert was irrelevant because the data upon which the expert relied did not involve the identical g forces. The Second Department ruled that the testimony was clearly relevant and the preclusion was reversible error.[33] Because the expected testimony would have established proof that the accident was not severe enough to have caused the injuries sustained, the jury should have been permitted to hear that testimony and to accord whatever weight the jury saw fit.[34]

## Trial Testimony

Following arguments in motion practice concerning the sufficiency of expert responses and the conclusion of a *Frye* hearing, expert witnesses will often be permitted to take the stand for the plaintiff or the defendant. The direct examination of such an expert is a much more involved process than for most motor vehicle accident experts. Although medical experts are often questioned concerning their credentials and experience, it is not difficult to lay such a foundation nor is there any great anticipation as to whether a physician will be entitled to render opinion testimony. In addition to the usual questions about education, training and experience, a foundation during a direct examination of a biomechanical expert must also include detailed explanations concerning the definitions of the terms and a detailed explanation concerning how the scientific formulas are applied to the vehicles and the occupants. Based upon the requirement in New York that the proper testimony from an expert be sufficiently "beyond the ken" of the ordinary juror so that the testimony would assist the trier of fact, a biomechanical engineering expert would certainly be entitled to provide expert testimony.[35] As with any expert who describes scientific or technical information, explanations to the jury should include everyday examples of the laws of physics. Such an illustration would include the way in which billiard balls react to each other when describing the principle of the conservation of momentum. Demonstrations should also include demonstrative aids such as model vehicles and photographs.

Although the usual cross-examination would include bias and the frequency with which experts testify, a proper cross-examination should include a technical analysis to break down the premise upon which the expert testifies. Changing the assumptions and thereby increasing the

forces will likely result in a concession that the end result will be much different if the initial assumptions by the expert are incorrect. Insistence upon complete disclosure prior to trial to include the identification of specific studies or data will also permit the attorney to become familiar with the subject matter and the methods utilized within those studies. Data and studies should be analyzed to assess the extent to which a study includes an appropriate sample or population within the study as well as any relationship between the volunteers and the organizers of the study.[36] Although an estimate concerning miles per hour observed by lay witnesses is something with which the expert will be familiar from deposition testimony or investigation, conflicting testimony from an opinion concerning these estimates may not be overly persuasive during cross-examination.

## Post-Trial Motions

Following a trial in which the plaintiff called various medical experts concerning the causation between the motor vehicle accident and the injuries sustained by the plaintiff and conflicting testimony from the defense experts that the injuries were not caused by the motor vehicle accident, the Third Department in *Cocca*[37] commented upon the sufficiency of the biomechanical engineering experts for the defense. The expert testimony from both engineering experts for the defense regarding the physical effects of the impact was found to be a "fair interpretation of the evidence" such that "the jury could have well concluded that injuries alleged to be sustained by plaintiff from this accident were preexisting and that the accident did not make a preexisting asymptomatic condition symptomatic."[38] The court determined that the expert testimony from the defense was a part of the "sufficient credible evidence" to support a verdict by the jury that the negligence of the defendant was not a substantial factor in causing the plaintiff's injuries.[39]

The preclusion of a biomechanical engineering expert in a motor vehicle case concerning the critical issue of the causation of the injuries was deemed so relevant, admissible and probative that exclusion of that evidence could not be deemed merely harmless such that the matter was remitted back to Supreme Court for a new trial.[40]

## Conclusion

As with any expert testimony, biomechanical engineering experts must be sufficiently prepared to describe the methods and the basis for the opinions to make this testimony admissible and persuasive. An analysis of the judicial opinions rendered in New York referred to in this outline should also be helpful to determine when such an expert should be retained, the appropriateness and completeness of the expert witness responses before trial as well as the presentation of the testimony during trial.

## Endnotes

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2. M.E. Allen, et al., *Acceleration Perturbations of Daily Living: A Comparison to Whiplash*, Spine 19, no. 11 (1994), 1285–1290.
3. *Cocca v. Conway*, 283 A.D.2d 787 (3d Dep't 2001), *lv. to appeal denied*, 96 N.Y.2d 721.
4. *Id.*
5. *Id.*
6. *Id.* at 787.
7. *Id.* at 788.
8. *Id.* at 787–788.
9. *Id.* at 788.
10. *Clemente v. Blumenberg*, 183 Misc. 2d 923, 927 (Sup. Ct., Richmond Co. 1999).
11. 272 A.D.2d 733 (3d Dep't 2000).
12. *Id.* at 735.
13. 279 A.D.2d 752 (3d Dep't 2001).
14. *Id.* at 753–754.
15. *Frye v. United States*, F. 1013 (D.C. Cir. 1923).
16. *Id*.
17. 283 A.D.2d 787 (3d Dep't 2001), *lv. to appeal denied*, 96 N.Y.2d 721.
18. *Id.* at 788**.**
19. *Clemente v. Blumenberg*, 183 Misc. 2d 923, 705 N.Y.S.2d 792 (Sup. Ct., Richmond Co. 1999).
20. *Id.* at 924.
21. *Id.* at 934.
22. *Id.* at 927.
23. *Id.*
24. *Id.*
25. *Cocca v. Conway*, 283 A.D.2d 787 (3d Dep't 2001), and *Valentine v. Grossman*, 283 A.D.2d 571 (2d Dep't 2001).
26. *Clemente v. Blumenberg*, 183 Misc. 2d 923.
27. *Id.*
28. Sonin & Jenis, *supra* note 1.
29. *Mulligan v. IBM*, N.Y.L.J., Apr. 11, 2000, p. 30, col. 5 (Sup. Ct., Suffolk Co.).
30. *Id.*
31. 283 A.D.2d 571 (2d Dep't 2001).
32. *Id.*
33. *Id.* at 573.
34. *Id.* at 573.
35. *People v. Johnson*, 273 A.D.2d 514 (3d Dep't 2000).
36. *Clemente v. Blumenberg*, 183 Misc. 2d at 927.
37. *Cocca v. Conway*, 283 A.D.2d 787 (3d Dep't 2001).
38. *Id.* at 789.
39. *Id.* at 789.
40. *Valentine v. Grossman*, 283 A.D.2d at 573.

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# Dissecting the Deposition: Practical Considerations for the Effective Litigator

By Robert A. Glick

*Black's Law Dictionary* defines "deposition." But truth be told, a deposition goes well beyond the scope of merely questions and answers. If conducted, evaluated and assessed carefully, the deposition process will not only yield an invaluable amount of discovery for the benefit of you and your client, but will provide a foundation to foster, develop and strengthen your practice. This article was envisioned with the idea of providing the litigator with more than just effective deposition techniques and questioning skills. It is designed to have you analyze the practical applications of the deposition process, conduct some sort of self-introspection which translates into an honest critique of yourself and your abilities as well as providing you with some constructive and creative ideas to be more effective. In other words, giving you some food for thought with the hopes of honing your skills by analyzing the practical, everyday aspects, the realities of taking or defending a deposition with the goal of seeing how that process is interrelated and all aspects of your practice.

*"If conducted, evaluated and assessed carefully, the deposition process will not only yield an invaluable amount of discovery for the benefit of you and your client, but will provide a foundation to foster, develop and strengthen your practice."*

Through introspection of the deposition process, it becomes readily apparent that a deposition provides so very much more than merely answers to questions. Each deposition, whether you've conducted one or one thousand, becomes a unique forum in which to learn new skills and provides you with an invaluable opportunity to learn new skills and perform meaningful evaluations that goes way beyond assessing liability and damages. It's an opportunity to evaluate yourself, your practice, and your skills as well as that of your adversaries. Likewise, it's also a chance for your client, your adversaries and their clients to assess your legal acumen and capabilities. Generally, the deposition is the only time you will have before trial to evaluate and assess the parties, witnesses and others who may be called to give trial testimony. More often than not, the non-verbal information, observations and subtle cues given by you or gleaned from others at a deposition will be just as effective, if not more than that of any spoken words. Experienced litigators will learn to look for and provide such information at the deposition and use it to their advantage for their clients and their practice.

## Stop, Look and Listen

The deposition is usually the first opportunity for counsel, the parties and other witnesses to interact, observe and assess each other. Think of it this way: a deposition is like the opening rounds of a boxing match. You get to feel each other out and determine each other's strengths and weaknesses before hopefully throwing that knockout punch at trial. But like a seasoned fighter, you must be prepared; thoroughly train, hone your skills and evaluate your opposition before entering the ring.

When I enter the deposition room, my eyes are like that of the tiger. All right, enough with the boxing analogies. But it's true . . . I enter the room and my antenna goes up. Carefully observing everything, paying attention to detail, listening to each word as it's uttered and then silently asking questions of my adversary and the witness as I do of myself. . . . Are you prepared? Are you thorough? Are you articulate? Are you argumentative? Do you have a command of the witness, the proceedings and the law? Do you follow up after getting a response? Are you asking the right questions to elicit favorable testimony? Are you making supplemental discovery demands based on the testimony? Are your objections proper or obstreperous? Does the witness come across as honest, credible, knowledgeable, educated, confident, sincere, and empathetic, or does he appear unsure, forgetful, deceptive, hostile, manipulative or sarcastic? Is the witness in control or easily intimidated, giving independent responses or being coddled by their attorney? And if they are being coddled, put a stop to it. You see, a leopard never changes his spots. (Don't worry. I'm not going down the animal analogy road.) You can bet your bottom dollar that counsel's and the witness's performance at the deposition will be a litmus test for how they will conduct themselves or be portrayed at the time of trial. Think of it as a litigation or trial foreshadow.

## The Unspoken Discovery

In a tort action, besides liability, the nature, extent and duration of the plaintiff's alleged injuries are usual-

ly contested. General questioning of the plaintiff regarding those injuries will provide only limited data. The unspoken discovery and information available at the deposition (which is there for the taking without a transcription charge) often may prove more valuable than any words spoken from the witness's mouth. Use your eyes in addition to all of your senses. Pay careful attention to your adversary and the deponent. Make note of the surroundings, the interactions, eye contact, subtle gestures, the tone and intonation of the questions posed and their respective responses. Evaluate the temperament and personality of your adversary and the witnesses. Does counsel come across as professional? Does he know the facts of his case? Does he appear sincere, disingenuous, condescending, manipulative or full of himself?

Make a thorough observation of the plaintiff who claims a bodily injury. How is the witness dressed? Did the plaintiff arrive at the deposition alone, with a friend or family member? Does the plaintiff appear to need assistance, etc.? What you observe in the deposition room will often not become part of the record unless you choose to make it part of the record. For example, in a back injury case, did the plaintiff arrive at the deposition wearing high heels?, carrying a brief case or pocketbook?, using a crutch?, wearing braces? Was he or she unable to sit for long periods of time? Does the plaintiff take breaks to stretch? In response to your questioning, does the plaintiff place their outstretched arms over their head, behind their back, or in the air to point or make reference to another portion of their body? Did plaintiff drop something on the floor and pick it up on their own volition? Inquire of plaintiff. Make a specific record: Let the record reflect that plaintiff has testified that he's unable to sit for extended periods of time, but remained seated during the entire two hours of questioning without getting up or requesting a break. Or: Let the record reflect that the plaintiff has raised his right arm over his head and then placed his right hand on the upper middle portion of his back, approximately 10 inches below his neck. If there are allegations of scarring, inspect them and describe them on the record. Likewise, note your file (not the record) if the plaintiff appears in earnest to have physical difficulties; note walking, bending, sitting, standing, lifting or stretches during breaks.

## Send a Message to Your Adversaries and Their Clients

Your performance and how you conduct yourself at the deposition sends a message to your adversary, the plaintiff, other witnesses and for that matter your own client that this is the type of thoroughness and advocacy they should expect through the pendency of the litigation and at time of trial. Did you come to the depositions with a complete file? Are your actions and questions exhibiting that you are prepared? Did you have all of your exhibits pre-marked and did you make enough copies? Are you able to think on your feet? Do you make appropriate, well-founded objections or are you just being obstreperous? Do you convey your knowledge of the law and procedural rules? By asking the plaintiff specific, detailed questions about the accident scene you are telling him that you are prepared, have conducted a thorough investigation, have a full command of all of the facts and circumstances surrounding the case and have been to the scene. For example:

*Q. Ms. Bonomo, you tripped and fell on the broken glass somewhere in aisle 4 of the supermarket, correct?*

*A. Sort of in the middle, but closer to the shelves where the pickles are located, because I fell near that section.*

*Q. And directly across from the pickle section is the canned vegetables' section, correct?*

*A. I don't recall.*

*Q. After you fell, you spoke with the manager, Mr. Steer. Correct?*

*A. Yes.*

*Q. Mr. Steer is a Hispanic male, approximately 6 feet tall, and has an earring in his left ear. Correct?*

*A. I believe so. In fact, I think he helped me up and sat me next to the frozen food section.*

*Q. The frozen food section is at the front of the store directly across from the customer service desk and he helped you sit on the blue newspaper rack in front of that area. Correct?*

*A. That's right.*

## Creative Questioning

Let's be realistic. A prepared witness who's repeatedly rehearsed their testimony will not easily give you the answers you're trying to elicit. Generally, responses to systematic, canned and rote questions will not yield itself to the powerful ammunition you're seeking to throw, that knockout punch at the time of trial. Ask yourself: How can I get the witness to provide meaningful testimony, information and possibly evidence without him (and counsel) realizing that those responses contain such intrinsic value? Invariably, certain responses may not require follow-up questioning or explanation, but will form the basis of post-deposition discovery, investigation or an expert's retention as a means to test the veracity and credibility of the witness's testimony. The key is what I call "creative questioning." Sometimes, it's not just the questions them-

selves that are key, but the sequence and the way in which you ask your questions that become paramount.

The combination of testimony and non-verbal discovery can prove to be invaluable and may lead to expeditiously disposing of the litigation. The plaintiff on the day of the deposition who claims to have daily and continuous difficulty walking, running, climbing stairs, bending, lifting, dancing, carrying heavy objects or requires the use of a cane or brace walking up and down stairs may be a quite a different plaintiff when, thanks to Warner Wolfe, we say, "Let's go to the videotape." There's nothing more compelling than a surveillance tape depicting the plaintiff in physical activity that directly contradicts his testimony.

Let me illustrate this by way of example through my recent questioning of a 30-year-old female plaintiff involved in an automobile accident who claimed to have sustained severe disc herniations with impingement. Her initial testimony (through my rote questions), which was obviously well-thought-out and prepared, echoed the injuries contained in her bill of particulars. With empathetic eyes and tears running down her red cheeks she testified on and on in a very soft-spoken voice that as a result of the injuries to her back, she had to quit her job as a waitress because she couldn't carry the plates or trays of food. She testified in addition to her normal daily activities she was no longer able to stand or sit for any length of time, had difficulty driving a car, walking up or down stairs, could no longer partake in any sports activities, do the laundry, grocery shopping or pick up her 3-year-old daughter, cuddle her in her arms, caress her and give her a hug. Once she was finished, it was time for some creative questioning:

*"There's nothing more compelling than a surveillance tape depicting the plaintiff in physical activity that directly contradicts his testimony."*

*Q. Ms. Smith, after the automobile accident, did you return to work?*

*A. No. I wasn't able to because of my injuries.*

*Q. Are you currently employed?*

*A. No.*

*Q. Have you attempted to seek employment in any capacity?*

*A. No. I'm not able to do very much.*

*Q. At any time after the accident were you prescribed any medications by any of your doctors?*

*A. Yes. I was given some painkillers by my doctor.*

*Q. Did you have that prescription filled at a pharmacy?*

*A. No, because it was Tylenol and I also had some in the house.*

*Q. So you were actually never given a written prescription for any medications or had any prescriptions filled as a result of your injuries?*

*A. No. I don't believe so.*

*Q. You testified that you continue to have pain in your back, your activities and physical ability has been limited since the date of the accident and you underwent physical therapy that lasted for approximately three months. Can you tell me when was the last time you saw or consulted with a doctor or any health care provider concerning your injuries?*

*A. Over a year ago.*

*Q. Ms. Smith, in the last year, have you been to any nightclubs or bars and gone dancing?*

*A. No. I'm no longer able to enjoy dancing because of my back.*

*Q. In the last year have you tried to dance at all?*

*A. No, I told you already, I'm no longer able to dance.*

*Q. Can you ride a bicycle, go swimming, work out in any way?*

*A. No. Not at all.*

*Q. Earlier, when you said you had difficulty bending, could you explain in more detail what you meant?*

*A. I'm unable to pick things up, carry groceries, sweep. It hurts if I try and bend forward.*

*Q. In the last year have you attended any weddings, bar mitzvahs or any other social events?*

*A. My brother's wedding was last March. My husband and I were in the wedding party and my daughter was one of the flower girls.*

*Q. Was there a wedding reception that you attended?*

*A. Yes.*

*Q. Was there dancing at the wedding reception?*

*A. Of course there was dancing. It was a wedding.*

*Q. Did you dance at all. In any capacity?*

*A. No. Not at all.*

*Q. Are you sure?*

*A. Positive.*

*Q. O.K., Ms. Smith. Was there video taken of your brother's wedding and the reception?*

*A. Yes, I was given a copy.*

*Q. Have you seen the video of the reception?*

*A. Yes.*

*Q. Was there video taken of the dance floor?*

*A. Yes.*

*Q. If I were to view that video, would you be depicted dancing at any time or in any capacity?*

*A. Well . . . uh . . . um . . . I wouldn't call it dancing.*

Whereupon a record of the plaintiff's brother and sister-in-law's name, address and telephone number was made. A demand was also placed on the record for production of a copy of the videotape. When plaintiff didn't recall the videographer's information, I left a blank in the transcript for her to provide the information. The day after the deposition, plaintiff was served with supplemental discovery demands based upon her testimony that included a demand for the video. The rest is history. You know how this dance ended. Not only did the video show the plaintiff on the conga line, but it showed her ability to remain standing along with the others in the wedding party for the entire 40-minute ceremony. Interestingly, it also showed the plaintiff bending to the floor both before and after the ceremony to pick up her sister-in-law's train as they climbed and descended the stairs in front of the altar and scurrying after her daughter, the flower girl, who was afraid to walk down the aisle. The case settled for less than nuisance value within a month after the deposition.

## Corroborating the Veracity of the Witness's Answers

Ms. Smith's Q&A is also illustrative of creative questioning whereby you try to place the witness in various situations, surroundings, environments and circumstances so it becomes readily apparent that the veracity of their testimony may be challenged or contradicted by others (non-parties) or best of all by documentary evidence. A witness will think twice about giving misleading or false testimony if he or she knows that friends, family members, colleagues, co-workers, health care providers, religious leaders, ex-girlfriends, neighbors, or other innocuous acquaintances are likely to be called upon at trial, asked to place their hand on a bible, swear to tell the truth and provide testimony that will contradict that given at the deposition. Based upon the plaintiff's responses to your questions, are there any documents out there (discoverable) that, when shown to a jury, will establish that the plaintiff 's testimony is not credible? Don't play all of your cards. Get what you want through the back door. As part of your defense, establish a line of questioning, a theory or a point you'll save down the road for closing arguments, for which you seek favorable or useful testimony and come up with questions that place the plaintiff in an environment where he'll be cornered into having to tell the truth or, better yet, be caught in a lie.

Let's go back to our example: the plaintiff's physical abilities are not restricted to the degree, certainty or extent as he would have a jury believe. After you ask the plaintiff what he currently does for work or did for work at the time of the accident (rote Q&A), don't stop there. Ask detailed follow-up questions; how many people there are in the company or on the job ? Do you generally work alone or among others? What are the names and telephone numbers of your supervisor(s), co-workers or other business associates? Do you have to travel as part of your job? Next ask questions that may establish that the plaintiff's job description, duties and responsibilities require physical activity contrary to his prior testimony and then continue with step-by-step, detail-by-detail questions that will elicit responses depicting the witness's physical abilities. Here's another example of actual testimony. It went something like this:

*Q. Mr. Jones, you previously testified that you have great difficulty bending, lifting, walking and carrying heavy objects on a daily basis, is that correct?*

*A. Yes.*

*Q. What do you currently do for work?*

*A. For the past eight years I've been employed in the computer industry by a company called CRM Services, Inc. as a senior systems analyst. Pretty boring stuff. I sit at a desk working with computers all day long.*

*Q. What does CRM stand for?*

*A. Computer repair and maintenance.*

*Q. Currently, what are your day-to-day job responsibilities?*

*A. I repair computer hard drives and monitors that are under warranty.*

*Q. How many employees are in the company?*

*A. About 50.*

*Q. Do you currently report to a particular supervisor?*

*A. Yes. Craig Mazzuchin.*

*Q. How many other people in the company have similar job responsibilities?*

*A. I would say around 15.*

*Q. Do you work in relatively close proximity to each other?*

*A. Yes. There are three people to each work station; we tend to share a set of tools and equipment.*

*Q. Do you normally share the same work station with the same people every day?*

*A. Generally, yes. But sometimes we switch for different reasons or if someone leaves the company or there's a new worker.*

*Q. How long have you been at your current station with the other two co-workers and what are their names?*

*A. First there's Arnie Snell. He's been with the company for about four years, but we've been at our station together for only a little over a year. And then there's Steve Kang. He just joined the company in November.*

*Q. Can you tell me the names and addresses of all of your co-workers?*

*A. I don't recall all of their names right now, but let's see . . . there's Tim Silver . . . Bryan Klein . . . Susan Hyman, um . . . Kelly Santa-Maria, and, um, Tank Connors. We call him Tank, because when you take a look at him . . . well . . . you'd understand. I really don't know his real name. I don't remember any others right now.*

*Q. O.K. We'll ask the court reporter to leave a blank in the transcript and I'll ask you to provide us with the correct spelling, address and telephone number of each of the co-workers you have just named as well as any other co-worker you recall after the deposition is completed.*

*A. I'll see what I can do.*

*Q. Now, Mr. Smith . . . When you say that you repair hard drives and monitors . . . can you be more specific and tell me in more detail what you actually do on a day-to-day basis?*

*A. Well . . . When customers have problems with their computers, they are sent back to the manufacturer, who has a service contract with CRM. The hard drives or monitors are boxed by the manufacturer and sent to us for repair. When they arrive, one of the supervisors reviews the repair order and, depending on the repair needed, assigns the job order to one of us. We get a copy of the new job order each night before we leave.*

*Q. When the computers arrive at CRM for repair where do they get stored until they're worked on?*

*A. They are kept on shelves in one of the back rooms, next to our parts department. We call it the property room.*

*Q. Can you describe the shelves, how many shelves, what they are made of, their height, their length?*

*A. There are three or four gray metal shelves about 2 to 3 feet apart, one on top of the other. I'd say the height of the top shelve is no more than 7 feet. The computers, monitors, laptops and other components are left in their boxes and placed on any one of the shelves with a copy of the repair order taped to the outside of each box.*

*Q. How does the computer get from the property room to your work station?*

*A. Whoever is assigned to the repair order goes to the property room, removes the boxed hardware from the shelf and brings it to their station. Usually, we have a dolly or hand truck to wheel some of the bigger boxes. When the job is done, I box the hardware back up, place a "repaired sticker" on the outside of the box, and bring it back to the property room and place it back on the shelf.*

*Q. How far is the property room from your station?*

*A. Oh, I don't know exactly. I would guess around 75 to 100 feet.*

*Q. When you bring the hardware back to your station, do you yourself actually remove it from the box and place it on your work station and when you are done, remove it from your station and box it back up?*

*A. Yes.*

*Q. Generally speaking, on average, how much do each of the boxes weigh?*

*A. I have no idea. I couldn't tell you. It really varies.*

*Q. Can you approximate?*

*A. I would say anywhere from 15 pounds to 50 pounds.*

*Q. Are you also responsible for taking the hardware out of the box, placing it on your station and then repackaging it once the job was completed?*

*A. Yes.*

*Q. How high is your work station from the ground?*

*A. I don't know . . . let me think . . . I would say around 4 feet or so.*

*Q. On average, how many pieces of hardware do you repair in any given day?*

*A. It also varies. It depends on what the job requires and if we have the parts in stock. Some days I may only work on one piece and there are other days I can fix six or seven pieces.*

*Q. Mr. Smith, as a result of your injuries, did you miss any time from work?*

*A. Yes, about a week or so.*

*Q. When you returned to work after the accident, did you at any time, or on any occasion ever tell Mr. Mazzuchin or any supervisor that you may have difficulty carrying, lifting or removing or replacing the boxes to or from the shelves?*

*A. I'm not sure. I don't think so. Probably not.*

*Q. When you returned to work, at any time, or on any occasion did you ever ask any of the co-workers you mentioned before, like Tank, or anyone you didn't yet identify, for help carrying or lifting any of the hardware.*

*A. Not generally. Sometimes, if its really heavy, I'll ask someone to help me.*

*Q. And are you called upon at times to help a co-worker if a piece of hardware is particularly heavy?*

*A. Sure. That happens occasionally.*

*Q. Have you ever told any of your-co-workers, when you've been asked for assistance, that you can't because you have problems with your back?*

*A. I don't recall. I don't remember the last time I was asked to help.*

*Q. Mr. Smith, when you were examined by any of your doctors after the accident, whether they be your treating physicians or any of your designated expert(s), did you ever tell them that your job entails lifting boxes of hardware on a regular basis?*

*A. They never asked.*

## Remember: You're a Professional

I can't tell you how many times I've conducted a deposition of a witness and their counsel is either not concentrating, not paying attention to the questioning, busy scurrying through unrelated paperwork, reading a newspaper or a magazine. They are totally oblivious to the world around them. In fact, once in a deposition, co-defendant's counsel had to be nudged on the arm and woken from her catnap. Too often I've observed counsel leave their client's side, ask to be excused and attempt to leave the room, but have told me to go ahead and continue my questioning. My first thought is . . . Gee, I'm glad this clown's not my attorney and I always wonder what their client thinks of him. When this happens, I immediately stop the Q&A and remind counsel that it is improper for me to continue questioning his client in his absence.

Be mindful that your clients are with you. Your actions are constantly being monitored and observed. Your conduct at a deposition reflects upon you as a person and professionally. No matter how heated the deposition gets, compose yourself and refrain from engaging in unrelated colloquy, personal attacks and ad hominems. They are not only improper, but also become part of the permanent record for which your client will be loathe to pay. Such petty antics can only come back to haunt you and diminish your effectiveness. As a general rule, consider that anything that you say will be published the next morning on the front page of the *New York Times*.

Mr. Black's definition only scratches the surface. Yes . . . The deposition is there for the taking, but your actions and inactions bespeak volumes of your ability, integrity and professionalism.

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# Proposals for Reducing the Impact of External Circumstances Upon Civil Verdicts in New York

By Michael A. Haskel

Jury verdicts may be influenced by a host of "external circumstances" which, for the purpose of this article, will be defined as any factor which does not constitute relevant admissible evidence[1] but which nevertheless causes a jury to render a verdict contrary to the charge given by standards set by the trial court.[2] When a jury bases its verdict on external circumstances, it has engaged in "jury nullification," a term most commonly applied to criminal trials, although in its broadest application this conduct can occur in a civil trial.[3] Civil jury nullification has substantial consequences, not only for litigants, but also for their insurance carriers, and for the community at large.[4] The consequences are of particular concern to personal injury lawyers and their clients. The liability and damage components of civil verdicts may be influenced by a host of external factors, including sympathy, anger, disagreement with existing law, or racial, ethnic, or religious prejudice.[5] When any factor or host of factors cause jurors to consciously override their oaths to render a fair and impartial verdict based on the competent evidence, they have engaged in nullification.[6]

*"When jurors arrive at a verdict, they establish the community's sense of justice concerning a particular case, although the community is usually defined narrowly in civil cases, and the justice dispensed is unique to the facts of the controversy in question."*

The vagaries of jury trials have always been a feature of this method of dispute resolution and even in the absence of jury nullification, jurors are influenced by their socio-economic, racial, ethnic, and religious backgrounds and beliefs, because jurors bring with them their own personal experiences, beliefs, and approaches to determining questions.[7] Individual jurors will evaluate witnesses' credibility from different perspectives, and follow different approaches in determining issues such as reasonableness, relative fault, and justification. Yet the dynamic triggered when six strangers each provide input into a civic decision is a microcosm of the larger democratic institutions that function through checks and balances and depend upon compromise in reaching a consensus.[8] When jurors arrive at a verdict, they establish the community's sense of justice concerning a particular case, although the community is usually defined narrowly in civil cases, and the justice dispensed is unique to the facts of the controversy in question.[9] At some points, the jury's role may drift beyond the parameters set by the political system, which envisions that the jurors will follow the judge's instructions. When the hazy line that defines a jury's role has been crossed, the administration of justice is challenged.[10]

It is beyond the scope of this article to consider the myriad external circumstances that result in jury nullification, or to engage in a moral or philosophical discourse concerning this phenomena. After a general discussion of the role that a jury is to play, this article will briefly discuss how external circumstances may subconsciously or consciously affect jury verdicts. There will follow proposals addressing how the influence of external circumstances can be reduced or addressed, both before and after verdicts.

## The Role of the Jury

In *Abbot of Tewkesbury v. Calewe*, a 14th-century English jury was called upon to determine the issue of whether certain realty was "free alms" or "lay fee."[11] Being unable to answer the question, if they understood it at all, the jury advised the judge that "we are not men of law," to which the judge responded, "say what you feel."[12] As has been pointed out, this interchange articulates the problem that arises when the court has not properly instructed the jury, leaving the jury confused as to how to render a decision.[13] However, the significance of the case goes beyond illustration of the jury's need for guidance. It reflects the historic role played by the jury, which was once given far greater freedom in reaching decisions.[14] Colonial American juries were judges of the law and the facts.[15]

After independence, however, jurists such as Associate Supreme Court Justice Joseph Story perceived a danger of a jury's disregard of the law and application of its own notion of mercy, thereby acquitting a defendant where the evidence required a conviction.[16] Of course, nullification can also occur in the reverse situation, as when a jury renders a punitive verdict that disregards the law but which satisfies some bias.[17] In either event, the nullification poses a threat to the process by which existing jurisprudence is vindicated. This threat was addressed by Justice Harlan in 1895 in

*Sparf and Hansen v. United States*.[18] There the Supreme Court held that it is the duty of a jury in a criminal case to apply the law as given to it by the trial court.[19] This decision set a precedent that has been followed to the present.

The issue of whether a jury could even be informed of its power to nullify was heard in the case of *United States v. Dougherty,*[20] which concerned protests arising out of the Vietnam War. In a decision which recognized that our democratic roots include many examples where juries had nullified the law on the basis of conscience, the District of Columbia Court of Appeals affirmed the trial court's refusal to charge the jury on their power and right to nullify. The court held that any instruction that the jury had the power to nullify would encourage lawless behavior.[21]

This is not to say that the jury has lost its power to disregard the law in rendering a verdict. Of course, this power remains.[22] Indeed, there is a vigorous debate over whether jury nullification, with its virtuous history, should continue to act as a bulwark against the community's outrage over flaws in the system.[23] The check upon potential abuses through the exercise of the power to nullify is promoted by the sanctity of the process by which the verdict is rendered. The New York State Bill of Rights, Civil Rights Law § 14, specifically provides that a jury cannot be subjected to any action, or be held liable for civil or criminal liability, for the verdict rendered, except when the verdict is the product of "corrupt conduct, in a case prescribed by law." Jury nullification does not constitute corrupt conduct under this section.

Regardless of the position that one takes on whether a jury should engage in nullification, there is no doubt that this practice has persisted, not only in criminal cases, but in civil as well.[24] Insofar as they have the raw power to render a verdict that is contrary to law, jurors have the power, although not the right, to nullify.[25]

In civil cases, where the juries have perceived some injustice in existing law, juries have exercised this extra-legal power to arrive at verdicts to satisfy their own notion of fairness. This type of nullification is believed to have occurred in cases involving the now-repealed law of contributory negligence.[26] Faced with a situation where the plaintiff was only partially at fault, juries in the past would sometimes render verdicts reflecting no fault on the plaintiff's part, in essence nullifying the law of contributory negligence to permit recovery. However, the jurors might then reduce the damages by a percentage of the plaintiff's liability. The comparative negligence standard that later went into effect was applied by such juries prior to the change in the law.[27] Other examples of such civil jury nullification abound. In medical malpractice cases where an infant sustains a severe injury, the jury will sometimes ignore competent evidence that supports a finding of no liability against the defendants, and may impose damages well beyond any injury that may have been caused by the malpractice. Engaging in this form of nullification, the sympathetic jury imposes its personal social justice upon a society that may not adequately care for those who are suffering from severe injuries.[28] In acting in this manner, however, the jury exposes medical providers who are blameless, and their carriers.

## The Role of the Court

The power of juries to nullify is restrained in a number of ways. Long before reaching trial, a judge may dismiss a case for failure to state a cause of action,[29] or may grant summary judgment to one of the parties when there is no issue of fact.[30] During the trial, this court may direct a verdict as a matter of law.[31] A mistrial may also be declared during the trial when the court believes that the jury cannot reach a fair verdict, as for example, where trial counsel has engaged in misconduct that prejudices a jury, and which taint cannot be cured by a corrective charge.[32] Post-trial motions empower the judge to direct verdicts, set aside verdicts, and order new trials.[33] This judicial authority in civil cases avoids juries where a determination may be made as a matter of law, and limits the powers of juries in cases where the court believes that the jury has not reached a fair verdict.[34]

Where a case is resolved as a matter of law by the court's directing a verdict, or where the court has set aside a verdict because the evidence so clearly preponderates against the jury's verdict, the jury's power to nullify has itself been checked.[35] However, this presumably leaves to the jury the closer cases where subtle biases may tip the scales. In cases where jury verdicts can go either way, the verdicts cannot be set aside as being against the weight of evidence, although they can be set aside in the interests of justice.[36] It is here where the jury's susceptibility to external evidence may cause the most damage.

Before discussing how the influence of external circumstances upon a jury can be further reduced, it is well to consider some general aspects of the cognitive process to better appreciate how to treat those aspects of it which involve jury nullification.

## Subconscious and Conscious Influences

The operation by which jury members process information and then engage in collective deliberations to arrive at a consensus has been the subject of numerous studies and articles.[37] Although there are conflicting views as to how the process works, two assump-

tions may be safely made. First, there will always be cases where a juror will be obstinate in his or her conscious disregard of the law.[38] Such jurors, which may be referred to as "obstinate jurors," will not be affected by jury instructions because the obstinate juror deliberately disregards the judge's instructions.[39] Where the obstinate juror has allies on the jury in the form of other obstinate jurors, or is sufficiently persuasive in advancing his or her position without revealing the underlying basis for taking such position, the result may be nullification.[40]

Second are cases where the judge's instructions had an impact on the cognitive processes of members of the jury, who keep an open mind concerning evidence and follow the law. Such jurors may be defined as "reactive jurors." This is not to say that a reactive juror is free of prejudice and may not be influenced by external circumstances. Subconsciously even conscientious jurors have a tendency to be influenced by external circumstances.[41] However, if reactive jurors come to appreciate that they are being influenced by factors outside the judge's instructions, they will either overcome such influences, in which case they remain reactive jurors, or they will consciously choose to allow the influence to play a role in their decision making. In the latter case, the reactive juror becomes an obstinate juror. The goal of the system should be to eliminate the obstinate juror from service, and to counteract subconscious influences upon reactive jurors so that they can render a verdict based upon competent evidence and apply the laws given to them by the court.

These two basic assumptions suggest that jury nullification in civil cases may be addressed in the following four ways: (1) by minimizing the effect of jury nullification before a jury is empaneled through approaches which affect the pooling process and overall composition of the *venire* persons; (2) dealing with the jury nullification issue during this selection process; (3) reducing influence of external factors during a trial; and (4) dealing with potential jury nullification after the trial.

In considering proposals to reduce the practice of nullification, it should be borne in mind that their application to civil juries is not confronted by some of the arguments favoring nullification in criminal cases.[42] Apart from the obvious difference that liberty is at stake only in the latter, the state is not prosecuting in the former, and the need for a check against tyranny, unpopular law, or overzealous prosecution is absent. To be certain, there are injustices in civil trial settings, and civil verdicts can have a significant impact on litigants, but the element of government oppression with which jury nullification has been historically concerned, is not starkly present.[43]

## I. Jury Composition

The goal of the jury selection process should not only be to provide a pool of prospective jurors, but also to draw widely from the "community" so that the jury is representative of the diverse groups which comprise the population from which it is drawn.[44] Drawing from a broad spectrum of the population is important to achieve diversity.[45] The mechanics of the jury selection process involve the identification of prospective jurors on the basis of lists, including motor vehicle operators, taxpayers, and utility users.[46] Prospective jurors on the lists are typically residents of the geographic area encompassed by the jurisdiction where the prospective jurors may be empaneled.[47]

Although the right to a jury trial may be waived, the New York State Constitution provides in article 1, section 2, that jury trial is guaranteed and shall "remain inviolative forever." The Constitution does not directly address the manner of jury selection, which is largely left to the state legislature.

Jury selection is addressed in two statutory bodies of law. The first is contained in Judiciary Law §§ 500 *et seq.*, which is concerned with establishing the political framework and the procedures by which jurors can be pooled. There are provisions that appoint the persons responsible for overseeing the process and those charged with the administration of the process,[48] that identify lists from which jurors can be drawn,[49] and that address juror qualifications.[50] The geographic area from which jurors are to be pooled is also a part of the Judiciary Law.[51]

The second major source of statutory jurisprudence concerning jury selection is the Civil Practice Law and Rules.[52] The CPLR is concerned with the procedure to be followed concerning jury selection, issue resolution by the jury, and the presentation of issues during jury trials, and with post-verdict motions.[53]

The cases addressing the constitutional requirements applicable to jury selection are legion. Two basis rights are involved: the right of litigants to an impartial trial, and the right of qualified citizens to serve on juries.[54] As noted above, the Judiciary Law, which is concerned with the first phase of the trial that involves the pooling of *venire* persons for potential service, implements certain aspects of the Constitution's broad guarantee of a jury trial. An integral part of this right includes the employment of random methods of the selection of jurors, and the assurance that citizens are afforded the opportunity to serve, provided they are not exempted, disqualified or excused.[55] Discrimination against any segment of the community in the pooling of jurors is clearly condemned by case law.[56] While any

given jury may not be representative of a cross-section of the community, where the composition of jurors is the product of deliberate, intentional or systematic discrimination, the selection process is unconstitutional.[57] Included in the prohibited selection practices would be discrimination on the basis of race, ethnicity, religion, sex, or sexual preference.[58]

There is also a potential prohibition against excluding jurors because of their beliefs.[59] However, this constitutional line must be carefully drawn. Where a juror's belief is prejudicial, the verdict may be tainted, and a fair trial denied.[60] Courts usually address the problem by asking jurors whether they can be fair despite their beliefs. If the juror answers affirmatively, then the juror may be permitted to sit.[61] This approach would allow members of hate organizations such as the Ku Klux Klan to be empaneled, provided the prospective juror swears that he can render a fair verdict.[62] However, such a juror's protestations that he or she can sit fairly may be no more than a subterfuge.[63] When general questions are asked as to whether a juror can render a fair verdict, the answer may be truthfully given because the juror's perception on such a general level is that the juror can be fair.[64] Ironically, those jurors who are most honest about their own personal biases are most likely to be sensitive to potential problems of fairness, and of the subtle ways that prejudices are likely to influence their decisions, yet because of their doubts, they are likely to be disqualified.[65]

## The Right to a Fair Jury Trial

In the face of competing interests, choices have to be made. Courts stress the right to a fair trial and it would seem that this consideration would override the chilling effect that might follow from disqualifying jurors on the basis of their beliefs and their membership in various groups.[66] When those beliefs or memberships present potential dangers to a fair trial, they should lead to disqualification.[67] The artificial approach in which a juror is allowed to serve despite holding beliefs that are likely to influence such juror, upon the questionable assumption that an expurgatory oath from such a juror that the juror could sit fairly, ignores basic psychology.[68] It also ignores the dictates of fairness. A party that holds biases is likely to follow them on at least a subconscious level, and therefore the danger of an unfair verdict is presented. Disqualification does not deprive the prospective juror of the right to hold his or her beliefs or to sit on other juries when those beliefs will not play a role in the rendering of a verdict.

The proposals which follow are based upon the following premises: (1) that the current balancing of competing interests of a fair trial on the one hand, and the right of a prospective juror to sit on a jury despite having beliefs which indicate a potential for an unfair verdict, weigh in favor of disqualification; (2) that statutory provisions do not adequately address the problem of bias in either the selection process or in the questioning and qualifying of jurors; and (3) existing procedures for insuring juror impartiality are underutilized.

## Proposals

### I. Jury Pooling to Assure Greater Diversity

Though Judiciary Law § 500 contemplates that jurors will be selected "from the community in the county or other jurisdiction where the court convenes," there appears to be no constitutional impediment to pooling jurors from counties outside the geographical area where the trial is to be conducted.[69] To be certain, there would be some inconvenience, and one would hardly expect potential jurors in Buffalo to report in Riverhead for jury duty, but restricting jurors for service within the county where they reside appears too rigid. The benefit of a more extensive jury pool would be an increase in the diversity of prospective jurors. For example, jurors sitting in Queens could be drawn from Brooklyn, Nassau, and Staten Island, and vice-versa.

By increasing the geographic area from which jurors are selected, the definition of "community" would be expanded to encompass a region of two or more counties. Assuming that there are significant differences between existing *venire* in terms of economic composition, racial and ethnic makeup, and concentrations of members of various religious groups, this expansion of the boundaries from which jurors are selected would assure greater diversity.[70] It would also increase the likelihood that jury verdicts would be more reflective of broader-based community values. Conversely, parochial determinations would be less likely.

### II. Greater Use of Jury Registration Questionnaires to Promote Impartiality

Judiciary Law § 513 formerly set forth the substance of the questionnaire which is to be filled out by prospective jurors. For the most part, the form of the questionnaire sought very general information along with answers which would reveal whether the *venire* person meets the general qualifications of Judiciary Law § 510. After its amendment in 1996, Judiciary Law § 513 referred the form of the questionnaire to the Chief Administrator of the Courts, thereby promoting a greater degree of flexibility. It is suggested that inquiry be expanded to assist in determining if a *venire* person can ignore external circumstances. Questions could be asked as to whether the *venire* person had any racial, ethnic, religious, or sexual prejudices.[71] The wording of the language of any such questionnaire would have to be carefully drafted to which purposes the services of psychologists may prove helpful.[72] The questionnaire would also have to be drafted to avoid unduly intru-

sive questions. A balance would have to be struck between the juror's right to privacy, and the litigants' right to a fair trial.

Within the appropriate parameters, the questionnaire could seek to identify obstinate jurors. Insofar as such jurors might be qualified to sit in certain cases, but not others, this information should be made available to attorneys and can then be the basis for exercising a challenge for cause in the appropriate case.

As noted above, it is anticipated that certain jurors might give untruthful responses, both those that wanted to be disqualified to avoid service, and those who wish to serve regardless of biases.[73] Yet, the questionnaire would still serve a role with respect to those jurors who answer truthfully and on the basis of such candor, should not serve.

Another possible way to increase the likelihood of fairness is to use the questionnaires to assure greater diversity. The requirements of Judiciary Law §§ 500 and 506 that jurors shall be selected at random, can be satisfied while assuring greater diversity in jury composition. For example, juries can be chosen by deliberately summoning jurors from subsets consisting of different neighborhoods, different socio-economic groups, different age groups, different degrees of education, and other factors.[74] The selection process can be from a mass list based upon subsets and can be done on a computer to assure both randomness and appropriate representation of subsets, so as to assure that the *venire* persons represent a cross section of the community.[75]

### The Venue Statutes

CPLR 501 *et seq.* deal with the issue of the venue of a trial, which can be changed for a host of reasons. For the purposes of avoiding a biased venue, focus is upon CPLR 510. In pertinent part, this section provides that on motion, a court can change the place of trial where "there is reason to believe that an impartial trial cannot be had in the proper county." This section has the potential for addressing the effects of external circumstances upon jury verdicts.

An illustration of how the Civil Practice Law, a predecessor section to the CPLR, was employed is instructive. In *Althiser v. Richmondville Creamery Co.*,[76] foreign creamery companies were sued based on alleged oral contract brought by 126 dairy farmers and milk producers residing in a county where the action was brought. The court noted that the population in the county largely consisted of those who would be sympathetic to the plaintiffs, including other farms, milk producers, friends and relatives. Therefore, the court granted a change in venue to eliminate bias.

Although demonstrating bias is often difficult, it has nevertheless been held that a party seeking to change venue must establish the grounds for such charge on the basis of convincing evidence, rather than speculation. In *Hayland Farms Corp. v. Aetna Casualty & Surety Co.*,[77] the plaintiff, which had commenced suit in New York County, claimed that as a result of unfair publicity, its action against a fire insurance company could not be fairly tried in Monroe County, where the property was located. However, the court held that New York County was not a proper venue and concluded that the claim that a trial would be prejudicial in Monroe County was based upon "mere suspicion." In contrast, a lower standard was employed in *Burstein v. Greene*,[78] where the court held that a change of venue from Nassau County to Kings County was warranted because plaintiff in a libel action was a spouse of a resident Supreme Court Justice of Nassau County.

Whether a court will order a change of venue based upon adverse pre-trial publicity, the prominence of one of the litigants within the community's court system, or the pecuniary interests of the community within the jurisdiction, such choice appears to be largely addressed to the court's discretion.[79] However, the cultural, economic, or racial composition of juries within a particular venue is not a sufficient ground for transferring venue pursuant to CPLR 510(b). Indeed, a transfer of venue on this ground would constitute an admission that a fair trial could not be obtained in a county because the residents of the county are, on the whole, likely to consider external evidence. Such an admission is not likely made for a variety of reasons, including political ones, and would raise constitutional issues. Yet, it is beyond question that biases have played roles in jury trials, and the tendency to prejudge is presumably more widespread in particular venues.[80] While a change of venue should be considered whenever it is believed that there cannot be a fair trial within the subject jurisdiction, it should be recognized that changes in venue are not frequently granted. Absent the court shifting the burdens of showing that bias exists, which are now heavily against the movant, the focal point for practitioners should be to address effects of potential bias within the venue.

## III. *Voir Dire*

The second stage of jury selection is the process by which *venire* persons are seating for questioning by lawyers. During the *voir dire* of *venire* persons, lawyers ask questions which are designed to ascertain if jurors will be influenced by external circumstances. Often the process involves the verbal jockeying of litigation counsel based upon the lawyers' perception of how law and facts, including external circumstances, may influence the way jurors perceive their clients.

Where it is clear that a juror cannot sit fairly, the juror may be challenged for cause pursuant to CPLR 4108.[81] Challenges for cause are not limited to those set forth in CPLR 4110,[82] which sets forth reasons for disqualification, including the pecuniary considerations and degree of consanguinity to a party. Case law deals with questions of bias, which can also be a basis for a challenge for cause.[83] Unfortunately, a number of decisions show that some jurists have a tolerance for jurors with potential biases.[84] Where the juror perfunctorily declares that he or she can sit fairly, some judges are satisfied.[85]

Where the juror cannot be challenged for cause, but the attorney for one of the parties does not believe the juror would be favorably disposed to his client's position, a peremptory challenge under CPLR 4109 can be employed, although under the Supreme Court's decision in *Batson v. Kentucky*,[86] peremptory challenges cannot be used on the basis of color. This prohibition extends to other forms of discrimination, such as use of peremptory challenges on the basis of religion or ethnic background.[87]

In general, the distinction between peremptory challenges and challenges for cause may distill down to the question of whether a potential juror believes that he or she can put aside personal feelings and follow the court's instructions.[88] However, this professed ability, when misguided or disingenuous, is particularly pernicious if an issue of race, religion or national origin is likely to influence the verdict. Therefore, it is suggested that even a hint that such discriminatory considerations or influences would come into play should be a basis for disqualifying jurors.[89] To effectuate that ground for disqualification, CPLR 4110 could be amended to expressly provide for disqualification on the basis of probable racial, ethnic, religious, sexual, or sexual preference bias.

## IV. The Juror's Oath

Pursuant to CPLR 2309, jury oaths are to be administered, but the form of such oath is not spelled out by the statute. Psychologists advise that the taking of an oath has particular significance.[90] The oath also has a special significance in jury trials, and is presumably designed to impress upon each juror the significance of the role that is to be played so that the juror can discharge his or her duties in the serious manner intended.[91]

The standard oath is very general. In essence, the juror swears to render a fair and impartial verdict. An oath based upon the assumption of such a general responsibility is insufficient because a ritualistic incantation of fairness hardly arouses a juror's consciousness of the duty to suppress tendencies to consider external evidence. In the abstract, most jurors believe that they can be fair.[92]

It is suggested that the oath contain specific language admonishing the juror not to consider external evidence and the charge could expressly describe what this entails. The form taken by this specific language should have the input from not only lay persons, but also psychologists. The phrasing of the oath could also be particularized with respect to the case in question.[93] For example, where the litigants are of different ethnic, religious, or racial backgrounds, the oath could be specifically framed in terms of the jurors disregarding these issue circumstances and basing their verdict on the facts. The element of sympathy could also be specifically tailored to the case in question.

## V. The Increased Role of the Judge

The trial judge has broad discretion in questioning possible jurors to avoid bias on the panel.[94] This discretion includes *voir dire* of the jury pool.[95] Because of the importance of a jury's ignoring external evidence, it is suggested that in those cases where there is a potential threat of nullification, the judge may speak to each juror separately, and out of the hearing of other jurors, to assure that the juror will exclude external evidence.[96] This separate treatment is likely to increase the juror's awareness of the importance of the subject, while encouraging the juror to express an inclination to consider external evidence.[97] Even if the juror fails to articulate doubts about being able to sit fairly, the process will reinforce the importance of impartiality, and what psychologists call "cognitive dissonance," which occurs when there is a conflict between competing considerations. Cognitive dissonance might cause a juror to suppress biases that might compete with the juror's higher duty to render an impartial verdict.

## VI. Pre-trial Instructions

Judges usually instruct jurors prior to the commencement of a trial as to their duties. The standard instructions contained in the Pattern Jury Instructions address the issue of external evidence in a number of ways, chief of which PJI 1:6 (admonishing that jurors are bound to accept the law as given by the court), and PJI 1:07 (instructing the jury that they must consider only competent evidence).

It is believed that these pre-trial instructions are insufficient. Additional language should be employed to further impress the jury of their duty of fairness. While the Pattern Jury Instructions address various circumstances that should not be considered in rendering a verdict, such as perceptions as to the court's personal views (PJI 1:6), and opening statements (PJI 1:3), specific instructions concerning biases could be articulated to

emphasize that the jury should make every effort to overcome any tendency to consider external circumstances, or to allow biases to enter into the verdict.

### VII. Requests to Charge

Predicated upon the system's faith that a jury will apply the law to the competent evidence, the jury trial's defining moment is the court's charge, which is expected to confine the jury's role to judging the facts of the case before them.[98] Pursuant to CPLR 4110(b), requests to charge include any appropriate matter. It is also clear the judge is not restricted to the request to charge. The charge has two aspects. The first includes general instructions, and the second encompasses the specific jurisprudence that governs the causes of action in the case. It is with the former aspect that there may be admonitions against consideration of external evidence. The general language currently employed concerning the rendering of a fair and impartial verdict on the competent evidence may be insufficient in certain cases. Specific language addressing particular issues should be considered.[99]

### VIII. The Use of Special Verdicts and General Verdicts in Interrogatories

It has been found that special verdicts and written interrogatories are more apt to reduce the jury's consideration of external circumstances.[100] When a jury is forced to focus upon specific factual details, there is less room for the influence of conscious and subconscious circumstances that would otherwise influence the jury.[101] Particularly in cases where external circumstances are more likely to be considered by a jury, the court should utilize special verdicts under CPLR 4111(b) or general verdicts with interrogatories under CPLR 4111(c).

### IX. Post-trial Motions

Although CPLR 4404(a) provides, among other judicial alternatives, that verdicts which are contrary to the weight of evidence can be set aside, the same subsection also calls for setting aside a verdict "in the interests of justice." This discretion can certainly be exercised where external evidence, particularly bias on the basis of racial, religious or ethnic grounds, has come into play in a civil verdict. This option is available to the judge, even when the verdict is not against the weight of evidence. The paramount consideration is whether the trial has been fair. The court should freely utilize CPLR 4404(a) to set aside verdicts that were tainted and direct a new trial.

## Conclusion

There is no question that external circumstances influence the jury, and this is inherent to the jury process. The consideration of external circumstances poses a serious threat to the system of justice. However, the effect of external circumstances in influencing jury verdicts can be substantially reduced. Three general ways have been suggested. The first, involving the jury selection process, can be modified to assure greater diversity. This goal could be achieved not only by polling jurors from more than one county, but also by use of questionnaires, and by computers to ensure panels are diverse.

Second, empanelment of the jury and the conduct of the trial can be executed in a manner which greater impresses each juror with their responsibilities. The oath could be modified, and tailored to address potential jurors and their sense of responsibility subject to greater scrutiny. The trial judge can take a more active role in combating the influences of external circumstances, including greater participation in *voir dire,* through more detailed instructions, and charges more sensitive to this topic.

Third, burdens of setting aside verdicts, and of changing venues, can be modified to reflect a greater appreciation of the subtle psychological effects of the consideration of external circumstances.

## Endnotes

1. By way of illustration, external circumstances may include the personalities of the litigants and their attorneys, the demeanor of the judge, political and economic conditions, or the jury's personal notion of fairness when such notion conflicts with the court's charge of the law. Included within the term are also biases which influence the juror to disregard competent evidence. Such biases may be the product of prejudice or sympathy and may influence the juror to prejudge issues or parties. Horowitz, Kerr, & Niedermeier, *Jury Nullification: Legal & Psychological Perspectives*, 66 Brook. L. Rev. 1207, 1230–1237, 1244 (2001).
2. New York Pattern Jury Instructions-Civil, at 3d ed., 1:7 coincides with this definition by requiring jurors to consider only the competent evidence before them.
3. Although the application for the term "jury nullification" may appear "problematic" to some scholars (*see* Horowitz, et al., *Jury Nullification*, *supra* note 1 at 1219–1220) when jurors deliberately choose to ignore the law, the phenomena cannot be denied in the context of civil cases.
4. Cases involving torts, particularly those wherein personal injuries have been sustained, are susceptible to the influence of external factors as evidenced by jury nullification in tort cases. Landsman, *The Civil Jury in America: Scenes from an Unprecedented History*, 44 Hastings L.J. 579, 610 (1993).
5. *See United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997), noting possible causes of nullification. It should be noted that nullification can also fail to occur if a jury fails to find liability. In *Joyce v. Rumsey Realty Corp.*, 17 N.Y.S. 118, 216 N.E.2d 317, 269 N.Y.S.2d 105 (1966), the court held that if the jury had rendered a no cause verdict under the facts of a Labor Law case, the jury would have engaged in nullification.
6. Nullification requires all jurors to disregard the facts, law and their oath. Finkel, *Commonsense Justice, Culpability and Punishment*, 28 Hofstra L. Rev. 669, 678 (2000).

7. For an interesting discussion of the mental processes which are involved in jury deliberations, see Thornburg, *The Power and the Process: Instructions in the Jury Trial*, 66 Fordham L. Rev. 1837 (1998).
8. Jurors tend to construct their own versions of events, then filter information in accordance with the stories they have constructed. *Id.* at 1860.
9. Weinberg-Brodt, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. Rev. 825, 855–856 (1990).
10. *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997).
11. Discussed in Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 Brook. L. Rev. 1081, 1082 (2001).
12. *Id.*
13. Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev. 37 (1993).
14. Smith, *The History and Constitutional Context of Jury Reform*, 25 Hofstra L. Rev. 377 (1996).
15. Discussed in Horowitz, et al., *Jury Nullification*, *supra* note 1.
16. *Id.*
17. For a concise history of jury nullification, see *People v. Douglas*, 178 Misc. 2d 918, 680 N.Y.S.2d 145 (Sup. Ct., Bronx Co. 1998).
18. 156 U.S. 51 (1895).
19. *Id.* at 105.
20. 473 F.2d 1113 (D.C. Cir. 1972).
21. *Id.* at 1133; discussed in Horowitz, *Jury Nullification*, *supra* note 1, at 1215; *see also United States v. Kryzh*, 836 F.2d 1013, 1021 (6th Cir. 1988), *cert. denied*, 488 U.S. 832, 109 S. Ct. 1089 (1988).
22. *Id.* at 1216–1217.
23. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L. Rev. 677, 679 (1995).
24. Herman, *The Jury in the Twenty-First Century: An Interdisciplinary Conference*, 66 Brook. L. Rev. 971, 987 (2001).
25. Horowitz, *Jury Nullification*, *supra* note 1, 1216–1217.
26. Thornburg, *The Power and the Process*, *supra* note 7 at 1858.
27. *Id.*
28. *Id.* at 1858–1863 (discussing jury verdicts' reflection of community values).
29. CPLR 3211.
30. CPLR 3212.
31. CPLR 4401.
32. *Capitol Cab Corp. v. Anderson*, 194 Misc. 21, 85 N.Y.S.2d 767 (N.Y. Mun. Ct. 1949), *aff'd*, 197 Misc. 1035, 100 N.Y.S.2d 35 (N.Y. Sup. App. Term 1950).
33. CPLR 4404.
34. Weinberg-Brodt, *Jury Nullification*, *supra* note 9.
35. *Id.*
36. CPLR 4404.
37. Horowitz, *Jury Nullification*, *supra* note 1 at 1210.
38. *Id.*
39. In *Wainwright v. Witt*, 469 U.S. 412 (1985), absolutist views concerning the death penalty were held to be grounds for disqualification, *viz.,* views that would prevent or substantially impair the juror's performance of his or her duty in accordance with the judge's instructions and the juror's oath.
40. The likelihood of this occurring is tempered by the need of five of six civil jurors in New York to share, for whatever reason, in the views of the obstinate juror. *See* CPLR 4113(a), requiring five-sixths of the jurors in a civil case to concur in the verdict.
41. Some jurors may honestly express a belief that they can sit fairly and later come to believe that they cannot be impartial, but it has been said that it is more likely that a juror's belief in his or her fairness is inversely proportional to actual bias. *People v. Williams*, 628 P.2d 869, 873 (Cal. 1981).
42. Horowitz, *Jury Nullification*, *supra* note 1.
43. *See* Weisberg-Brodt, *Jury Nullification*, *supra* note 9.
44. New York Judiciary Law, § 500 ("Jud. Law").
45. Adams & Lane, *Constructing a Jury that is both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. Rev. 703 (1998).
46. Jud. Law § 506.
47. Jud. Law § 510.
48. Jud. Law § 503.
49. Jud. Law § 506.
50. Jud. Law § 510.
51. Jud. Law §§ 510, 520, N.Y. Comp. Codes R. & Regs. tit. 22 § 128.7 ("N.Y.C.R.R."). Section 513 of the Judiciary Law also refers the form of the questionnaire to be filled out by each prospective juror to the Chief Administrator of the courts.
52. 22 N.Y.C.R.R. implements the Judiciary Law.
53. *See* CPLR 4101 *et seq.*; CPLR 4401 *et seq.*
54. *Ancrum v. Eisenberg*, 206 A.D.2d 324, 615 N.Y.S.2d 14 (1st Dep't 1994), *motion denied,* 207 A.D.2d 1045, 617 N.Y.S.2d 640 (1st Dep't 1995), *appeal dismissed,* 85 N.Y.2d 853, 624 N.Y.S.2d 367 (1995), *appeal dismissed,* 85 N.Y.2d 1027, 655 N.E.2d 396, 631 N.Y.S.2d 253 (1995).
55. Jud. Law § 500 *et seq.*
56. *Superior Sales & Salvage v. Time Release Sciences*, 224 A.D.2d 922, 637 N.Y.S.2d 584 (4th Dep't 1996), *supp. op.* 227 A.D.2d 987, 643 N.Y.S.2d 291 (4th Dep't 1996).
57. *People v. Guzman*, 60 N.Y.2d 403, 469 N.Y.S.2d 916, 457 N.E.2d 1143 (1983) *cert. denied,* 466 U.S. 951, 104 S. Ct. 2155, 80 L. Ed. 2d 541 (1984).
58. *Superior Sales & Salvage v. Time Release Sciences*, *supra* note 56. Although the cited case only dealt with race and sex, its rationale applies to other constitutionally protected categories.
59. *See* 63 A.L.R.3d 1052; *Young v. Johnson*, 123 N.Y. 226, 25 N.E. 363 (1890). See also Bader, *Batson meets the First Amendment: Prohibiting Peremptory Challenges That Violate Prospective Juror's Speech and Association Rights*, 24 Hofstra L. Rev. 567 (1996) for a discussion of potential constitutional problems with such exclusions.
60. *People v. Blyden*, 55 N.Y. 2d 73, 447 N.Y.S.2d 886., 432 N.E.2d 758, 760–61 (1982).
61. Abramovsky & Edelstein, *Challenges for Cause in New York Criminal Cases*, 64 Albany L. Rev. 583 (2000).
62. Where the juror unequivocally states that he or she could be fair, the law may ignore evidence of bias. In *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), the Supreme Court opined that the test is whether the juror's views prevent or substantially impair the juror's performance of his or her duties. Whether there should be differences in standard when the trial issue involves a degree of the nature of the crime (e.g., anti-abortion defendant causing injury or property damage), the punishment (e.g., death penalty), or the defendant (member of Bernardi), can be debated on several levels. *See* Weinberg-Brodt, *Jury Nullification*, *supra* note 9.
63. *People v. Williams*, *supra* note 41.

64. *Silverthorne v. United States*, 400 F.2d 627, 638 (9th Cir. 1968) (opining that merely going through the formality of obtaining assurances of impartiality is insufficient).

65. *People v. Williams*, *supra* note 41.

66. Even while recognizing that jurors who engage in nullification violate their oath, the Supreme Court has warned against the threat to independence of the jury. *See Sparf & Hansen v. United States*, 156 U.S. 51, 106 (1895). Discussed in Weinberg-Brodt, *Jury Nullification*, *supra* note 9.

67. *People v. McQuade*, 110 N.Y. 284, 18 N.E. 156 (1888).

68. Abramovsky, *Challenges for Cause*, *supra* note 61.

69. As discussed in Adams, *Reconstructing a Jury*, *supra* note 45, a number of different approaches have been taken to make jury pools more representative. The steps, such as greater efforts to contact minorities in the stage where jurors are pooled, are among those constitutionally allowed. The authors propose an interesting method of selection akin to cumulative voting by minority shareholders.

70. Greater diversity in the pooling stage of jury selection, wherein summonses are sent to *venire* persons, promotes the constitutionally favored objective of increasing minority representations. *Id.*

71. Insofar as racial prejudice is a ground for disqualification, see *People v. Blyden*, *supra,* there should be vigorous efforts to uncover same. *See* Brown, *A Challenge to the English-Language Requirement of the Juror Qualification Provision of New York's Judiciary Law*, 39 N.Y.L. Sch. L. Rev. 479, 494 (1994).

72. *See generally* Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev. 37 (1993), suggesting greater use of psycholinguistic principles in drafting jury instructions. The same psycholinguistic principles can be applied to questionnaires.

73. *See supra* note 41.

74. As discussed in Adams, *Constructing a Jury*, *supra,* the Alabama plan for increasing the number of jurors in each *venire* involves creating subsets by race.

75. Jud. Law § 500.

76. 13 A.D.2d 162, 215 N.Y.S.2d 122 (1961).

77. 89 A.D.2d 516, 452 N.Y.S.2d 62 (1st Dep't 1982).

78. 61 A.D.2d 827, 402 N.Y.S.2d 227 (2d Dep't 1978).

79. *Nicholas v. Brini*, 204 A.D.2d 194, 612 N.Y.S.2d 123 (1st Dep't 1994)

80. *See generally* Weinberg-Brodt, *Jury Nullification*, *supra* note 9; *Althiser v. Richmondville Creamery Co.*, *supra* note 76.

81. *Orange County v. Storm King Stone Co.*, 229 N.Y. 460, 128 N.E. 677 (1927) (discussing challenges for cause); There are two types of challenges for cause: (1) challenges for principal cause, which involves an objection to a juror who is unqualified as a matter of law, and (2) challenges for favor, which raises a question of fact. Where there is a question concerning whether a juror can be challenged for cause, under CPLR 4110, the court may determine the issue. *See* 8 Carmody Wait 2d § 55:34, pp. 33–34.

82. *Johnson v. City of New York*, 191 A.D.2d 216, 594 N.Y.S.2d 201 (1st Dep't 1993).

83. *People v. Blyden*, *supra* note 60.

84. *See Glessner v. Lafayette Post No. 37 of the American Legion*, 50 Misc. 2d 1059, 272 N.Y.S.2d 69, *aff'd,* 28, A.D.2d 648, 282 N.Y.S.2d 664 (2d Dep't 1967) (placing burden upon attorney examining jurors to determine "sympathy adverse" to client, and to use peremptory challenge if this bias is uncovered).

85. Abramovsky, *Challenges for Cause*, *supra* note 61, warning against acceptance of "hollow incantations" of fairness.

86. 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 691 (1986).

87. *Superior Sales & Salvage v. Time Release Sciences*, *supra* note 56.

88. *People v. Martell*, 138 N.Y. 595, 33 N.E. 838 (1893).

89. Abramovsky, *Challenges for Cause*, *supra* note 61.

90. *Id.* at 599.

91. The importance of jury oaths is also repeatedly stressed by the courts; *see, e.g., United States v. Wedolowsky*, 572 F.2d 69 (2d Cir. 1978).

92. *People v. Williams*, *supra* note 41.

93. At least in criminal cases, warnings had been sounded regarding too extensive use of prequalification of jurors, which process was viewed as a threat to the defendant's right to a fair trial. *See* Weinberg-Brodt, *Jury Nullification*, *supra* note 9. However, with respect to the jury oath, such intrusion would be minimal.

94. *People v. Parks*, 257 A.D.2d 636, 684 N.Y.S.2d 288 (2d Dep't 1999).

95. *Rosales-Lopez v. United States*, 451 U.S. 182, 189, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981); *Ristaino v. Ross*, 424 U.S. 589, 594–95, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976); *People v. Vargas*, 88 N.Y.2d 363, 377, 645 N.Y.S.2d 759, 668 N.E.2d 879 (1998).

96. Diamond, *Realistic Responses to the Limitations of* Batson v. Kentucky, 7 Cornell J. L. & Pub. Pol'y 77, 90 (1997), discussing problems of jurors responding to inquiries in a public courtroom.

97. *Id.*

98. It has even been recognized that the charge may nullify the law. In *Cronjaeger v. City of Suburban*, 119 N.Y.S. 181 (N.Y. Sup. App. Term 1969), the trial court's charge "practically nullified" the application of the doctrine of contributory negligence, taking this question away from a jury. Apparently, dissatisfaction with the doctrine of contributory negligence extended to some trial courts, as well as to juries. *See supra* p. 6.

99. Thornburg, *The Power and the Process*, *supra* note 7.

100. *Id.*

101. *Id.*

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# Challenging Economic Damages in Labor Law Litigation

By Alan Kaminsky and Kate Moran

Due to the nature of Labor Law § 240 claims, frequently the inevitable result at trial is a directed verdict on liability and a trial on damages. In such a case, the focus of the trial becomes challenging the damage projections of plaintiffs' economic and vocational rehabilitation experts.

A few key issues to analyze to discredit plaintiff's economic and vocational rehabilitation findings and ultimately reduce potential jury awards based upon the plaintiff's inflated calculations are: (1) unrealistic salary projections combined with understated future earnings potential in other fields, (2) mischaracterized or inflated work life expectancy and life expectancy, and (3) inflated or erroneous fringe benefit calculations offered through a plaintiff's union. The issues to identify with fringe benefit calculations are (a) possible double counting of medical expenses; (b) incorrect methodology for calculation of health care; (c) incorrect methodology for calculation of pension benefits; and (d) exaggerated assumptions in annuity calculations.

Each one of these items will be addressed in turn.

## I. Salary

It is unrealistic to assume that any laborer in a physically challenging occupation will maintain the work schedule of a younger and more physically fit coworker. Older laborers work less as time passes, taking less overtime, thereby reducing their annual income.

On cross-examination of plaintiff's experts, it is important to draw out the salary assumptions and the basis for them. Union representatives provide confirmation through testimony and payroll records that work is cyclical, particularly where it is performed outdoors. Moreover, union employees do not always work in New York at New York union wages, the highest in the country, full-time for 50 weeks each year. Union members such as ironworkers and sometimes masons are not always able to maintain a full-time schedule during the winter or in rain. Unless the plaintiff travels out of the area for work, at potentially lower rates, he or she would collect unemployment during down cycles, which would decrease hours worked and annual salary. By and large, economist's reports do not reflect this phenomenon. Rather, they tend to assume full employment for 50 weeks, full-time, at the pace of younger laborers in the field. This inflates salary projections exponentially over the course of years.

Also consider that an expert will tend to use a wage growth rate of 4–7% by relying on the proposed percentages set forth in union collective bargaining agreements. However, the actual wage growth history over the past decade for ironworkers has been in the 2–3% range based upon published United States Department of Labor statistics. Proposed percentages from the collective bargaining agreements are not proper authority for wage growth assumptions.

The proposed percentages are not guaranteed and unions routinely request a high percentage because historically, by the end of the negotiations, they will settle around a 3% growth rate.

## II. Work Life Expectancy/Life Expectancy

The concept of "worklife" arises out of U.S. Department of Labor statistics using many educational, geographic, ethnic, industry specific and socioeconomic variables to determine a realistic timeline within which both men and women can be expected to actively participate in the work force. Plaintiff's economists will assume 100% employment with 100% productivity to the age of 65, with no possibility of death or disability of the plaintiff prior to that time. This type of assumption is contrary to established authority.

Plaintiff's economists traditionally assume that a plaintiff will work in their stated field to the age of 65 as a basis for wage projections. However, the more realistic age of retirement for ironworkers, based upon union data and Department of Labor statistics, is a maximum retirement age of 57–62. While a difference of five years may not seem significant at first glance, the future value of the wages and benefits as incorporated into an inflated projection can be significantly exaggerated due to the effects of compounding.

The best and most appropriate source for determining the accurate trends in retirement across various careers based upon geographic location and type of employment is the United States Bureau of Labor Statistics and the Monthly Labor Review. It is important to establish whether the plaintiff's expert has ever used it as a source on cross-examination. The Department of Labor has concluded, "The average age at exit from the labor force provides a reasonable indication of the age at which older workers retire." Tables, based upon data compiled by the government, track current retirement trends in both men and women. The current trend in men in the United States provides a median retirement age of 62.2 for men and a median retirement age of 62.1 for women. Despite this fact, economists will assume for the sake of projected earnings that a plaintiff will actively stay in their pre-accident career to the age of 65. However, on cross-examination, an effective way to discredit that assumption is by asking the expert to

identify anyone in the courtroom who, with 100% certainty, will be alive, not suffering from any type of disability that will affect work productivity, and be employed full-time regardless of economic conditions for the next 15, 20 or 30-plus years. The tactic is effective inasmuch as it discredits his or her own theory and assumptions if the expert provides a realistic and honest answer. Or, on the other hand, it will discredit the expert in front of the jury where he or she will not concede both market realities and unexpected, but possible, life events.

The United States Department of Labor tables for work life expectancy allow you to track a plaintiff by age and sex and determine with reasonable certainty their life expectancy. In addition, it allows you to identify the corresponding work life expectancy. For example, a 50-year-old Caucasian man with a high school education has a "life" expectancy to 75. However, he only has a remaining "work life" expectancy of 11 years to the age of 61. The table further differentiates for individuals that are currently employed and unemployed. The same 50-year-old hypothetical male described above who is not currently employed only has a remaining "work life" expectancy of 8.3 years to the age of 58.3.

Where medical records establish that a plaintiff has a history of prior injuries, determine whether the plaintiff's expert was aware of the complete medical history prior to making calculations. Prior injuries and dangerous or physically demanding hobbies affect reasonable productivity calculations. For example, a motorcycle enthusiast has a reduced life expectancy. Where a plaintiff has a history that indicates prior injuries or participation in arguably dangerous activities, those factors will further discredit calculations of future earnings and benefits for extended periods of time.

A jury should be cognizant of the fact that work life estimates are important and should be considered in projecting lost earnings. They should know that an "intention or desire" to work to the age of 65 does not guarantee that a person will not be injured, unemployed, disabled or die before the expiration of the next 1, 5, 10 and even 15 years.

Exaggerated salary estimates compounded annually at a growth rate exaggerated by 2% to a retirement age that is 3 years beyond what is proper based upon Department of Labor industry trends and credible statistics will overstate a plaintiff's projected economic losses by as much as 30% due to the "time value of money."

## III. Fringe Benefit Issues

Parties are entitled to an expert's full report, including tables and raw data upon which final projections are based, as part of the CPLR 3101 exchange. Under the New York Court of Appeals case of *Oden v. Chemung County IDA*,[1] the court should afford latitude in itemizing each and every element of damages for the jury's consideration. Moreover, counsel should develop and apply collateral source issues at trial to assist the jury in determining realistic damage calculations. The disaggregated values put forth by plaintiff's experts need to be understood by the jury in order for them to identify and discount exaggerated values.

All questions on cross-examination in this area should be directed at breaking down the expert's calculations and reducing the projected loss figures to reach a realistic methodology to calculate fringe benefits.

### A. Double Counting of Medical Benefits

Examine the CPLR 3101 report to determine the total estimated future medical costs. Depending upon the trial testimony and evidence in the record, establish whether the plaintiff will incur out of pocket expenses and the nature and extent of future treatment. The treatment cannot be mere speculation and there must be some testimony to establish a reasonable cost in order for a plaintiff to maintain the claim. If there is nothing in the evidence to support the expert's calculation, seek to have any claim for future medical expenses stricken from the record.

Depending upon the figures detailed in the expert's report, you may also want to consider whether the expert deems medical benefits to be the same thing as "health and welfare fringe benefits." There is a distinction. If the expert deems them to be the same or even similar, there may be a possibility that the medical expenses were double-counted, i.e., included in both medical cost projections and health care/fringe benefit calculations.

### B. Health Care

The value of health care benefits should not be calculated as a percentage of wages. For example, if the plaintiff is assumed to make $35 per hour, and the employer contributes $7 to health care, $4 to pension and $4 to the annuity funds, an expert should not assume that each of the employer's contributing dollars is earmarked for the plaintiff. This is an incorrect benefit calculation on several grounds.

First, the employer contribution goes into a pool for all union members. An estimated 2,000 annual hours multiplied by a $7 per hour employer contribution, means that the union pool gets $14,000. That does not represent the value of an individual plaintiff's health plan. A health plan has a constant price, which is not tied to the number of hours worked. A vested union member who worked 100 hours, contributing $700 gets the identical plan/coverage as the vested union member who worked 2,000 hours and contributed $14,000.

Finally, the expert must establish and clearly identify the "replacement cost" of health care to a plaintiff for an accurate health care expense estimate. This means that the expert must show how much the plaintiff is paying out of pocket and will be going forward for medical expenses by having to obtain medical coverage from an independent source. However, it is important to note that a vested union member with the requisite credits does not need to obtain medical care from an independent source. He or she will receive full coverage under the union plan. Moreover, labor statistics establish that insurance costs are not related to changes in salary and any projection by an economist that relates the cost of health care as a percentage contribution of salary is erroneous.

### C. Pension

As with health care, pension estimates are not properly calculated as a percentage of wages. The employer contribution to a union pension fund is to a pool. The actual pension amount paid to a retiree is based upon the number of credits a union member has earned multiplied by the value of the pension credit as set by the union trustees in the retiring year. Pension benefits paid upon retirement have a set value determined in the retiring year. Once that payment amount is set, it is subject to very few and only slight changes.

Another factor to consider in reducing projected economic losses is the time frame or start date for pension benefits as assumed by an expert. Payment of pension benefits should not be calculated from the date of the accident. This results in a gross overstatement of value. A worker is only entitled to collect pension benefits upon retirement to the date of death. If an economist calculates pension from the date of injury as a percentage of hours, rather than basing it on value of credits from retirement age to death, pension value will be grossly overstated. Pension benefits begin when a worker retires. The value of credits earned and the economic contribution the plaintiff made toward the union pool while employed has no relation to the value of the credits he will get upon retirement. As detailed above, the union pension trustee determines that value.

### D. Annuity

An employer contribution to an annuity fund is specifically earmarked for the individual employee and based on a percentage of hours worked. As a hypothetical, when a plaintiff worked 2,000 hours, an employer contribution of $4 per hour results in a personal annuity contribution of $8,000. The key here is that the contribution is tied to the actual hours worked, which decreases as ironworkers get older. An assumption of a steady 2,000 hours for the next 15-plus years for a plaintiff may be unrealistic. In physically demanding jobs, union members develop injuries affecting their ability to work long hours and overtime. It is reasonable to assume that individuals in their 50s and 60s do not work the same hours and in the same manner as their counterparts who are in their 20s, 30s and 40s. Age matters in annuity calculations because it can affect earnings and ultimately, the annuity projection.

An employee does not receive his or her annuity until retirement. However, there are two different types of annuities available through the union. The regular annuity is not available until retirement. However, in a topping out fund, a participant can borrow against the funds contributed, but must repay the fund. The repayment is deducted from salary and can affect annual earnings, and the corresponding calculations of an economist who fails to consider this debt.

## IV. Vocational Rehabilitation Experts

Vocational rehabilitation reports are typically used as a basis for an economist's projections. By discrediting the assumptions relied upon by a vocational rehabilitation expert you can reduce the credibility of the plaintiff's entire damage claim. Some specific areas to explore for inaccuracies are detailed below.

### A. Labor Statistics

The national average wage, from United States labor statistics, tends to be lower than wages in the New York metropolitan region in virtually all fields. Wages in New York City tend to be higher than in the outlying counties. In addition, regional employment prospects will vary by geographical region. Where you have an opportunity to introduce your own vocational rehabilitation expert to rebut your adversary, or if you can only cross-examine the plaintiff's expert, it is important to localize the employment market as well as the plaintiff's skills. Classifieds from a local paper will verify availability of jobs, salary ranges and the suitability of the plaintiff for particular tasks based upon skills, education and vocational testing. There may also be a disparity to develop on cross-examination of the market prospects as compared with the efforts by a plaintiff to seek suitable employment.

### B. Vocational Testing

First, there are different testing methods utilized by various experts in evaluating transferable skills. Understand the method used by the vocational rehabilitation specialist and delve into the results of the various tests administered for fair interpretation of the findings. In doing so, questions may arise regarding the possibility of false testing results or a significant disparity in the results obtained by the plaintiff's expert versus the defendant's.

In such an instance, it may be possible to introduce secondary gain. It is a theory that in some situations, an individual may be motivated not to work, or show their best potential, because of litigation or the prospect of increased economic gain from a jury award due to a perceived severe economic detriment.

### C. VESID

The vocational and educational services for individuals with disabilities (VESID) is a New York State rehabilitation agency that provides free training and career assistance to individuals who have a disability that interferes with or prevents that person from working in their typical field when they are medically stable. It is helpful to determine whether a plaintiff has sought vocational rehabilitation assistance or in any way attempted to mitigate their losses. This can also relate back to the concept of secondary gain noted above.

While the issues detailed above are not intended to be a comprehensive punch list for challenging damages at trial, they offer valuable suggestions to provide a starting point from which projected damages can be substantially reduced at trial through cross-examination of an adversary's expert, or as a basis upon which your own expert or trial consultant can testify.

### Endnote

1. 87 N.Y.2d 81, 637 N.Y.S.2d 670 (1995).

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# Outside Counsel: Splitting the Defense in Construction Site Accident Litigation

By Glenn A. Kaminska

A common and recurrent theme in construction site accident litigation is that the injured plaintiff employee will bring an action against the owner and/or general contractor. The owner and/or general contractor will then commence an action against plaintiff's employer. Generally, this third-party action will include both common law and contractual claims. This simple fact pattern often leads to an ethical dilemma for counsel representing employers.

Assuming the employer gives timely notice to both its general liability and workers' compensation carrier, pursuant to *Hawthorne v. South Bronx Community Development*[1] these two insurance providers will split the defense of the employer in the action. The general liability carrier is usually responsible for any contractual liability whereas the workers' compensation carrier is responsible for any common law liability.

## Employee Exclusion

It is important to note that there is an employee exclusion within most general liability policies stating that the policy does not provide coverage to injuries of employees unless there is an "insured contract." Accordingly, it is a good practice for a general liability carrier to disclaim coverage under the exclusion if it appears there is no insured contract or that the insured contract will be void under the General Obligations Law.[2]

Without such a disclaimer, a general liability carrier can be responsible for common law coverage based on the failure to disclaim.[3] Similarly, standard employers liability coverage contains an exclusion for liability assumed under a contract. The failure to assert this exclusion may prove detrimental.

Since the Workers' Compensation Reform Act of 1996, an employer only has common law liability where there is a "grave injury." Because of the relatively high standard used in determining a "grave injury," the compensation carrier will seek to push for a motion with regard to this issue, leaving only the contractual cause of action remaining.

The question presented is whether counsel that has been retained by the general liability carrier is obligated to move to dismiss the common law cause of action if in eliminating it the unlimited coverage provided by the workers' compensation policy also will be eliminated. Counsel retained by the general liability carrier need not make this motion.

Although the attorney is being paid by both the general liability and workers' compensation carriers, he or she is obligated to pursue a defense that is in the best interests of the insured.[4] In a situation where the plaintiff is severely injured but not injured to the extent of a "grave injury," it is in the insured's best interests to retain as much coverage as possible so as to avoid exposure of the insured's personal assets. This position finds support in *Nelson Electric Contracting Corp. v. Transcontinental Insurance Co.*[5]

### *Nelson*

In *Nelson*, the court determined that where the interests of the insurer are at odds with those of the insured, the attorney may make decisions that benefit the insured without fear of the insured losing coverage for "failure to cooperate." As such, the insured's attorney was not obligated to oppose a motion by a general contractor seeking contractual indemnity against an electrical subcontractor where to do so would have exposed the insured subcontractor to personal liability for a breach of contract.

Based upon this analysis, counsel for an employer on a construction site accident claim need not move upon "grave injury" grounds. Such a motion would be adverse to the client's interest.

A workers' compensation carrier is not without recourse under this scenario. In *Frost v. Monter*,[6] the court found that carriers can intervene in the underlying tort action to sort out coverage where parties take positions contrary to the carrier's interest.

In *Frost*, the plaintiff brought an action against the defendant sounding in intentional tort and set forth a factual predicate in the nature of intentional criminal acts. The defendant demanded that his carrier, CNA, defend him but was refused under the complaint as drafted. A declaratory judgment action supported this disclaimer. Six years following the intentional acts and three-and-a-half years after the original complaint, plaintiff made a motion to amend the complaint to assert causes of action sounding in negligence. The defendant did not oppose the motion.

Upon CNA's receipt of knowledge of the motion, CNA was allowed to intervene in the motion. Plaintiff

argued that CNA had no standing. CNA, however, argued that it had standing under article 10 of the CPLR and pursuant to CPLR 5511 as "an aggrieved party." Upon reviewing the issues, the Appellate Division determined that not only did CNA have standing in the appeal but also in the underlying action "[s]ince the proposed amendment of the complaint would prejudice only CNA Insurance Companies, and the defendants have no interest in opposing the motion to amend, CNA was the real party in interest and clearly was aggrieved by the amendment within the meaning of CPLR 5511."[7]

Under the facts as set forth in a typical Labor Law action example, the workers' compensation carrier would be able to intervene in the tort action in order to seek the appropriate motion. Moreover, in a situation where the third-party plaintiff has moved for indemnification based upon a "grave injury," the workers' compensation carrier can intervene to oppose such motion.

### *Failla*

In addition to *Frost*, the Third Department has offered another remedy for aggrieved carriers in situations where counsel acts adverse to the insurer. In *Failla v. Nationwide Insurance Co.*[8] it was determined that where the attorney for the insured allowed the case against his clients to go to the jury under a "negligence theory," the jury's determination of negligence would not be binding with regard to the insurer's disclaimer based upon an intentional act.

The court found that Nationwide, the insured's carrier, was not a party to the underlying action and could not be said to be in privity with the insured for the purposes of applying the doctrine of collateral estoppel.

As Nationwide's interests were not represented in the prior proceeding, it could not be said to have fully and fairly litigated the issue of the insured's conduct so as to determine the scope of the policy. Accordingly, a trial as to the issue of the intentional act would be conducted in a declaratory judgment action.

Based upon the *Failla* decision, it is a better practice for counsel to advise the compensation carrier that no motion will be made to affirmatively dismiss any common law cause of action, but at the same time to tender that prospective motion to that carrier. If the compensation carrier is invited to intervene in any motion practice and does not accept that offer, then the argument can be made that the opportunity to be heard and fully litigate the "grave injury" issue was afforded and that they are estopped from arguing to the contrary.[9]

In light of the Workers' Compensation Reform Act of 1996, there is often a conflict for an attorney representing an employer in a construction site accident litigation where the compensation carrier requests a motion made to eliminate the common law indemnification claim.

*Nelson* addressed this type of ethical dilemma and allows counsel to fulfill its duty to the client by not making any such motion, thereby retaining the unlimited coverage of the compensation policy. A compensation carrier is not without recourse. It may intervene in the action or seek to avoid liability in a subsequent declaratory judgment action. Counsel are well advised to take all steps possible to ensure that the compensation carrier will be bound by the findings in the underlying dispute.

## Endnotes

1. 78 N.Y.2d 433, 576 N.Y.S.2d 203 (1991).
2. See General Obligations Law § 5-322.1.
3. *See* Insurance Law § 420; *Utica v. CNA*, 285 A.D.2d 640, 728 N.Y.S.2d 398 (2d Dep't 2001).
4. Code of Professional Responsibility § 1200.32 (DR 7-101).
5. 231 A.D.2d 207, 660 N.Y.S.2d 220 (3d Dep't 1997).
6. 202 A.D.2d 632, 609 N.Y.S.2d 308 (2d Dep't 1994).
7. *See 'Frost' Gives Insurers Greater Leeway to Intervene*, N.Y.L.J., May 25, 1994, p. 1.
8. 701 N.Y.S.2d 161 (3d Dep't 1999).
9. *See Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 386 N.E.2d 1328, 414 N.Y.S.2d. 308 (1979) for collateral estoppel generally.

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# Liability to Third Party Pursuant to a Contract Only Allowed in Limited Exceptions

By John M. Shields

In two separate decisions, the Court of Appeals recently addressed whether a contract can result in liability in tort to a third party. Generally, a contractual obligation standing alone will not give rise to a tort liability in favor of a third party. However, the Court has recognized three distinct exceptions where a party who enters into a contract to render services may assume a duty of care to persons outside the contract. A party to a contract may be liable to third persons where: (1) the contracting party creates or exacerbates a harmful condition; (2) the plaintiff detrimentally relies on the continued performance of the contracting parties' duties; or (3) the contracting party completely assumes another's duty to maintain premises safely.[1]

In *Espinal*, the plaintiff brought a personal injury action against the defendant, a company that entered into a snow removal contract with a property owner.[2] The plaintiff alleged that she slipped and fell in the parking lot owned by her employer, due to an icy condition created by negligent snow removal by the defendant.[3]

A threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party.[4] In the *Espinal* case, the issue was whether any duty ran from the contractor to the plaintiff, given that the snow removal contract was with the property owner.[5] The existence and scope of a duty is a question of law requiring courts to balance competing public policy considerations.[6]

A contractual obligation, standing alone, will generally not give rise to a tort liability in favor of a third party.[7] Imposing tort liability under such circumstances could render contracting parties liable in tort to an indefinite number of potential beneficiaries.[8] However, the Court has recognized limited circumstances where a party who enters into a contract assumes a duty of care to persons outside the contract.[9]

The Court, in *Espinal,* discussed the decisions in *Moch*, *Eaves Brooks* and *Palka* that articulate the contractual situations involving possible tort liability to third persons.[10] In *Moch*, the defendant entered into a contract with a city to supply water to the city for various purposes, including water at the appropriate pressure for fire hydrants.[11] A building caught fire and, because the defendant allegedly failed to supply sufficient water pressure to the hydrants, the fire spread and destroyed the plaintiff's warehouse.[12] Although the contract was valid and enforceable as between the city and the defendant, the contract was not intended to make the defendant answerable to anyone who might be harmed as a result of the defendant's alleged breach.[13] "Liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty."[14] Ultimately, the Court in *Moch* held that tort liability to a third person may arise where an alleged wrongdoer launched a force or instrument of harm.[15]

In *Eaves Brooks,* the Court held that detrimental reliance is another basis for a contractor's liability in tort to third parties.[16] In *Eaves Brooks*, a commercial tenant sought to recover for property damage sustained when a sprinkler system malfunctioned and flooded the premises.[17] The tenant sued the companies that were under contract with the property owner to inspect and maintain the sprinkler system.[18] The Court refused to extend liability to the defendant companies, noting that the building owners were in a better position to insure against loss.[19] The Court in *Eaves Brooks* held that tort liability may arise where performance of contractual obligations has induced detrimental reliance on continued performance and the defendant's failure to perform those obligations causes an injury to the plaintiff.[20]

In *Palka*, the Court considered whether a maintenance company under contract to provide preventive maintenance services to a hospital assumed a duty of care to the plaintiff, a nurse who was injured when a wall-mounted fan fell on her as she was tending to a patient.[21] The contract between the parties was "comprehensive and exclusive" and required the maintenance company to inspect, repair and maintain the facilities, and to train and supervise all support service personnel.[22] The company's obligation to the hospital was so comprehensive that it entirely displaced the hospital in carrying out maintenance duties.[23] Accordingly, the Court held that the contracting provider owed a duty to non-contracting individuals reasonably within the zone and contemplation of the intended safety services, including the plaintiff.[24]

### *Espinal v. Melville Snow Contractors*

In *Espinal*, under the express terms of the contract, the snow removal company was obligated to plow only when the snow accumulation had ended and exceeded three inches.[25] In addition, the company agreed that upon the landowner's request, it would spread a salt and sand mixture on certain areas of the property.[26] As for snow removal, the company contracted to plow one

time per snowfall during the late evening and early morning hours, but not until all accumulations had ceased.[27]

This contractual undertaking was not "comprehensive and exclusive" property maintenance.[28] The snow removal company did not entirely absorb the landowner's duty to maintain the premises safely.[29] The contract explicitly stated that it was the responsibility of the property manager or owner to inspect the property and decide whether an icy condition warranted application of salt-sand.[30] Pursuant to the contract, the owner was required to communicate any defect in performance to the contractor immediately.[31] Although the company undertook to provide snow removal services under specific circumstances, the landlord retained its duty to inspect and safely maintain the premises.[32] The company was under no obligation to determine if an icy condition developed.[33]

The plaintiff in *Espinal* failed to allege detrimental reliance on the company's continued performance of its contractual obligations.[34] A defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury.[35] The snow removal company simply cleared the snow as required by the contract.[36] The plaintiff's fall on the ice was not the result of the company having launched a force or instrument of harm.[37] By merely plowing the snow, the snow removal company cannot be said to have created or exacerbated a dangerous condition.[38]

### *Church v. Callanan Industries*

In *Church*, an infant plaintiff received catastrophic spinal injuries when the driver of the car, in which he was a rear seat passenger, fell asleep at the wheel. The vehicle veered off the highway into a ditch.[39] The location where the vehicle left the highway was within a substantial resurfacing and safety-improving project, which was completed years earlier, pursuant to an agreement between the Thruway Authority and Callanan Industries, as general contractor.[40]

The project plans and specifications called for the removal and replacement of existing guiderail with a more extensive guiderail system.[41] In a related agreement, the Thruway Authority engaged a construction engineering firm (engineer) to inspect and supervise the contractor's compliance with the plans and specifications.[42] Under the agreement with the contractor, the engineer's recommendation was required before final acceptance of the contractor's work.[43]

The contractor entered into a subcontract for the installation of the guiderail system.[44] Pursuant to the subcontract, all drawings, certifications and approvals of the subcontractor were to be submitted for approval of the architect or engineer.[45] In addition, the contractor reserved the right to demand that the subcontractor furnish evidence of its ability to fully perform the subcontract in the manner and within the time specified in the subcontract.[46]

The gravamen of the action was the negligent failure to complete the full installation of new guiderailing called for by the general contract and subcontract.[47] The contractor and the subcontractor moved for summary judgment, arguing that, as purely contracting parties with respect to installation of the guiderailing, they owed no duty to the plaintiffs.[48] The defendants submitted opinion evidence that, had the guiderailing been completed in accordance with the contracts, the car would have been prevented from traveling down the embankment.[49]

The subcontractor had no preexisting duty imposed by law to install guiderailing at that point on the Thruway.[50] There was no evidence in the record that the incomplete performance of the contractual duty to install guiderailing created or increased the risk of the car's divergence from the roadway beyond the risk which existed, even before any contractual undertaking.[51] The plaintiff did not contend that the loss of control of the car occurred because the driver detrimentally relied on the continued performance of the contractual duties when she failed to remain awake and alert at the wheel.[52] Finally, tort liability for breach of contract will not be imposed merely because there is some safety-related aspect to the unfulfilled contractual obligation.[53] There are limitations on the imposition of liability based upon a defendant's assumption of its promisee's duty to safeguard third persons.[54]

The Court in *Church* found that the subcontractor did not comprehensively contract to assume all of the Thruway Authority's safety-related obligations with respect to the guiderail system.[55] Instead, the Thruway Authority retained a separate project engineer to provide inspection and supervision of all aspects of the project, including contract compliance with respect to the stipulated length of the guiderail system.[56]

Conversely, the contractor assumed significant obligations to ensure that the construction complied with the project specifications and in a timely fashion, thus undertaking an obligation to inspect and oversee all aspects of the subcontractor's work.[57] The subcontractor had no reason to foresee the likelihood of physical harm to third persons as a result of reasonable reliance by the Thruway Authority on it to discover any alleged safety defects, and therefore did not assume the potential corresponding tort liability.[58]

## Conclusion

A contractual obligation alone will not give rise to a tort liability in favor of a third party. The Court of Appeals has recognized three narrow exceptions where a party who enters into a contract to render services may assume a duty of care to persons outside the contract: (1) creation or exacerbation of a harmful condition; (2) detrimental reliance; or (3) complete assumption of maintenance of premises. In *Espinal* and *Church* the Court recently held that due to the fact that the alleged conduct by the contracting party did rise to the level of any of the specific exceptions to the general rule that a contractual obligation will not result in tort liability in favor of a third party, the defendants owed no duty to the plaintiffs, and therefore cannot be held liable in tort.

## Endnotes

1. *Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002); *Church v. Callanan Indus.*, 2002 N.Y. LEXIS 3467 (Ct. App. 2002).
2. *Espinal* at 121.
3. *Id.*
4. *Espinal* at 122; *Church* at *5.
5. *Espinal* at 122.
6. *Id.*, citing *Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579, 585–586, 611 N.Y.S.2d 817 (1994) and *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 226–227, 557 N.Y.S.2d 286 (1990); *Church* at *5; *Hughes v. City of New York,* Sup. Ct., Kings Co., Nov. 25, 2002, N.Y.L.J., p. 19 (architect accountable to third party for negligent design).
7. *Espinal* at 122; *Church* at *6.
8. *Espinal* at 122, citing *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 168 (1928).
9. *Espinal* at 122-23.
10. *Id.* at 122.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*, citing *Moch* at 168.
15. *Id.* at 122–23.
16. *Id.* at 123.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 123–24.
26. *Id.* at 124.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Church* at *1.
40. *Id.* at *1–2.
41. *Id.* at *2.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at *2–3.
46. *Id* at *3.
47. *Id.*
48. *Id.* at *4.
49. *Id.*
50. *Id.* at *6.
51. *Id.* at *8–9.
52. *Id.* at *9.
53. *Id.* at *9–10.
54. *Id.* at *10.
55. *Id.* at *12.
56. *Id.*
57. *Id.* at *13.
58. *Id* at *13–14.

**John M. Shields is an Assistant Attorney General in the Suffolk Regional Office. Any opinions expressed in the article are exclusively those of the author and not the Office of the Attorney General.** **A version of this article was previously published and is reprinted with permission from the *New York Law Journal* 8 2002 NLP IP Company. Further duplication without permission is prohibited. All rights reserved.**

# A Hospital's Liability for the Sexual Misconduct of Its Employees: Perceiving a Foreseeable Risk to the Patient

By Robert Vilensky

A patient under the care and treatment of a hospital traditionally has had little recourse if he or she was sexually assaulted by one of the hospital's employees. The courts have shielded the hospitals from liability by narrowly proscribing the situations in which a hospital will be found negligent. For example, the courts have consistently refused to attach vicarious liability to the hospital for the sexual misconduct of its employees. The prevailing interpretation is that sexual assault is clearly not within the scope of employment, nor is it in furtherance of hospital business; it is motivated by purely personal desires and is a complete departure from routine duties.[1] Thus, a patient's only hope for recovery seemed to be based upon the theories of negligent hiring, negligent retention and negligent supervision.[2]

Prevailing upon these theories, however, has proven to be extremely difficult. If, at the time of hiring, there was nothing within the employee's background that would put the hospital on notice as to a propensity for violence or sexual abuse, the hospital was deemed to have met its duty of reasonable care and found not to be negligent.[3] This conclusion rested upon the notion that if there is no trigger within the employee's background to alert the hospital of danger, there can be no foreseeable risk of unreasonable harm to patients upon which to hang liability. The theories of negligent supervision and retention rested upon the same grounds.

The 2001 case of *Diaz v. New York Downtown Hospital*[4] is no exception to the narrow approach of the courts. The plaintiff, a patient at New York Downtown Hospital, was sexually assaulted during the course of a vaginal sonogram by the technician performing the sonogram. The First Department dismissed the complaint against the hospital, concluding that there was no basis for attaching liability. The court determined that the employee was duly screened and his background sufficiently checked, with nothing to place the hospital on notice of potential propensity for violence or sexual abuse. Since the sexual assault was not reasonably foreseeable, the hospital was not negligent in its hiring, retention and supervision of the employee.

However, the First Department in *Diaz* took the role of shielding the hospital from liability a step further. While the vaginal sonogram was being performed, the plaintiff was alone in the room with the male technician. The plaintiff contended that the hospital was negligent in failing to adopt or follow operating procedures of having a female observer present in the room during a male physician/technician's examination of a female patient. In support of this contention, the plaintiff cited recommendations by two professional organizations stating that "it is recommended that a woman be present" during such a procedure and that "a female member . . . should be present . . . when possible."[5] However, the court interpreted these guidelines as mere "suggested procedure," falling short of generally accepted standards in the industry.[6] As such, these recommendations were not sufficient to raise an issue of fact as to the hospital's negligence and did not constitute a departure upon which to find the hospital negligent. Thus, the initial background check of the employee entirely discharged the hospital's responsibility.

Justice Mazzarelli dissented from the court's opinion, finding the plaintiff's injuries to be caused by a deviation from these recommendations, and that "by recommending the presence of a woman during a vaginal sonogram, the industry explicitly recognized the risk of the precise sexual misconduct which took place in this case."[7] According to the dissent, these guidelines delineated a foreseeable risk, and the hospital's failure to attend to such a risk should have imposed liability.

The dissent's opinion of recognizing a "foreseeable risk" was taken up by the Court of Appeals in February of this year, less than a year after *Diaz*, in *N.X. v. Cabrini Medical Center*.[8] In that case, the plaintiff was sexually assaulted by a surgical resident while the patient was recovering from surgery. The Court found that where there was no known history of sexual misconduct by a physician, any danger of such misconduct is not reasonably foreseeable, and thus the hospital will not be found liable on the basis of negligent hiring, retention or supervision.[9]

However, the Court in *Cabrini* denied the hospital's motion for summary judgment. The Court found that a question of fact remained as to whether the employee's misconduct was actually observed or readily observable by the other hospital employees. According to the facts of the case, the surgical resident was not one of the physicians listed on the plaintiff's chart, and the nurses in the area appear to have been generally aware of the

resident's presence prior to the misconduct. These nurses, according to the Court, may have had "a duty to protect the plaintiff once there were acts or events suggesting that an assault or an unauthorized 'examination' was about to take place, and did take place, in their presence."[10] The nurses knew that a female staff member was required during a male physician's pelvic examination of a female patient, and the nurses should have been on notice when the unknown doctor, wearing surgical gloves, approached the plaintiff's bed apparently intent on examining her. The Court held that "observations and information known to or readily perceivable by hospital staff that there is a risk of harm to a patient under the circumstances can be sufficient to trigger the duty to protect."[11]

This holding in *Cabrini* seems to be in line with the reasoning of the dissent in *Diaz*. The dissent in *Diaz* recognized that in putting forth recommendations, the professional organizations recognized a foreseeable risk to the patient.[12] As such, assigning a male technician to perform such a "delicate procedure"[13] on a female patient without a female observer present, seems to be a "readily perceivable . . . risk of harm to a patient under the circumstances to trigger the duty to protect."[14] By using this standard set forth in *Cabrini*, the hospital should be found liable for disregarding a perceived risk. Furthermore, the fact that these recommendations were not industry standard would be irrelevant. If the hospital knew of these guidelines, even if merely advisory, it would have known of the potential risk to the patient. By disregarding such a foreseeable risk, liability can, and should be, imposed upon the hospital. Therefore, after *Cabrini*, it seems that the hospital's failure to act upon these recommendations, even if not industry standard, constituted a failure to undertake reasonable efforts to prevent a foreseeable risk to the patient.

Unfortunately, the full effect of the *Cabrini* decision has yet to be applied by the courts. The First, Second, Third and Fourth Departments all have merely cited to *Cabrini* when discussing the doctrine of vicarious liability and its inapplicability to sexual misconduct by an employee.[15] On April 2, 2002, the First Department cited to *Cabrini* in the case of *Rice v. St. Luke's-Roosevelt Hospital*,[16] in discussing the hospital's liability when a patient is assaulted by another patient. In *Rice*, the plaintiff was raped by another patient while in the hospital's cardiac care unit. The court denied the defendant's motion for summary judgment, and cited to *Cabrini* in finding that the "defendant failed to provide reasonable security to the decedent while she was in their cardiac care unit."

Even the Court of Appeals itself has skirted the issue of dealing with *Cabrini*. On November 21, 2002, the Court of Appeals decided *Sanchez v. The State of New York*,[17] which involved an attack between inmates in the Elmira Correctional Facility. The Court's decision focused upon the notion of foreseeability and the appropriate standard of care. The Court specifically stated, while citing to *Cabrini*, that "we will not engage in extended discussion regarding foreseeability in public schools, hospitals or housing." In so doing, the Court implicitly affirmed the holding in *Cabrini*, even if in the limited context of the hospital.

However, on December 12, 2002, the Court of Appeals again avoided dealing with *Cabrini* by affirming the decision in *Diaz*.[18] In affirming the lower court, the Court of Appeals stated that the "plaintiff's expert failed to provide any factual basis for her conclusion that the guidelines establish or are reflective of a generally accepted standard or practice in hospital settings." Perhaps if the plaintiff's expert had set forth facts that the hospital knew of the standards, the Court would have applied *Cabrini*.

Perhaps the most extensive discussion on *Cabrini* was presented in the First Department case of *J.E. v. Beth Israel Hospital*, decided on June 27, 2002.[19] In that case, the plaintiff brought a negligence action against the hospital, alleging that she was sexually assaulted while under the effects of general anesthesia following surgery. The court, in citing *Cabrini*, stated that "there is no question that a hospital has a duty to safeguard the welfare of its patients."[20]

However, the court in *J.E.* ultimately dismissed the complaint, finding that there was no evidence that the sexual assault took place on the hospital's premises. The court distinguished the facts from *Cabrini*, stating that in *Cabrini*, the "facts of the assault, including the time, place and perpetrator, were all undisputed or clearly established by the evidence."[21] The decision, however, leads one to believe that had the evidence been sufficient to establish that the assault took place on the hospital's premises, the court would have been ready to apply the *Cabrini* standard. This conclusion finds support in a footnote, wherein the First Department recognized the holding of *Cabrini*, and thereby affirmed it as a possible cause of action against the hospital. The court stated:

> The Court of Appeals held that readily observable acts or events suggesting that an assault or unauthorized 'examination' was about to take place would trigger the duty to protect against such assault, even if such an assault would otherwise be unforeseeable: 'observations and information known to or readily perceivable by hospital staff

> that there is a risk of harm to a patient . . . *can be sufficient to trigger the duty to protect' against what might otherwise be 'a risk so remote [as to not] be reasonably foreseeable*.[22]

The court has therefore recognized the *Cabrini* standard and the future impact it will have on cases that would not have survived a motion to dismiss based upon a theory of negligent hiring, retention or supervision. The *Cabrini* decision thus gives hope to plaintiffs who have been sexually assaulted by hospital employees. No longer is the plaintiff's option in bringing a claim against the hospital limited to negligent hiring, retention and supervision. Under *Cabrini*, it seems that a hospital can be found liable if it is aware of a potential risk of harm under the circumstances and fails to do anything to prevent that risk. However, we will have to wait to see the true effects of *Cabrini* and whether risks to the patient, even if merely recognized by professional organizations as in *Diaz*, will now have some bearing on a hospital's liability.

## Endnotes

1. *See, e.g., Noto v. St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 142 Misc. 2d 292, 537 N.Y.S.2d 446 (Sup. Ct., N.Y. Co. 1988); *Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932, 693 N.Y.S.2d 67 (1999); *Mataxas v. North Shore Univ. Hosp.*, 211 A.D.2d 762, 621 N.Y.S.2d 683 (2d Dep't 1995).
2. *Kladstrup v. Westfall Health Care Ctr., Inc.*, 183 Misc. 2d 11, 701 N.Y.S.2d 808 (N.Y. Sup. Ct. 1999) (quoting *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 299 A.D.2d 159, 654 N.Y.S.2d 791).
3. *See, e.g., Rodriguez v. United Transp. Co.*, 246 A.D.2d 178, 677 N.Y.S.2d 130 (1st Dep't 1998); *Kirkman v. Astoria Gen. Hosp.*, 204 A.D.2d 401, 611 N.Y.S.2d 615 (2d Dep't 1994).
4. 2001 WL 1287078 (N.Y.A.D. 1 Dep't 2001).
5. *Diaz*, 2001 WL 1287078 at *1 (quoting the guidelines of the American College of Radiology and the American Institute of Ultrasound in Medicine).
6. *Id.*
7. *Id.* at *2.
8. 97 N.Y.2d 247, 765 N.E.2d 844, 739 N.Y.S.2d 348 (2002).
9. *Id.* at 254.
10. *Id.* at 253.
11. *Id.* at 255.
12. *Diaz*, 2001 WL 1287078 at *2.
13. *Id.* at *4.
14. *Cabrini*, 97 N.Y.S.2d at 253.
15. *Parlato v. Equitable Life Assurance Soc'y of U.S.*, 2002 WL 31322537, 2002 N.Y. Slip Op. 07409 (1st Dep't, Oct. 17, 2002); *Nepaul v. C.W. Post College, Long Island Univ., reprinted in* N.Y.L.J., Nov. 27, 2002, p. 22; *McKay v. Healthcare Underwriters Mut. Ins. Co.*, 295 A.D.2d 686, 743 N.Y.S.2d 593 (3d Dep't 2002); *Doe v. Westfall Health Care Ctr., Inc.*, 2002 WL 31888128 (4th Dep't, Dec. 30, 2002).
16. 293 A.D.2d 258, 739 N.Y.S.2d 384 (1st Dep't, Apr. 2, 2002).
17. 2002 WL 31619048 (N.Y., Nov. 21, 2002).
18. *Diaz v. New York Downtown Hosp.*, 2002 WL 31770491 (N.Y., Dec. 12, 2002).
19. 295 A.D.2d 281, 744 N.Y.S.2d 166 (1st Dep't 2002).
20. *J.E. v. Beth Israel Hosp.*, 295 A.D.2d at 283.
21. *Id.* at 283–84.
22. *Id.* at n.1 (emphasis added).

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## To Our Readers:

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Please contact the chair of the committee listed in the front of this issue of the *Torts, Insurance & Compensation Law Section Journal*.

# Northern Exposure: A Review of Snow and Ice Case Law

By Brian P. Heermance

Practicing law in the Northeast offers exposure to case law not found in other parts of the country. The inclement weather routinely experienced during winter months often gives rise to accidents. And although the winter of 2001-2002 was relatively mild, this past winter proved to be a rough one.

Now, therefore, is an appropriate time to review applicable case law regarding both residential and non-residential property owners' responsibility for the clearing and removal of snow and/or ice from their premises and/or public property that abuts their building and/or land.

## Icy Sidewalks

It has long been held that the responsibility for maintaining a public sidewalk rests with a municipality and not on any abutting landowners. This rule has been steadfast since *Roark v. Hunting*[1] was decided by the Court of Appeals.

In *Roark*, the Court held that only a municipality can be held liable for the negligent failure to remove snow and ice from public sidewalks. An abutting owner is not liable, even though he may fail to comply with the provision of a charter, statute or ordinance requiring him to remove the snow or ice.

The owner is liable if, and only if, by artificial means snow and ice are transferred from the abutting premises to the sidewalk. An example is the situation in which water from the property is permitted to flow onto a public sidewalk and then freezes. Therefore, the Court found that the basic distinction between liability and nonliability rests upon whether the snow or ice was conducted from private premises to a public sidewalk by artificial or natural means.

*Roark* has been continuously upheld in all departments. Courts have found that where there is no evidence demonstrating that an owner made a sidewalk more hazardous by attempting to remove snow or ice, the owner cannot be held liable for injuries occurring as a result of snow or ice existing on a public sidewalk.

## Private Property

Case law is more dubious regarding the duty maintained by a party in control of real property for snow or ice removal.

Generally, a party in control of real property may be held liable for a hazardous condition created on its premises because of the accumulation of snow or ice only if the party had a "reasonably sufficient time from the cessation of the precipitation to remedy the condition."

What qualifies as a "reasonably sufficient time" is the basis for differing opinions, however. Generally, a landowner, lessor or lessee cannot be held liable for accumulations from a storm that is still in progress at the time of an injury.

In *Simmons v. Metropolitan Life Insurance Co.*,[2] the Court of Appeals held that although the plaintiffs presented evidence that icy patches had been noticed weeks prior to the accident, no testimony was introduced that the defendant was notified of the icy conditions. Furthermore, no evidence was introduced as to the origin of the patch of ice on which the plaintiff allegedly slipped and whether the defendant had sufficient time to remedy the dangerous condition.

Therefore, it appears that for a plaintiff to establish a prima facie case, he must be able to show what particular snow or ice accumulation was the cause of the plaintiff's alleged fall. Even if, as in *Simmons*, testimony showed it had snowed a week before an accident, it is insufficient to establish notice unless evidence is introduced that the ice upon which the plaintiff allegedly fell was a result of that particular snow accumulation. Additionally, where the record establishes that a storm ended late in the evening and that the subsequent accident happened in the early morning of the next day, it has been held not to satisfy the "reasonably sufficient time requirement."

## Third-Party Contractor

Many private companies hire outside contractors to remove snow and ice from their property. Often these contracts require that ingress to and egress from the premises at all times is free of ice and snow. However, these contracts generally do not displace the owner's duty as a landowner to safely maintain its property. The contracts are generally considered a limited undertaking and not a comprehensive maintenance obligation.

More recently, cases involving actions against an owner arising out of the condition of a property and predicated upon a third party's failure to perform

under a maintenance contract have led to different circumstances that may or may not give rise to the third party's direct and indirect liability for the plaintiff's injuries.

At one level is the rare case where the third party has entered into a maintenance agreement so comprehensive and exclusive that it entirely displaces the landowner's duty, and imposes an independent duty of care on the part of the third party in favor of the plaintiff.

At a more intermediate level, the delegation of authority to a third party, while insufficient to provide a basis for independent tort liability, is comprehensive enough to relieve the owner of any meaningful responsibility or control. In such cases, any liability on the part of the owner will be vicarious or, at the very least, of such minimal gravity, vis-à-vis the fault of the third party, that the owner "in fairness ought not bear the loss."

In *Philips v. Young Men's Christian Ass'n*,[3] the court found an adequate basis for vicarious liability and an implied indemnity claim in a case where the oral maintenance agreement required the third party to automatically perform snow removal operations upon an accumulation of one to two inches, and to sand and salt the entry ramp without direction or approval from the owner.

The lowest level involves cases where the landowner has retained sufficient responsibility or control over the snow removal operation so that "liability for the injured plaintiff, if any, would be based on an actual wrongdoing in failing to properly maintain its property, not for the liability for the third party's conduct."

In the latter cases, the landowners' own negligence would bar its claim against the third party under a theory of implied indemnity.

Therefore, similar to a lease agreement, it is imperative to fully analyze the contract entered into, whether it is written or oral in nature, between the owner and contractor to determine the level of control an owner retains over the snow removal operation in question.

Nevertheless, the rules stated previously regarding "reasonably sufficient time" to remove the snow and ice still apply whether a contractor or an owner is responsible for its removal.

Keeping ahead of Mother Nature in winter can be difficult, and case law recognizes this by attempting to strike a balance between what is desirous on the one hand and what is realistic on the other.

## Endnotes

1. 24 N.Y.2d 470, 248 N.E.2d 896, 301 N.Y.S.2d 59 (1969).
2. 84 N.Y.2d 972, 646 N.E.2d 798, 622 N.Y.S.2d 496 (1994).
3. 215 A.D.2d 825.

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# *Hoffman Plastic Compounds v. NLRB*: Have Undocumented Aliens Lost the Right to Recover Unearned Lost Wages as Damages in Personal Injury Actions?

By Edwin L. Smith and Reed M. Podell

A United States Supreme Court decision may effect a significant change in New York tort law: precluding undocumented aliens from asserting claims for future lost earnings. It has long been the practice of the plaintiffs' bar to engage economists to quantify the plaintiff's future lost wage claims, which may total hundreds of thousands or millions of dollars. However, for plaintiffs who are undocumented aliens, the U.S. Supreme Court's 2002 decision in *Hoffman Plastic Compounds v. NLRB*[1] may have brought an end to such claims.

A federal immigration law, enacted in 1986, prohibits the employment of aliens unless they are able to present required documentation of their identity and employment authorization. An alien who is unable to present that documentation is deemed "unauthorized" and is forbidden from employment.

At this point, it must be noted that the immigration statute's category of "unauthorized aliens" is broad, encompassing those aliens who are present in this country illegally, and those who are lawfully present but whose status does not permit employment, such as tourists.

In asserting claims for future lost wages in personal injury actions, plaintiffs seek to recover those wages that they could have earned had their injuries not rendered them incapable of gainful employment.[2] However, federal legislation makes clear that unauthorized aliens cannot be lawfully employed in the United States. Therefore, an unauthorized alien should not be permitted to recover future lost wage damages in personal injury actions, a concept that runs counter to existing New York decisional law. Nevertheless, the statute, and the manner in which it has been interpreted and applied by the U.S. Supreme Court, mandates preclusion of such lost wage damages to unauthorized aliens.

## Immigration Reform and Control Act of 1986

### Legislative History

The Immigration Reform and Control Act of 1986 ("IRCA"),[3] was Congress' effort to control immigration by eliminating the availability of employment to both illegal immigrants and nonimmigrants[4] who violate their status.[5] According to recent statistical data, the United States has 7 million unauthorized aliens,[6] a figure that is greater than the populations of 38 states.[7] As of January 2000, 489,000 unauthorized aliens resided in New York.[8]

In his statement about this legislation, the President said, "It will remove the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens here."[9]

*"It has long been the practice of the plaintiffs' bar to engage economists to quantify the plaintiff's future lost wage claims . . . [h]owever, for plaintiffs who are undocumented aliens, the U.S. Supreme Court's 2002 decision in* Hoffman Plastic *. . . may have brought an end to such claims."*

After considering the legislation, the House of Representatives Committee on the Judiciary reported:

> Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status.
>
> . . .
>
> While there is no doubt that many who enter illegally do so for the best of motives—to seek a better life for themselves and their families—immigration must proceed in a legal, orderly and regulated fashion. As a sovereign nation, we must secure our borders.
>
> In fact, the Committee is worried that failure to control our borders could lead to increasing resentment against the continued admission of lawful immigrants and refugees.[10]
>
> . . .

> Undocumented aliens tend to come from countries with high population growth and few employment opportunities. The United States is not in a position to redress this imbalance by absorbing these workers into our economy and our population.[11]
>
> . . .
>
> [T]he Committee is convinced that as long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country or to violate status once admitted as a nonimmigrant in order to obtain employment will continue.[12]

Testimony before the Committee also supported the conclusion that employment of illegal immigrants has an adverse impact upon citizen minorities. According to this testimony, minorities are forced from employment rolls by undocumented workers who are hired at subminimum wages and who are at the mercy of their employers. Aware of their precarious status as illegal aliens, undocumented workers are willing to accept "starvation" wages to be employed in the United States.[13]

To stem the tide of illegal immigration, and to neutralize its social and economic impact, Congress enacted the IRCA, making it illegal to employ undocumented aliens. Central to effectuating the statute's purpose was its enforcement scheme. "In an effort to eliminate the availability of employment, the legislation imposes penalties on those employers who hire, recruit or refer undocumented aliens."[14]

## Federal Statutes and Regulation

In its attempt to eliminate the lure of employment, Congress made it unlawful for a person or entity to employ, refer or recruit for employment an unauthorized alien.[15] An "unauthorized alien" is an alien who is either not lawfully admitted for permanent residence, or is not authorized to be employed pursuant to the requirements of the statute or by the regulations of the Attorney General.[16]

The statute's enforcement scheme requires, under pain of sanctions, that employers verify the alien's eligibility for employment.[17] To establish their employment eligibility, aliens must present specific documentation to prove both their identity and employment authorization.

In the typical case, where the alien is over the age of 16, the alien is permitted to produce the following documents as evidence of both identity and employment authorization:[18]

(1) United States passport (unexpired or expired);

(2) Alien Registration Receipt Card or Permanent Resident Card, Form I-551;

(3) An unexpired foreign passport that contains a temporary I-551 stamp;

(4) An unexpired Employment Authorization Document issued by the Immigration and Naturalization Service which contains a photograph, Form I-766; Form I-688, Form I-688A, or Form I-688B;

(5) In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, an unexpired foreign passport with an Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, so long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the Form I-94.

The following documents are acceptable to establish identity only:

(1) A driver's license or identification card containing a photograph, issued by a state (as defined in section 101(a)(36) of the Act) or an outlying possession of the United States (as defined by section 101(a)(29) of the Act). If the driver's license or identification card does not contain a photograph, identifying information shall be included such as: name, date of birth, sex, height, color of eyes, and address;

(2) School identification card with a photograph;

(3) Voter registration card;

(4) U.S. military card or draft record;

(5) Identification card issued by federal, state, or local government agencies or entities. If the identification card does not contain a photograph, identifying information shall be included such as: name, date of birth, sex, height, color of eyes, and address;

(6) Military dependent's identification card;

(7) Native American tribal documents;

(8) United States Coast Guard Merchant Mariner Card;

(9) Driver's license issued by a Canadian government authority.

The following are acceptable documents to establish employment authorization only:

(1) A social security number card other than one which has printed on its face "not valid for employment purposes";

(2) A Certification of Birth Abroad issued by the Department of State, Form FS-545;

(3) A Certification of Birth Abroad issued by the Department of State, Form DS-1350;

(4) An original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal;

(5) Native American tribal document;

(6) United States Citizen Identification Card, INS Form I-197;

(7) Identification card for use of resident citizen in the United States, INS Form I-179;

(8) An unexpired employment authorization document issued by the Immigration and Naturalization Service.

"Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies."[19] If the alien does not have the required documents, he may not be hired. If the alien produces a document that was not issued to him, or produces a false document, then he "subverts the cornerstone of IRCA's enforcement mechanism" and commits a crime.[20] In short, there is no lawful avenue by which an undocumented alien can earn wages in the United States, and that is exactly what Congress intended.

## Prior New York Decisions Affecting Illegal Aliens' Lost Wage Claims

It has long been held that illegal aliens have the right to sue in New York's courts,[21] and published decisions from New York's courts have consistently shown that illegal aliens may recover on their lost wage claims, despite challenges by defendants.

These published New York State court decisions—all pre-dating *Hoffman Plastic*—have evaluated these lost wage claims by drawing upon the common law principle that one should not be permitted to recover damages based upon the consequences of an act where the act is a serious crime that directly caused the injuries.[22] Under that principle, the courts have found that whether the alien would have earned wages as a result of serious illegal activity was a jury question. However, the courts refused to hold that the alien's act of working illegally in the United States constituted a serious crime so as to bar, as a matter of law, his lost wage claim.[23]

Among the issues that the courts have left to the jury as affecting an illegal alien's lost wage claim are: the length of time during which the alien might have continued earning wages in the United States (which may be limited if deportation or voluntary departure from the United States is imminent); the likelihood of potential deportation; and, whether the wages that the alien would have earned would have been the product of serious illegal activity.[24]

*"[P]rior to* Hoffman Plastic *the impact of the IRCA upon an illegal alien's lost wage claim had never been discussed, nor had that statute ever been cited, in any published New York State court decision."*

It has also been held that the prejudicial impact of allowing a defendant to present evidence at trial of a plaintiff's illegal status outweighs its probative value. Therefore, unless the defendant can show that deportation proceedings had begun or were contemplated, a plaintiff's status as an illegal alien was held irrelevant to his lost wage claim and prejudicial on his entire damages claim.[25]

However, if defendants meet their burden of demonstrating that plaintiff's deportation is imminent, then juries may be presented with evidence of plaintiff's illegal status. Even so, the jury may still award illegal aliens damages for lost earnings. Past lost earnings would be based upon wages the alien was receiving in the United States, and future lost earnings would be based upon prevailing wages in the alien's home country.[26]

With evidence of, *inter alia*, imminent deportation proceedings being a factor in calculating the alien's lost wage damage award, defendants have been held entitled to discovery regarding plaintiffs' immigration status.[27]

Significantly, prior to *Hoffman Plastic* the impact of the IRCA[28] upon an illegal alien's lost wage claim had never been discussed, nor had that statute ever been cited, in any published New York State court decision.

## The Impact of Federal Law on Unauthorized Aliens' Lost Earnings Claims

There is no subject over which Congress' power to legislate is more complete than the admission of aliens.[29] Congress' power over aliens is of a political character and is, therefore, subject to only narrow judicial review.[30] It is also settled that Congress has the power to make rules affecting aliens that would be unacceptable if applied to citizens.[31] On the issue of an alien's right to recover lost wages, it must be remembered that, "An alien has no constitutional right to work without authorization."[32]

Under the Supremacy Clause, federal laws are binding upon the judges of every state, notwithstanding any state law to the contrary.[33] It has, therefore, been held that "Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere."[34]

Absent any express statutory limitations, the terms and policies of immigration law are omnibus in effect. Federal immigration laws apply broadly, touching on areas of the law as diverse as matrimonial law,[35] unemployment benefits,[36] unfair labor practices,[37] and tort.[38]

In *Sure-Tan, Inc. v. National Labor Relations Board*[39] ("*NLRB*"), the U.S. Supreme Court was presented with an apparent conflict between immigration law and the NLRB's effort to effectuate the policies of federal labor law. There, the NLRB found that the employer engaged in an unfair labor practice by reporting to the Immigration and Naturalization Service (INS) certain employees known to be undocumented aliens in retaliation for their engaging in union activities. As a result, these alien employees were deported. The NLRB's remedial measure for this unfair labor practice was to award the discharged, deported workers back pay.

The Supreme Court held that the NLRB's implementation of its traditional remedies, such as back pay, must be conditioned upon the aliens' legal readmittance to the United States. The Court added that "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."[40] The Court also noted a legal anomaly in that the Immigration and Nationality Act[41] was intended to deter unauthorized immigration, but it did not prohibit the employment of undocumented aliens.

Two years later, the IRCA was passed into law, thereby making the employment of undocumented aliens unlawful. The Supreme Court found that combating the employment of illegal aliens was central to Congress' policy of immigration law, and that this policy was forcefully recognized by the passage of the IRCA.[42]

In *Hoffman Plastic Compounds*, an employer laid off several workers for engaging in union organizing activities. One of these employees was an alien who was never legally admitted to enter or authorized to work in the United States, but produced false documents to obtain employment. Although the NLRB awarded back pay to this worker as a remedy for the employer's unfair labor practice, the Court found that the IRCA foreclosed that remedy.

Under the IRCA, "If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired."[43] The Court then found that the NLRB's award of back pay to an illegal alien for years of work not performed and for wages that could not lawfully have been earned "runs counter to the policies underlying IRCA."[44]

There is no reason to believe that Congress intended to award an unauthorized alien lost wages where, but for the event giving rise to the lost wage claim, "an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities."[45]

By enacting the IRCA, Congress intended to halt illegal immigration, and eliminating unauthorized aliens' employment opportunities was the method it chose to accomplish that goal. The U.S. Supreme Court found the IRCA's purpose and enforcement scheme legitimate and enforceable. And so, it may fairly be said that awarding an unauthorized alien *wages for work not performed* "not only trivializes the immigration laws, it also condones and encourages future violations."[46]

In the preceding paragraph, the words "wages for work not performed" are emphasized because this has been a point of distinction generally made by courts interpreting *Hoffman Plastic*. In those cases, the unauthorized aliens were making claims under the Fair Labor Standards Act (FLSA) to recover wages for work actually performed. For these claims, *Hoffman Plastic* was held to be no barrier to recovery.[47]

## A Change in the Legal Landscape

Until recently, the applicability of the IRCA had not been addressed in any reported New York State case that held an undocumented alien can recover on a future lost wages claim. Now that the United States Supreme Court has held that, under the IRCA, undocumented aliens cannot recover wages for work not performed, prior New York case law on this issue may be viewed as superseded.

In deciding that illegal aliens can recover on future lost wage claims, these earlier New York courts drew primarily upon the common law principle that one

should not be permitted to recover damages for injuries sustained in the commission of a serious crime.[48] However, without their also considering the impact of the IRCA on this issue, the courts' analyses in those cases are incomplete.

As the U.S. Supreme Court aptly observed, "Congress and the President have broad power over immigration and naturalization which the States do not possess."[49] Drawing upon this principle, and the Supreme Court's application of the IRCA, an unauthorized alien's recovery on a future lost wage claim under state tort law is incompatible with federal immigration law because it awards him wages that he could not lawfully earn. As such, an award of lost wages to an unauthorized alien contravenes the policy of the IRCA, trivializes immigration law, and is an affront to the constitutional power of Congress to legislate rules affecting aliens.[50]

Not all courts have seen the federal interest so clearly, however. As indicated above, there have been recent published New York state court decisions applying *Hoffman Plastic*. In *Cano v. Mallory Management*,[51] defendant Con Edison moved to dismiss the undocumented alien plaintiff's suit in its entirety, rather than merely the future lost earnings claim alone. The court found that public policy weighed in favor of allowing illegal aliens access to the court system, and so it held that *Hoffman Plastic* did not have to be so broadly construed so as to require dismissal of the action.

However, the *Cano* court also said that plaintiff's undocumented alien status can be presented to the jury on the issue of lost wages. This view represents a departure from earlier decisional authority—which the *Cano* court cited in its decision—which held that, in view of its prejudicial effect, an alien's immigration status can only be presented to a jury if deportation proceedings are imminent.[52] In contrast, the *Cano* court did not condition a defendant's presenting evidence of plaintiff's immigration status at trial upon an offer of proof of deportation proceedings. Nevertheless, the practitioner should be cautious in placing too much stock in the *Cano* court's application of *Hoffman Plastic* to a lost earnings claim because the motion before the court was for dismissal of the suit in its entirety, and so the court's statement regarding the lost earnings claim is dicta.[53]

But one court's dicta is another court's holding. In *Balbuena v. IDR Realty, LLC*,[54] the third party defendant moved, *inter alia*, to dismiss the undocumented alien's lost earnings claim based upon the IRCA and its application in *Hoffman Plastic*. In the first instance, the court found *Hoffman Plastic* was not applicable because there "the Supreme Court merely held that an undocumented worker could not be awarded backpay under the NLRA, a specific federal statute not pertinent to" the alien plaintiff's state tort claims.[55] Having found the NLRA not applicable, and without further addressing the IRCA, the *Balbuena* court said that there was "no federal statute at issue" and did not otherwise view the *Hoffman Plastic* decision as encompassing state tort claims.

The court added that, even if the decision were applicable, *Hoffman Plastic* would not preclude the plaintiff's recovery of wages he might have lawfully earned outside the United States. In such case, the court found, a question of fact would remain as to the amount of wages, if any, that the plaintiff might have earned outside the United States.

*"Indeed, with all due deference to the* Cano *and* Balbuena *courts, it would be a windfall to allow an unauthorized alien to recover on a future lost wages claim."*

The *Balbuena* court nevertheless directed plaintiff to respond to discovery demands (identical to those that follow this article) that specifically referred to documents authorizing his employment under the IRCA, and which were otherwise unrelated to immigration status or deportation. Prior court decisions that directed aliens to provide disclosure of their immigration status were made under an existing body of law which held that such discovery was relevant and admissible at trial when deportation proceedings are imminent because deportation impacts upon the alien's future lost wage claim.[56] Thus, the *Balbuena* court's direction that plaintiff respond to discovery demands unrelated to deportation serves no purpose unless the parties were then permitted at trial to present evidence of the alien plaintiff's employment authorization—or lack of it.

In asserting future lost earnings claims, plaintiffs seek reimbursement for wages it is claimed they cannot earn as a result of injuries caused by defendants.[57] But even if an unauthorized alien plaintiff were not injured, he can not lawfully earn wages in this country. The plaintiff's status as an unauthorized alien prevents him from lawfully earning U.S. wages, irrespective of his claimed injuries.

Indeed, with all due deference to the *Cano* and *Balbuena* courts, it would be a windfall to allow an unauthorized alien to recover on a future lost wages claim. Without having to produce or even obtain the required documents, he would be awarded wages that no United States employer could lawfully pay.

In effect, the award of future lost wages to an undocumented alien would legitimate an illegal employment relationship by allowing the alien to recover wages that the law prohibits him from earning. Such an award is particularly ironic and incongruous because New York courts will not enforce or award damages for breach of illegal employment contracts.[58]

The IRCA also impacts upon the defense of lost earnings claims. In personal injury actions, a plaintiff has "a duty to mitigate his damages consisting of lost earnings to the extent that he reasonably could seek and obtain such rehabilitation."[59] However, an unauthorized alien cannot mitigate damages "without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers."[60]

Consequently, undocumented alien plaintiffs are under a legal disability that prohibits them from lawfully mitigating their lost earnings damages in the United States. As a result, defendants can not legitimately offer a vocational rehabilitation expert's testimony or present other evidence of mitigation because to do so would be to argue that the undocumented alien has an affirmative duty to violate the law! This is an impossible position for defendants.

Indeed, one might even argue that because alleged tortfeasors are exposed to greater damages and limited in their defense when the plaintiff is an undocumented alien, they are treated disparately in violation of their equal protection rights under the federal and state constitutions.[61]

## Utilizing *Hoffman Plastic* in Personal Injury Cases

A view frequently voiced by personal injury plaintiffs' attorneys is that *Hoffman Plastic* does not apply to tort actions because that case dealt with a claim arising under the National Labor Relations Act (NLRA) and not under state tort law.[62] That argument is flawed for three reasons.

First, the IRCA is an immigration statute and, as such, applies to aliens irrespective of the legal field in which issues affecting them arise or the forum in which such issues are heard. There is nothing express or implied in the IRCA limiting its effect to claims arising under the NLRA or any other labor laws.

Second, the NLRA violation in *Hoffman Plastic* was simply the statutory basis of the alien's claim, just as a defendant's alleged Labor Law § 240(1) violation or negligence may give rise to an alien plaintiff's tort claims. "Hoffman eliminated back pay as a remedy available to undocumented workers, thus the decision precluded illegal aliens from a very specific remedy."[63] And so, the effect of the IRCA is to eliminate the remedy of unearned back and future wages to an unauthorized alien, whether the alien's claim arises under federal labor law or state tort law.

Third, the IRCA's prohibition of an unauthorized alien's employment is explicit and "critical to federal immigration policy."[64] As such, the IRCA may fairly be seen as Congress' intent to occupy the field, thereby pre-empting conflicting state tort law that would allow for an award to an unauthorized alien of unearned lost wages. Even if the IRCA was somehow not viewed as occupying the field, state tort law allowing an unauthorized alien to recover unearned lost wages would necessarily be pre-empted because such an award "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress"[65] in enacting the IRCA.

To press the issue of the alien plaintiff's employment eligibility, traditional discovery devices available in CPLR article 31 should be sufficiently effective. As companion discovery demands, a Notice to Admit and a Notice for Discovery and Inspection should be used.[66] Samples follow this article.

The Notice to Admit calls for an admission that the alien plaintiff is neither in possession of nor has been issued the documents federal law requires for his lawful employment, and the Notice for Discovery and Inspection requires the plaintiff to provide copies of those documents. Although the Notice for Discovery and Inspection cannot be used if the Note of Issue has already been filed, the Notice to Admit can be served up to twenty days before trial.[67]

Upon receipt of these demands, plaintiff attorneys will likely either move for a protective order or make various objections rather than give a definitive response, particularly to the Notice to Admit. However, the use of a Notice to Admit for the purpose of ascertaining an alien's employment eligibility under the IRCA has been upheld,[68] and so plaintiffs are not likely to obtain a protective order. Furthermore, since CPLR 3123 only authorizes certain responses to a Notice to Admit, objections and other such responses not enumerated in the statute will likely be viewed as impermissible.[69]

Notices to Admit are to be used to eliminate from the litigation factual matters which are easily provable, but which do not seek admissions about material issues or ultimate or conclusory facts.[70] In view of these guidelines, a Notice to Admit is an ideal tool because an alien plaintiff's employment authorization does not speak to an ultimate issue that must be submitted to the judge or jury as fact finders, such as the question of negligence, and it can be easily proved through production of documents.

Unfortunately, the CPLR gives an unsatisfying remedy for a party's unreasonable denial of a matter set forth in a Notice to Admit. That is, the aggrieved party may be awarded the costs of proving that which should have been admitted.[71] However, if plaintiff's response to the Notice to Admit is a denial (thereby representing that he has been issued the federally required documents), then he can be pressed for his response to the Notice to Produce, which calls for production of those documents.[72]

Of course, obtaining the alien plaintiff's admission at deposition that he is illegally present in the United States or otherwise unauthorized for employment is the most effective means of establishing that he is barred from employment under the IRCA. Oftentimes, though, plaintiffs' counsel will not allow their client to answer questions regarding immigration status. As a result, either a motion to compel or one of the above-mentioned discovery devices may be required to obtain discovery of the plaintiff's status and employment authorization.

Once it is established that the alien plaintiff does not have the federally required documents, the case is ripe for a motion for partial summary judgment to dismiss his claim for future loss of earnings.

New York state courts have traditionally held that whether an undocumented alien would have illegally earned wages in the United States presents a question of fact for the jury to resolve.[73] However, in view of the IRCA's requirements, the question of whether the alien plaintiff would have earned money illegally is one that can be resolved summarily because there is no witness credibility to weigh or bias to consider.

Quite simply, the alien plaintiff was either issued the required documents or not. If he was not issued the federally required documents, then immigration law prohibits his employment. While existing state decisional authority supports an undocumented alien's recovery of unlawful future wages, a meaningful application of federal immigration law and policy is fatal to this lost wage claim.

## Postscript

Motions are pending in several state courts seeking to apply the IRCA and *Hoffman Plastic* to preclude an award of unearned lost wages to undocumented aliens. Given the significance of such claims, individually and in the aggregate, it is clear that appellate courts will be deciding this issue in the near future.

## Endnotes

1. 535 U.S. 137, 122 S. Ct. 1275, 1283 (2002).
2. 36 N.Y. Jur. 2d, Damages §§ 68, 198.
3. 8 U.S.C. § 1324a (as added by Pub. L. 99-603, tit. I, § 101(a)(1), 100 U.S. Stat. 3360.
4. Nonimmigrants include officials and employees of foreign governments, aliens visiting for business and pleasure, etc. *See e.g. Mathews v. Diaz*, 426 U.S. 67, 79 and n.13 (1976).
5. H.R. Rep. No. 682(I), 99th Cong., 2d Sess., at 46, reprinted in 1986 U.S. Code Cong. & Admin. News, at 5650 ("House Report").
6. Office of Policy & Planning, U.S. Immigration & Naturalization Serv., "Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000," Jan. 2003, *available at* <http://www.immigration.gov/graphics/shared/aboutus/statistics/Illegals.htm> ("Estimates of the Unauthorized Immigrant Population").
7. U.S. Census Bureau, "Annual Population Estimates by State: April 1, 2000 to July 1, 2002," *available at* <http://eire.census.gov/popest/data/states/tables/ST_EST2002_01.php>.
8. "Estimates of the Unauthorized Immigrant Population," *supra* note 6.
9. 22 Weekly Compilation of Presidential Documents 1534, Presidential Statements and Remarks, President Ronald Reagan, Nov. 10, 1986, reprinted in 1986 U.S. Code Cong. & Admin. News, at 5856-1.
10. House Report, 1986 U.S. Code Cong. & Admin. News, at 5650.
11. *Id.* at 5651.
12. *Id.* at 5660.
13. *Id.* at 5651.
14. *Id.* at 5660.
15. 8 U.S.C. § 1324a(a)(1).
16. 8 U.S.C. § 1324a(h)(3).
17. 8 U.S.C. § 1324a(b), (e) & (f).
18. 8 U.S.C. § 1324a(b)(1); 8 C.F.R. § 274a.2(b)(v). Minor aliens under age 18 and handicapped aliens are afforded alternative documents that they can produce, which are set forth at length in 8 C.F.R. § 274a.2(b)(v).
19. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S. Ct. 1275, 1283 (2002).
20. *Id.*; 8 U.S.C. §§ 1324c, 1546.
21. *Catalanotto v. Palazzolo*, 46 Misc. 2d 381, 258 N.Y.S.2d 473 (Sup. Ct., N.Y. Co. 1965); *Mazur v. Rock-McGraw, Inc.*, 246 A.D.2d 515, 666 N.Y.S.2d 939 (2d Dep't 1998).
22. *Public Admin. of Bronx County v. Equitable Life Assurance Soc'y of the U.S.*, 192 A.D.2d 325, 595 N.Y.S.2d 478 (1st Dep't 1993).
23. *Id.*; *Klapa v. O & Y Liberty Plaza Co.*, 168 Misc. 2d 911, 645 N.Y.S.2d 281 (Sup. Ct., N.Y. Co. 1996).
24. *Collins v. New York City Health and Hosps. Corp.*, 201 A.D.2d 447, 607 N.Y.S.2d 387 (2d Dep't 1994); *Public Admin. of Bronx County*, 192 A.D.2d 325.
25. *Klapa,* 168 Misc. 2d 911; *Guzman v. American Ambulette Corp.*, N.Y.L.J., Feb. 1, 2001, at 30, col. 1 (Sup. Ct., Kings Co., Rivera, J.).

26. *Guzman,* N.Y.L.J., Feb. 1, 2001, at 30, col. 1.
27. *Gomez v. Long Island R.R.*, 201 A.D.2d 455, 607 N.Y.S.2d 388 (2d Dep't 1994); *Vasquez v. Sokolowski*, 277 A.D.2d 370, 717 N.Y.S.2d 212 (2d Dep't 2000).
28. 8 U.S.C. § 1324a.
29. *Fiallo v. Bell*, 430 U.S. 787 (1977).
30. *Id.*
31. *Mathews v. Diaz*, 426 U.S. 67 (1976); *Fiallo*, 430 U.S. 787.
32. *Aliens for Better Immigration Laws v. United States*, 871 F. Supp. 182 (S.D.N.Y. 1994) (Internal quotation marks and citations omitted).
33. U.S. Const., art. VI, cl. 2.
34. *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977); U.S. Const., art. I, § 8(4).
35. *Heilbut v. Heilbut*, 297 A.D.2d 233, 746 N.Y.S.2d 294 (1st Dep't 2002) (prenuptial agreement declared invalid due in part to scheme to circumvent immigration laws).
36. *In re Gibei*, 284 A.D.2d 784, 727 N.Y.S.2d 189 (3d Dep't 2001) (alien not authorized to work is ineligible for unemployment benefits).
37. *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984); *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002).
38. *Vasquez v. Sokolowski*, 277 A.D.2d 370, 717 N.Y.S.2d 212 (2d Dep't 2000) (immigration status relevant on lost wage claim in tort action).
39. 467 U.S. 883 (1984).
40. *Id.* at 903.
41. 8 U.S.C. § 1101, *et seq*.
42. *INS v. National Center for Immigrants' Rights, Inc.* 502 U.S. 183, 194 and n.8 (1991); *Hoffman Plastic Compounds, Inc. v. NLRB,* 122 S. Ct. at 1282.
43. *Hoffman Plastic Compounds, Inc.*, 122 S. Ct. at 1282 (emphasis added).
44. *Id.* at 1283.
45. *Id.*
46. *Id.* at 1284.
47. *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002); *Flores v. Amigon*, 233 F. Supp. 2d 462 (E.D.N.Y. 2002); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002).
48. *Public Admin. of Bronx County v. Equitable Life Assurance Soc'y of the U.S.*, 192 A.D.2d 325, 595 N.Y.S.2d 478 (1st Dep't 1993).
49. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 95 (1976); U.S. Const., art. I, § 8(4).
50. *Hoffman Plastic Compounds, Inc.*, 122 S Ct at 1284; *Fiallo v. Bell,* 430 U.S. 787, 792 (1977); U.S. Const., art. I, § 8(4); U.S. Const., art. VI, cl. 2.
51. *Cano v. Mallory Management*, __ Misc. 2d __, 2003 N.Y. Slip Op. 23567 (Sup. Ct., Richmond Co., Apr. 10, 2003).
52. *Klapa v. O & Y Liberty Plaza Co.*, 168 Misc. 2d 911, 645 N.Y.S.2d 281 (Sup. Ct., N.Y. Co. 1996); *Guzman v. American Ambulette Corp.*, N.Y.L.J., Feb. 1, 2001, at 30, col. 1.
53. *People v. State Bd. of Tax Comm'rs.*, 174 N.Y. 417 (1903) ("Principles are not established by what was said, but by what was decided; and what was said is not evidence of what was decided, unless it relates directly to the question presented for decision." *Id.* at 447).
54. *Balbuena v. IDR Realty, LLC*, N.Y.L.J., May 28, 2003, at 18, col. 1 (Sup. Ct., N.Y. Co., Richter, J.).
55. *Balbuena, supra* (emphasis in original).
56. *Guzman,* N.Y.L.J., Feb. 1, 2001, at 30, col. 1.
57. PJI 3d 2:290 (2002).
58. *Surgical Design Corp. v. Correa*, 290 A.D.2d 435, 736 N.Y.S.2d 392 (2d Dep't 2002); *Valenza v. Emmelle Coutier, Inc.*, 288 A.D.2d 114, 733 N.Y.S.2d 167 (1st Dep't 2001).
59. *Bell v. Shopwell, Inc.*, 119 A.D.2d 715, 716, 501 N.Y.S.2d 129 (2d Dep't 1986).
60. *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275, 1284 (2002).
61. U.S. Const., amend. XIV, § 1; N.Y. Const., art. 1, § 11.
62. This view was adopted by the court in *Balbuena v. IDR Realty, LLC, supra* note 54.
63. *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1061 (N.D. Cal. 2002) (emphasis added).
64. *Hoffman Plastic Compounds*, 122 S. Ct. at 1285.
65. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987).
66. CPLR 3120, 3123.
67. CPLR 3123(a).
68. *Majlinger v. Cassino Contracting Corp.,* Sup. Ct., Richmond Co., Feb. 10, 2003, Mega J., Index No. 12301/01; *Balbuena v. IDR Realty, LLC, supra* note 54.
69. *Constantino v. Newman*, 47 A.D.2d 626, 363 N.Y.S.2d 348 (2d Dep't 1975) (improvident exercise of discretion to grant protective order where party could have given response enumerated in statute); *Great American Ins. Co. v. Matzen Constr., Inc.*, 114 A.D.2d 625, 494 N.Y.S.2d 464 (3d Dep't 1985) (protective order properly denied where enumerated response could have been used).
70. *Taylor v. Blair*, 116 A.D.2d 204,500 N.Y.S.2d 133 (1st Dep't 1986).
71. CPLR 3123(c).
72. CPLR 3124, 3126.
73. *Collins v. New York City Health and Hosps. Corp.*, 201 A.D.2d 447, 607 N.Y.S.2d 387 (2d Dep't 1994).

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_____ COURT OF THE _____ OF NEW YORK

COUNTY OF _____

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|---|---|---|
| | : | Index No.: |
| | : | |
| Plaintiff, | : | **NOTICE TO ADMIT** |
| | : | |
| —against— | : | |
| | : | |
| | : | |
| Defendant. | : | |

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COUNSELORS:

PLEASE TAKE NOTICE, that pursuant to CPLR 3123, you are hereby requested to furnish to the undersigned, within twenty (20) days after the service of this notice, a written admission to the following facts relating to plaintiff's lost earnings claims:

**DEFINITIONS**

a. "Subject period": the date of the accident/incident pleaded in the complaint, continuing to the present.

**FACTUAL ADMISSIONS**

1. During the subject period, the plaintiff was and is not in possession of the documents set forth in: 8 U.S.C. § 1324a(b)[1](B); 8 U.S.C. § 1324a(b)[1](C) and (D); and 8 CFR § 274a.2(b)[v].

2. During the subject period, the plaintiff was and has not been issued the documents set forth in: 8 U.S.C. § 1324a(b)[1](B); 8 U.S.C. § 1324a(b)[1](C) and (D); and 8 CFR § 274a.2(b)[v].

Dated: New York, New York

Yours, etc.,

Attorney for Defendant

_____

TO:

_____ COURT OF THE _____ OF NEW YORK

COUNTY OF _____

.....x

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|---|---|---|
| | : | Index No.: |
| | : | |
| Plaintiff, | : | **NOTICE FOR DISCOVERY** |
| | : | **AND INSPECTION** |
| —against— | : | |
| | : | |
| | : | |
| Defendant. | : | |

.....x

COUNSELORS:

PLEASE TAKE NOTICE, that pursuant to Sec. 3101 and Rule 3120 of the Civil Practice Law and Rules, it is hereby demanded that plaintiff(s) _____ serve upon and deliver to the undersigned, within twenty (20) days of this demand, at _____, the following documents relating to plaintiff's lost earnings claims:

**DEFINITIONS**

a. "Subject period": the date of the accident/incident pleaded in the complaint, continuing to the present.

**DOCUMENTARY DEMAND**

1. Copies of the documents set forth in 8 U.S.C. § 1324a(b)[1](B), 8 U.S.C. § 1324a(b)[1](C) and (D), 8 CFR § 274a.2(b)[v] that were or have been issued to the plaintiff during the subject period.

PLEASE TAKE FURTHER NOTICE, that pursuant to 3101(h), the foregoing are continuing demands. If any of these items are obtained after the date of this demand, they are to be furnished immediately. The undersigned will object, upon the trial of this matter, to testimony or the introduction of any items sought herein with which there has been no compliance.

Dated: New York, New York

Yours, etc.,

Attorney for Defendant

_____

TO:

# TICL Fall Meeting • Nov. 2002 • Disney Yacht & Beach Club

View from the boat deck of the resort.

Program Chair Robert Coughlin, Jr. introducing the panel; Charles Totero, M.D.; Alfred Cipriani, P. Eng. and Richard Maguire, Esq.

Henry Miller, Lorraine Power Tharp, Dennis R. McCoy and Robert Coughlin, Jr.

Henry Miller becomes Clarence Darrow.

Members' children enjoy a moment with Mickey.

# TICL Annual Meeting • Jan. 2003 • New York City

Eric Dranoff, Dennis R. McCoy and Richard M. O'Keefe.

Then NYSBA President Lorraine Power Tharp and Paul S. Edelman.

Weeden A. Wetmore, Hon. Douglas J. Hayden and Kevin A. Lane.

Hon. Judith S. Kaye; Hon. Seymour Boyers, then Trial Lawyers Section Chair; Hon. Richard C. Wesley; Glenn A. Monk, Program Chair.

Executive Board Meeting.

# Notice to Our Readers Regarding New HIPAA Regulations for Medical Authorization Release Forms

By Paul S. Edelman

One of your editors recently received a denial in response to requests to access clients' medical records because of "new HIPAA regulations," which require modified authorization forms.

*"Under the Privacy Rule, attorneys must obtain the individual's written authorization for any use or disclosure of protected health information that is not for treatment, payment or health care operations or otherwise required by the Privacy Rule."*

The Secretary of Health and Human Services developed the *Standards for Privacy of Individually Identifiable Health Information*, or the "Privacy Rule," which sets national standards for the protection of certain health information, pursuant to the Health Insurance Portability and Accountability Act (HIPAA). The Privacy Rule went into effect 14 April 2003 and it applies to health plans, health care clearinghouses and to any health care provider who transmits health information in electronic form in connection with transactions for which the Secretary has adopted standards under HIPAA. The Privacy Rule protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper or oral.

Under the Privacy Rule, attorneys must obtain the individual's written authorization for any use or disclosure of protected health information that is not for treatment, payment or health care operations or otherwise required by the Privacy Rule. **The authorization must be written in specific terms and contain specific information regarding the information to be disclosed or used, the person(s) disclosing and receiving the information, an expiration date and the right to revoke in writing.**

It is our understanding that members can avoid denial of requests by updating medical authorization release forms, of which a suggested copy appears on page 57. When describing the purpose of the requested disclosure on the forms, members should indicate "at the request of the individual." This should be sufficient to comply with the Privacy Rule.

**Note:** A section of the Privacy Rule exempts a right of access for individuals trying to obtain information compiled in anticipation of legal proceedings. This right of access exemption should not be used as a basis for denying attorneys access to the records. This section of the Privacy Rule should only be used to protect attorney work product. It is not anticipated that health providers will use this section to deny access to records.

To:

_____

_____

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_____

I, _____, hereby authorize copies, Photostats, or photographs of the following, beginning with _____, for _____:

1. ❑ Hospital bill ❑ Hospital records
   ❑ Medical records ❑ X-rays and/or reports
   ❑ Medical Examiner's report ❑ Income Tax records
   ❑ Social Security records ❑ Workers' Compensation records
   ❑ School records ❑ _____

2. To be sent to:

   _____

   _____

   _____

   _____

3. My name is: _____
4. This request is for legal purposes and at my request.
5. This Authorization is valid for one (1) year after the date of execution.
6. I reserve the right to revoke this Authorization.

_____

STATE OF )

) ss:

COUNTY OF )

On the ___day of _____, personally appeared before me, _____ known to me and to me known to be the person described in, and who executed, the foregoing instrument and acknowledged to me that (s)he executed the same.

_____

Notary Public

# Recent Court Decisions Which May Impact Your Practice

By Adam Ferrandino and Kevin Lane

## Insurance Coverage

**ABSOLUTE POLLUTION EXCLUSION:** Policy's pollution exclusion applies to mining waste which can be used commercially, discharged, and contained hazardous materials. *Gold Fields v. Aetna*, 744 N.Y.S.2d 395 (1st Dep't 2002).

**ADDITIONAL INSURED:** A Certificate of Insurance issued by broker of named insured does not create any question on coverage where policy makes no provision for it. Since the broker has no contractual relationship with the purported additional insured, the broker could not be liable to the insured on a negligent misrepresentation claim, as the broker bore no duty to the purported additional insured. The policy endorsement providing coverage for liability arising from work performed by the named insured for purported additional insured was not triggered by work performed on behalf of the named insured by the named insured. *Glynn v. United House of Prayer*, 741 N.Y.S.2d 499 (1st Dep't 2002).

**ADDITIONAL INSURED, Job Site:** Employee of named insured slipped and fell on the floor of a job site bathroom. The First Department inquired as to whether: (1) use of the job site bathroom "was a necessary and unavoidable activity that arose in the course of the construction project"; and (2) whether injury to the employee of named insured "arose in connection with the execution [of the named insured's] work for [the purported additional insured]." Here, the First Department correctly found coverage to be owed. The self-inflicted liability of the additional insured (caused by failure to comply with discovery) had no bearing on the coverage owed to it because of the insurer's "unjustifiable refusal" to defend the additional insured. Notably, this reasoning may persuade additional insureds who are refused coverage to roll over, perhaps agreeing to a consent judgment against them when the insurer refuses to provide it with coverage to which it is entitled. *Turner v. Pace*, 748 N.Y.S.2d 356 (1st Dep't 2002).

**ANTISUBROGATION RULE:** Insurer of subcontractor could not bring suit against subcontractor's workers' compensation carrier for one half of the settlement and defense costs. In the underlying suit, the action would have been barred by the antisubrogation rule. Therefore, the insured could not seek to recover from workers' compensation carrier, who would not have been obligated to contribute to the underlying settlement. *National Casualty Co. v. Allcity Insurance Co.*, 737 N.Y.S.2d 70 (1st Dep't 2002).

**ANTISUBROGATION RULE:** Plaintiff-employee of third-party defendant restaurant slipped and fell on a stairway in restaurant owned by landlord. Plaintiff sued landlord, and landlord sued restaurant. The court ruled the antisubrogation rule did not apply to bar the landlord's suit because the restaurant's general liability policy, which named the landlord as an insured, clearly excluded coverage for work-related bodily injuries. The plaintiff's loss, as an employee of the restaurant, was therefore not covered under the restaurant's policy. Thus, the landlord and restaurant were not mutual insureds as it related to the plaintiff's injury, and the antisubrogation rule did not apply. *Raj v. Olshan*, 735 N.Y.S.2d 710 (1st Dep't 2001).

**CANCELLATION OF POLICY, Premium Finance Company:** While controlled by relevant provisions of Banking Law (*see* Banking Law § 576), the common law rule that cancellation is not effective until notice is received by the insurance company remains in effect. Thus, while premium finance company may have complied with all relevant notice provisions of Banking Law in canceling policy for non-payment of premiums, the cancellation was not effective on the date of the accident, since the notice of cancellation did not reach the insurer until after that date. *Crump v. Unigard Insurance Co.*, 100 N.Y.2d 12 (2003).

**CHOICE OF LAW, Serious Injury Threshold:** New York "serious injury" threshold law derived from Insurance Law §§ 5102 and 5104 would apply where the accident occurred in New York, defendants lived in New York, and case was sued in New York, despite plaintiff's New Jersey residency and a New Jersey law to the contrary. *Kranzler v. Austin*, 732 N.Y.S.2d 328 (2d Dep't 2001).

**CONSTRUCTION OF TERMS, Ambiguity:** The First Department ruled that "midnight" constituted an ambiguous word, thereby allowing two policies (one had been obtained to replace the other upon its expiration) to apply to the same loss. Elements of estoppel existed, as the plaintiff defended the insured against the underlying personal injury action for more than two years. Elements of prejudice were also noted, as the court would have found an obligation on the part of plaintiff to defend given "the resulting prejudice to the insureds were the carrier allowed to withdraw and the defense given entirely to [the other insurer]." Notably, based on the facts contained in the opinion, it seems that such a requirement was just summarily found to

apply. While such language constitutes mere dicta, it is troubling nonetheless. *American Transit Insurance Co. v. Wilfred*, 745 N.Y.S.2d 171 (1st Dep't 2002.)

**DECLARATORY JUDGMENT ACTION:** The Third Department vacated default where the default was shown to be because of law office failure and to have been the result of neglect, not intent. Interestingly, one may note that the law concerning declaratory judgment actions generally states that since the action is to invoke the equitable power of a court, a default judgment will not be granted on the mere showing of a default. *Mothon v. ITT Hartford Group*, 755 N.Y.S.2d 468 (3d Dep't 2003).

**DILIGENCE:** Insurer was entitled to permanent stay of arbitration where insured waited 11 months to contact the state insurance authorities to determine if other driver was insured. Driver had received a denial from other driver's insurer, whose code number appeared on the accident report. *State Farm v. Fuccio*, 732 N.Y.S.2d 221 (1st Dep't 2001).

**DISCLAIMER:** Insurer's delay of 30 days in disclaiming coverage was untimely as a matter of law where the grounds for disclaimer were obvious on the face of the notice given to insurer. *West 16th Street Tenants Corp. v. Public Service Mutual Insurance Co.*, 736 N.Y.S.2d 34 (1st Dep't 2002).

**DUTY TO DEFEND:** Insurer has no duty to defend an insured in action where the sole remaining cause of action is not covered by the policy. Plaintiff had commenced suit against insured listing six causes of action for which the insurer owed a duty to defend, plus a cause of action for breach of contract, which the insurer did not owe a duty to defend. The six causes of action were dismissed, leaving only the breach of contract cause of action. The court ruled that since the only viable cause of action was not covered by the policy, the insurer could properly disclaim and did not owe a duty to defend. *Perras Excavating v. Transportation Insurance Co.*, 737 N.Y.S.2d 692 (3d Dep't 2002).

**FIDELITY POLICY:** Here, employees generated false work orders in hopes of obtaining bonuses, but the insured, having no policy to provide bonuses to employees, learned of falsity and sold the order at a loss. Because the "manifest intent" of employees was to obtain a bonus, "employee benefits earned in the normal course of employment" exclusion applied and insured was not entitled to coverage for this loss. *Jamie Brooke v. Zurich*, 748 N.Y.S.2d 5, (1st Dep't 2002.)

**HOMEOWNER'S INSURANCE, Debris Removal:** Policy clearly and unambiguously provided for debris removal as an extra coverage, which the insureds obtained as part of the payment pursuant to that portion of the policy. They were not entitled to such coverage under the loss of contents portion of the extended replacement cost. *Geisinger v. Vigilant Insurance*, 748 N.Y.S.2d 613 (2d Dep't 2002).

**MOTOR VEHICLE COVERAGE, Cancellation:** Carrier properly cancelled by strictly complying with the mandates of Vehicle & Traffic Law § 313(1)(a). Although the insurer received notice of new address five days after sending notice but before cancellation date, it bore no duty to send notice to new address. Here, estoppel elements were not satisfied. Further, the payment of vandalism claim did not constitute waiver because it happened prior to cancellation. Moreover, submission of the check register did not establish partial payment. *Brelsford v. USAA, a/k/a United Services Automobile Ass'n*, 734 N.Y.S.2d 707 (3d Dep't 2001).

**MOTOR VEHICLE COVERAGE, Duty to Forward Suit Papers in Action Against "At Fault Driver":** With regard to a SUM claim, the carrier was precluded (*see* Insurance Law § 3420[d]) from raising this point when it agreed to a settlement by its insured in March 2001 but did not raise the failure to provide it with suit papers until nearly four months later when it petitioned to stay arbitration. Notably, the Second Department's decision left questions as to whether prejudice would also have been required, and how prejudice would be shown in an SUM request. *Aull v. Progressive*, 751 N.Y.S.2d 292 (2d Dep't 2002).

**MOTOR VEHICLE COVERAGE (PIP), Intoxication Exclusion:** Carrier did not lose right to deny no-fault payments where, while it timely requested medical records from the hospital, it did not do so on a certain form. Instead, the carrier requested medical records in a letter addressed to the attorney for the hospital, who was identified in hospital forms as the proper contact person. The Second Department found that even if the attorney was not the proper contact person, he was obligated to either advise the carrier to contact another person or to forward the papers to the carrier. *New York Hospital v. State Farm*, 741 N.Y.S.2d 86 (2d Dep't 2002).

**MOTOR VEHICLE POLICY, Who Constitutes An Insured:** Here, the Fourth Department acknowledged that a person may have more than one residence for insurance purposes. Thus, son was a resident of the household of his step-father and mother where, while maintaining other residences during military service, he intended to live there for an indefinite period during his search for gainful employment after completing active duty, had a key, and used the address for his driver's license. *New York Central v. Peckey*, 747 N.Y.S.2d 878 (4th Dep't 2002).

**PRECLUSION (Insurance Law § 3420[d]):** Since lack of coverage for breach of contract claim is not dependent on an exclusion, there is no need to timely disclaim.

Insurer therefore entitled to declaration that it owes neither a defense nor indemnification for suit where other covered causes of action have previously been dismissed. Hypothetically, an ethical issue with defense counsel, if retained by the carrier, bringing a motion to get all covered claims dismissed may exist. *Perras v. Transportation Insurance Co.*, 737 N.Y.S.2d 692 (3d Dep't 2002).

## Labor Law

**LABOR LAW § 200, Direction, Control and Supervision:** The Fourth Department found that a property owner failed to establish, by evidentiary proof, that it did not exercise supervisory control over the work site. Such a burden cannot be met based upon plaintiff's failure to identify the party/parties responsible for the dangerous conditions. The court properly denied property owners' summary judgment motion seeking dismissal of common law negligence claims and Labor Law § 200 claim. *Lyons v. Schenectady International, Inc.*, 753 N.Y.S.2d 411 (4th Dep't 2002).

**LABOR LAW § 200, No Liability Absent Supervision, Direction, and Control:** Plaintiff, a General Motors employee, suffered injury after tripping and falling over a piece of angle iron left on the floor of the GM plant. At the time of the injury the plant was undergoing renovations and an outside contractor was engaged in a removal of machinery. After the removal of the machinery, a protective railing made of angle iron was to have been erected around the drainage pit that had been used to collect fluids from that piece of machinery. Plaintiff's fall occurred near such protective railing *after* the defendant had completed its work in that area and GM re-entered that area for purposes of storing machine parts and conducting other activity. Because the defendant neither controlled nor supervised the plaintiff's work or work site, the Fourth Department dismissed the Labor Law § 200 claim. *Severino v. Hohl Industrial Services, Inc.*, 752 N.Y.S.2d 777 (4th Dep't 2002).

**LABOR LAW § 200, Supervision and Control:** Contractor was hired to build a one-family home. Contractor hired another entity to clear trees from the property so that the house could be built. The tree removal company, in turn, contracted with plaintiff's employer to remove the trees. Because the injury arose as the result of the manner in which work was performed at the site, and because no liability could attach in the absence of supervision and control over the actual work performed or actual/constructive notice of any unsafe condition creating the accident, the claim under Labor Law § 200 and common law principles was dismissed as to property owner and contractor. The court thus found overall supervisory control over the work site insufficient in the absence of specific supervision and control over tree-cutting operations. *Begor v. Mid-Hudson Hardwoods, Inc.*, 754 N.Y.S.2d 57 (2d Dep't 2003).

**LABOR LAW § 200, Supervision and Control:** Property owners were involved in deciding the layout of renovation work being performed at funeral home and visited the site periodically. The property owners also hired all the workers (except for injured plaintiff) and paid for all materials used in the renovations. Thus, evidence was sufficient to raise triable issue of fact regarding supervision and control, therefore subjecting to potential liability under Labor Law § 200. *Latino v. Nolan and Taylor-Howell Funeral Home, Inc.*, 754 N.Y.S.2d 289 (2d Dep't 2003).

**LABOR LAW § 240, Protected Activity:** Plaintiff, employed by the Transit Authority of the City of New York, fell from a ladder while attaching a 3-by-5 bulletin board to the wall of a subway station locker room owned by the City of New York. This work did not involve a "physical change" of the building. Thus, there was no alteration within the meaning of the Court of Appeals' decision in *Joblin v. Solow* (91 N.Y.2d 457 [1998]). *Croce v. City of New York*, 746 N.Y.S.2d 485 (1st Dep't 2002).

**LABOR LAW § 240(1):** Owner hired roofing company to remove and replace the roof of a building. Plaintiff, employed by a subcontractor, suffered injury while stepping down from an elevated portion of the roof using bundles of packaged insulation as makeshift steps. On the facts presented, summary judgment to plaintiff should have been granted as a matter of law given defendants' failure to supply a ladder or other safety devices to obtain access to the elevated work site. The mere presence of the ladder somewhere at the work site does not establish that statute has been satisfied. *Orellana v. American Airlines*, 753 N.Y.S.2d 114 (2d Dep't 2003).

**LABOR LAW § 240(1), Covered Activity:** Plaintiff suffered injury after falling from a ladder while taking measurements for the installation of a "racking" system in a warehouse leased by his employer. The racking system was installed by another company. The Fourth Department determined that plaintiff was *not* employed in "construction" activity. Thus, defendant's summary judgment motion seeking dismissal of Labor Law § 240(1) should have been granted. *Ciesielski v. Buffalo Industrial Park, Inc.*, 750 N.Y.S.2d 246 (4th Dep't 2002).

**LABOR LAW § 240(1), Elevation-Related Risk:** Plaintiff was injured when he slid four feet down a barrel roof while engaged in construction work at a project. The First Department determined that this incident constituted the type of extraordinary elevation-related risk which Labor Law § 240(1) was enacted to guard

against. Here, the fall was caused, in part, by lack of safety devices. Thus, summary judgment to plaintiff was appropriate. *D'Acunti v. New York City School Construction Authority,* 751 N.Y.S.2d 459 (1st Dep't 2002).

**LABOR LAW § 240(1), Fall of 15-16 Inches:** Plaintiff suffered injury at a construction project. At the time of incident, plaintiff stood on top of a rock/boulder located in a ditch and jack-hammered the rock in order to break it down. Plaintiff fell from the boulder and injured his back, right knee, and ankle. At the first trial, the court directed verdict entered under Labor Law § 240(1). That verdict was subsequently reversed and the matter remanded for a new trial. At second trial, the jury determined that the top of the boulder that plaintiff worked on rested 15 inches from the bottom of the ditch. Given that plaintiff slipped while on top of the boulder and suffered injury after trapping himself between the boulder and the trench, the court found as a matter of law that plaintiff's injuries resulted from elevation-related risk and directed judgment under Labor Law § 240(1). Sufficiency of elevation differential cannot be reduced to a bright line test although one side of the spectrum falls at or very near ground level. Under the totality of circumstances, the 15 inches height differential sufficed to bring the case within the ambit of the statute. *Amo v. Little Rapids Corp.*, 754 N.Y.S.2d 685 (3d Dep't 2003). See also prior decision in *Amo v. Little Rapids Corp*. (268 A.D.2d 712, 701 N.Y.S.2d 517, *amended* 275 A.D.2d 565, 713 N.Y.S.2d 295).

**LABOR LAW § 240(1), Independent Contractor:** Plaintiff suffered injury after falling from a stepladder that had been positioned on the top of a van. At the time of the incident, plaintiff used the stepladder to perform electrical work at a pole barn to be utilized, following completion, by two corporations solely owned by the private property owner. One of the corporations hired third-party defendant Knauer Electric to perform work. There was a factual dispute as to whether Knauer Electric employed the plaintiff, or if the plaintiff acted as an independent contractor. The Fourth Department determined that regardless of employment relationship, plaintiff was "employed" within the meaning of Labor Law § 240(1). *Knauer v. Anderson*, 750 N.Y.S.2d 390 (4th Dep't 2002).

**LABOR LAW § 240(1), Liability of Construction Manager:** Injured worker brought action against construction manager, general contractor, and subcontractor asserting common law negligence claims as well as violations of Labor Law §§ 200, 240(1) and 241(6). In order for construction manager/project coordinator to be liable under Labor Law §§ 240(1) or 241(6) as "agent" of owner, that entity must have been delegated by the owner the authority to supervise/direct/control the injury-producing work. Pursuant to the terms of the contract, the authority to supervise/direct/control work of contractors at site was specifically withheld. Thus, the claim against construction manager was properly dismissed. *Bateman v. Walbridge Aldinger Co.*, 750 N.Y.S.2d 402 (4th Dep't 2002).

**LABOR LAW § 240(1), Plaintiff's Conduct Sole Proximate Cause:** Plaintiff claims he was injured when he stepped onto a scaffold plank that was purportedly not properly secured. The plank "see-sawed" causing him to fall approximately 8 feet to the ground. Plaintiff's affidavit in support of the summary judgment motion was controverted by an accident report signed by him and deposition testimony of the foreman. This deposition testimony indicated that plaintiff advised foreman that he had "walked off the end of the planking." Inspection of scaffold immediately after the accident indicated no problems with the scaffolding and that no planks were shifted, broken or out of place. This testimony sufficient to raise a triable issue of fact of whether the accident was caused by a defect in the scaffold as well as whether plaintiff's actions were the sole proximate cause. *Manning v. Walter S. Johnson Building Co.*, 757 N.Y.S.2d 168 (4th Dep't 2003) (including a dissenting opinion by Chief Justice Pigott and Justice Lawton arguing that summary judgment should have been granted).

**LABOR LAW § 240(1), Protected Activity:** Plaintiff attempted to gain access to a retractable fire escape ladder located at second floor of building. After gaining access, plaintiff intended to use the ladder as a means of ascending to his assigned work station when the ladder descended and trapped his hand. The ladder and fire escape platform were being utilized by workers to provide access to different areas where work was performed as well as to store materials. Although the plaintiff did not fall, the injury to his arm (caused by the falling ladder) was a direct consequence of the application of the forces of gravity. Thus, claim under section 240(1) existed and summary judgment should have been afforded. *Acosta v. Kent Bentley Apartments, Inc*., 747 N.Y.S.2d 507 (1st Dep't 2002).

**LABOR LAW § 240(1), Protected Activity:** Plaintiff suffered injury after falling from a ladder while installing insulation on HVAC system. This constituted an "alteration" of the building so as to fall within Labor Law § 240(1). *Cuddon v. Olympic Board of Managers*, 752 N.Y.S.2d 715 (2d Dep't 2002).

**LABOR LAW § 240(1), Unprotected Activity:** Plaintiff, a truck driver employed by a supplier of electrical material, incurred injury while delivering a heavy copper reel at a construction site. While rolling the reel to the truck's elevated tail gate, the gate collapsed and caused the plaintiff to fall four feet to the ground. Plaintiff was not among the class of workers within Labor Law § 240(1). Thus, the court granted the defendant's

motion for summary judgment dismissing the complaint. *Chiarello v. J & D Leasing Co.*, 749 N.Y.S.2d 33 (1st Dep't 2002).

**LABOR LAW § 240(1), Work Activity Not Within Coverage of Statue:** Plaintiff suffered injury while moving a steel plate from a pile at ground level to another pile 10 feet away. At the time of the injury, plaintiff used a boom crane affixed to the back of a flatbed truck owned by his employer. At a point when the crane was extended approximately 30 feet in the air, the boom broke off and fell on plaintiff. The crane was not being used to erect, demolish, repair, alter, paint, clean or plank a building or structure. Thus, the court dismissed the Labor Law § 240(1) claim. *Pavlou v. City of New York*, 752 N.Y.S.2d 619 (1st Dep't 2002).

**LABOR LAW § 241(1)(6):** Plaintiff, while standing on top of an elevator performing a safety inspection, slipped on oil and fell, causing injury to his right shoulder. Plaintiff sued the owner of the building under Labor Law §§ 200, 240(1), and 241(6), but subsequently withdrew claims under sections 200 and 240(1). The inspection was being performed to assure that safeties, namely the brakes on the elevator, worked properly. Such activity was not covered since it constituted routine maintenance work which is *not* within the ambit of this section even though regulation 23-1.4(b)(13) defines construction work to include "maintenance" work. The Court of Appeals, concluding that the statutory definition takes precedence over the regulation, found that the activity was not covered and afforded summary judgment. *Nagel v. D & R Realty Corp.* 99 N.Y.2d 98 (2002).

**LABOR LAW § 241(1)(6), Tripping Regulation Not Applicable:** Plaintiff, an electrician, tripped over a six-inch piece of electrical cable resting on the floor below the ladder she was descending. As part of her job, plaintiff was required to pull cable through a ceiling, cut the cable from a spool, and affix the cable to the ceiling. She tripped over cable of the type she was using. The Second Department determined that Labor Law § 241(6) claim based upon a violation of 12 N.Y.C.R.R. § 23-1.7(e)(2) did *not* apply and thus dismissed the complaint. Section 23-1.7(e) requires floors to be kept clear of "debris" and all scattered "tools and materials." The object which plaintiff tripped over was an integral part of work and thus outside the scope of this regulation. *Harvey v. Morse Diesel International, Inc.*, 750 N.Y.S.2d 117 (2d Dep't 2002).

**LABOR LAW § 241(6), Adjustment of Elevator Control Panel Not Within Ambit of Section:** Here, plaintiff suffered injury while examining an electrical control panel in an attempt to repair an elevator not properly stopping level with the floor. The plaintiff sought to repair the elevator itself, not the building. Injury occurred when plaintiff, while walking in the dimly lit room, tripped over a concrete floor containing two different levels. The court determined that the work activity was not "construction work" within the meaning of Labor Law § 241(6). *Peluso v. 69 Tiemann Owners Corp.*, 755 N.Y.S.2d 17 (1st Dep't 2003).

**LABOR LAW § 241(6), Assumption of Risk:** Plaintiff's recovery not barred because the injured worker was struck by a car while working as a flagman. Workers do not assume risk of injury caused by a statutory violation regarding proper illumination. *See* 12 N.Y.C.R.R. § 23-1.30. *Lucas v. KD Development Construction Corp.*, 752 N.Y.S.2d 718 (2d Dept. 2002).

**LABOR LAW § 241(6), "Construction Work" Within Purview of Statute Includes Repair of Water Softener:** Plaintiff was employed by the operator of a resource recovery plant owned by the City of Long Beach. While repairing a broken water softener, plaintiff slipped and fell on a puddle of oil leaking from the turbine to the machine. The court found that work was "construction work" as defined by 12 N.Y.C.R.R. § 23-1.4(b)(13), and that the Industrial Code provision relied upon (12 N.Y.C.R.R. § 23.1.7[d]) was implicated. Thus, an issue of fact to determine whether that violation was the proximate cause of plaintiff's accident existed. *Cameron v. City of Long Beach*, 748 N.Y.S.2d 26 (2d Dep't 2002).

**LABOR LAW § 241(6), Debris Within Meaning of 23-1.7(d):** Plaintiff suffered injury after falling off the deck of a crane he operated when his feet allegedly slipped on accumulated oil and rainwater. The court determined that the defendants failed to establish entitlement to summary judgment under Labor Law § 241(6). The area where plaintiff fell was a "platform" used by the injured plaintiff to reach his work area and thus within the ambit of 23-1.7(d). Further, the oil which resulted from the leak of the crane's engine was "debris" pursuant to 23-1.7(e)(2). *Beltrone v. City of New York*, 749 N.Y.S.2d 271 (2d Dep't 2002).

**LABOR LAW § 241(6), Work Platform Not a "Passageway" Within Regulation:** Here, the plaintiff incurred injury during the renovation of the North Grand Island Bridge. As he vacuumed debris from a platform suspended beneath the bridge, plaintiff tripped over a sandblasting hose connected to a compressor on a barge in the Niagara River and used by a co-worker. Regulations 23-1.7(e)(1) and 23-1.7(e)(2) were found inapplicable. Further, the area where plaintiff was working was not a "passageway." Moreover, the hose neither constituted "debris" nor "scattered tools and materials." Rather, the hose constituted an integral part of the work being performed. Thus, summary judgment should have been granted to defendants. *Schroth v. New York State Thruway Authority*, 752 N.Y.S.2d 478 (4th Dep't 2002).

**ROUTINE MAINTENANCE NOT COVERED UNDER LABOR LAW § 240(1) BUT COVERED UNDER SECTION 241(6):** Plaintiff suffered injury after falling from a ladder while preparing to vacuum fly ash at a plant owned by Central Hudson Gas and Electric. Plaintiff's activity was part of routine maintenance at the premises. Before conducting the activity in question, plaintiff opened the door to the hopper in order to inspect the vacuum hose, allowing fly ash to spew forth and causing him to fall from the ladder. The court found that plaintiff's summary judgment motion under Labor Law § 240(1) should have been denied and the cause of action dismissed, as the plaintiff was engaged in routine maintenance in a non-construction, non-renovation context. However, Industrial Code provisions defining "construction work" to include any work performed in the "construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures" (12 N.Y.C.R.R. § 23-1.4(b)(13)) made such routine maintenance covered by Labor Law § 241(6). *Farmer v. Central Hudson Gas and Electric*, 753 N.Y.S.2d 418 (4th Dep't 2003).

## Landlord/Tenant

**LEAD PAINT:** Pursuant to the New York City Administrative Code § 27-201(h), the elements of a prima facie claim for injury resulting from lead poisoning in a multiple dwelling constructed prior to 1960 include: (1) actual or constructive knowledge that a child under the age of six resided in the building; (2) actual or constructive notice of peeling paint in the apartment in which the child resided; (3) failure of the landlord to use diligent and reasonable efforts to abate the lead hazard; and (4) evidence that the child has been injured as a result of the lead hazard. Moreover, constructive notice of peeling paint is provided by the right implicitly granted to landlords to enter an apartment in order inspect and repair lead-paint defects. Further, conflicting expert affidavits as to the cause of the children's elevated blood lead levels creates an issue of fact making summary disposition inappropriate for either party. *Miah v. New York City Housing Authority*, 748 N.Y.S.2d 913 (2d Dep't 2002).

**LEAD PAINT:** To establish a landlord's liability for lead-paint condition, plaintiff must demonstrate that landlord had actual or constructive knowledge of condition and opportunity to remedy hazardous condition. However, on defendants' summary judgment motion, the burden rests on the landlord to show that he or she had no prior actual or constructive notice of a dangerous lead-paint condition. Thus, the court held that the landlord did not establish that she had no prior actual or constructive notice of lead-paint condition. Therefore, landlord could not limit liability and damages to period after New York City Department of Health issued an order to abate nuisance. *McCabe v. Hans*, 749 N.Y.S.2d 51 (2d Dep't 2002)

**LIABILITY, Landlord for Intentional Torts or Crimes of Others:** Tenant alleged that negligent maintenance of apartment building entry system allowed admission of rapist. However, the assault constituted an unforeseeable criminal act that severed any connection with purported negligence. Moreover, landlord's compliance with duty to take minimal precautions for safety of tenants was established by tenant's admission that entry system was functioning immediately prior to attack; landlord was not on notice of alleged unauthorized entries and no prior criminal activity occurred in building or neighborhood. Thus, the court held that the landlord complied with duty to take minimal precautions and granted the landlord's motion for summary judgment. *M.D. v. Pasadena Realty Co.*, 753 N.Y.S.2d 457 (1st Dep't 2002).

**TENANT LIABILITY:** Tenant did not create nuisance, and subject itself to liability for landlord's increased security costs, merely by tenant's presence. The court granted defendant League of Arab States' motion for summary judgment dismissing landlord's claims that the mere presence of the League posed a safety risk given the number of individual and groups wishing to seek vengeance against Arabs and/or Muslim groups for the September 11 attacks. The landlord failed to point to any "conduct" (beyond presence) on the part of the tenant constituting a legal cause of the threats. *League of Arab States v. 4 Third Ave. Leasehold, LLC*, 753 N.Y.S.2d 323 (Sup. Ct., New York Co. 2002).

## Litigation

**ABANDONED CASE, Dismissal:** Here, the trial court had no basis to deny plaintiff's motion to restore matter. Since no note of issue had been filed when plaintiff failed to appear at a conference that had been the adjourned date of defendant's motion to strike the complaint, dismissal pursuant to CPLR 3404 would have been improper. Additionally, there was no basis to dismiss the matter based upon section 202.27 of the Uniform Rules for Trial Courts. As a result, trial court should have allowed plaintiff to restore matter. *Antoniadis v. Stamatopoulos*, 752 N.Y.S.2d 38 (1st Dep't 2002).

**ARTICLE 78:** Actions brought to challenge decisions of Superintendent of Insurance are controlled by the four-month statute of limitations under Article 78. While Insurance Law § 7312(t)(1) provides a one-year limit to contest the validity of acts taken under a demutualization plan, that limit is not meant to provide a one year period alternative to the four-month period. *Chatlos v. MONY Life Insurance Co., et al.*, 749 N.Y.S.2d 230 (1st Dep't 2002).

**DISCOVERY, Surveillance Materials:** Plaintiff entitled to immediate production of all surveillance tapes in possession of defendant, notwithstanding fact plaintiff had not, as of yet, been deposed. Pursuant to CPLR 3101(i), a defendant is not entitled to insist upon the deposition of the plaintiff prior to such disclosure. Therefore, upon demand, defendant must turn over to plaintiff all videotapes in defendant's possession. *Falk v. Inzinna*, 749 N.Y.S.2d 259 (2d Dep't 2002) (reinforcing a rule also followed by the Third and Fourth Departments, but not the First Department).

**INTELLIGENCE TESTING:** Defendant failed to demonstrate how intelligence testing of infant mother, in lead paint poisoning action, was material and necessary to the defense of the action. As a result, plaintiff's motion for a protective order regarding intelligence testing of mother was granted. *Baez v. Sugrue*, 752 N.Y.S.2d 385 (2d Dep't 2002).

**RELATION-BACK DOCTRINE:** The fact that entities share common shareholders and officers is insufficient to establish that entities are united in interest. Plaintiff must establish a relationship between the entities which gives rise to the vicarious liability of one for the other. Since not established here, plaintiff's cross-motion to add defendant was properly denied. *Mercer v. 203 E. 72nd St. Corp.*, 751 N.Y.S.2d 457 (1st Dep't 2002).

**SERIOUS INJURY THRESHOLD, Lower Lip Scar Does Not Qualify as a "Serious Injury":** Defendant's motion for summary judgment as to lack of serious injury was denied, and defendant appealed. The court held that a reasonable person viewing the scar on plaintiff's lower lip, 7/8 of an inch in length, would not view it as "unattractive, objectionable, or as the object of pity and scorn." Consequently, the Second Department rejected plaintiff's contention that the scar on plaintiff's lip constituted a "significant disfigurement," so as to qualify under the "serious injury" threshold of Insurance Law § 5102(d), and reversed the trial court's denial of summary judgment. *Sirmans v. Mannah*, 752 N.Y.S.2d 359, 360 (2d Dep't 2002) (citations omitted).

**SERVICE OF PROCESS, Conspicuous Service:** Since process server for plaintiff rental car company failed upon three attempts to serve defendant at his last known address, defendant was served via "nail and mail" service. Defendant subsequently defaulted and failed to appear on the date of plaintiff's motion for default judgment. However, the process server's affidavit and all papers submitted by plaintiff failed to include a ZIP code for defendant. Therefore, plaintiff failed to satisfy the requirement of conspicuous service and failed to exercise due diligence as it did not attempt to identify defendant's place of employment. As a result, plaintiff's motion to direct entry of default judgment was denied, and, upon court's own motion, the action is dismissed. *ELRAC, Inc. v. Booker*, 752 N.Y.S.2d 520 (Civ. Court, Queens Co. 2002).

**STATUTE OF LIMITATIONS:** Defendant may raise a statute of limitations defense, *even if it concealed* information about the time in which to timely bring a suit, if it is not in a fiduciary relationship with the plaintiff, so long as no misrepresentation was made about time to file. If the defendant keeps the plaintiff from timely filing suit by using fraud, misrepresentations, or deception, it may be estopped from pleading statute of limitations as a defense. However, if the plaintiff claims concealment without misrepresentation, there is no estoppel if there is no fiduciary relationship between the parties. *Hetelekides v. Ford Motor Co.*, 750 N.Y.S.2d 404 (4th Dep't 2002).

**STATUTE OF LIMITATIONS:** No extension of time under the theory of continuous representation exists against actuaries. The Second Department ruled that a plaintiff cannot have the statute of limitations period for bringing suit against a defendant actuary tolled on the basis of continuous representation because actuaries are not "professionals" for purposes of CPLR 214(6). In New York, a group is considered "professional" (and subject to the rules regarding professional malpractice actions) when its qualities include extensive formal training and learning, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace, and a system of discipline for violation of those standards. In New York, actuaries do not meet this test. They are not required to be licensed, are not regulated by the state, and are not subject to state-created discipline. As a result, actions brought against actuaries cannot be tolled on the theory of continuous representation, as they might for accountants or lawyers. Thus, any claims against actuaries are subject to the three-year time limit for negligence actions. *Castle Oil Corp. v. Thompson Pension Employee Plans, Inc.*, 750 N.Y.S.2d 629 (2d Dep't 2002).

**TOLLING, Continuous Representation:** The First Department found that plaintiff doctor's complaint brought against attorney defendants for malpractice was timely, because it was commenced within three years of defendants' withdrawal as plaintiff's defense counsel. The statute of limitations to bring suit was tolled under the Continuous Representation rule, because the representation was continuous, ongoing, developing, and dependent, until the trial court's decision on the plaintiff's post-trial motion to set aside the verdict. *Gonzalez v. Ellenburg*, 752 N.Y.S.2d 302 (1st Dep't 2002).

**WRONGFUL DEATH ACTIONS, Damages for Loss of Parental Guidance:** Decedent's widow brought a wrongful death action against decedent's treating

physician for failure to diagnose angina. The trial court (Kings County) entered judgment for the plaintiff in the amount of $637,000 for lost earnings, but denied damage award for loss of parental guidance. On appeal, the Second Department held that the evidence was sufficient to require an award for loss of parental guidance. Specifically, the evidence indicated that although decedent's work schedule often kept him away from home prior to his death, he generally spent several hours during weekday evenings and entire weekends with his five-year-old and eight year-old sons. He had taught them to play baseball, read to them, and took them to the movies, bowling, ice skating, to the park, and to the zoo during years prior to his death. The Second Department held that this evidence was sufficient to require award of damages for loss of parental guidance in this wrongful death action. *Zygmunt v. Berkowitz*, 754 N.Y.S.2d 313 (2d Dep't 2003).

## Motor Vehicles

**CHAIN REACTION COLLISION, Summary Judgment:** Here, the court found that a defendant stopped in an attempt to make a left turn was not a proximate cause of the accident, as other vehicles involved in the accident were stopped near the turning vehicle for several seconds prior to impact. *Flores v. Stevenson*, 754 N.Y.S.2d 665 (2d Dep't 2003).

**LIABILITY, Emergency Doctrine:** Complaint dismissed as to moving defendant as defendant was faced with an instantaneous cross-over emergency situation and the acts of the driver of the vehicle in which plaintiff was a passenger were the sole proximate cause of the accident. *Simon v. Iskander*, 749 N.Y.S.2d 365 (Sup. Ct., Kings Co. 2002).

**REAR-END COLLISION, Summary Judgment:** As it can easily be anticipated that cars ahead will make frequent stops in rush hour traffic, defendant's failure to anticipate and react to plaintiff's vehicle is not a sufficient non-negligent explanation for the collision. *Ruzycki v. Baker*, 750 N.Y.S.2d 680 (4th Dep't 2002).

**SERIOUS INJURY THRESHOLD, Summary Judgment:** Here, the court ruled that a chiropractor's affirmation does not constitute competent medical evidence in opposition to a threshold motion. *See* CPLR 2106. *Ramos v. Dekhtyar*, 753 N.Y.S.2d 489 (1st Dep't 2003).

**SERIOUS INJURY THRESHOLD, Summary Judgment:** A diagnosis of meralgia paresthetica based partly upon subjective complaints of pain will support a determination of serious injury when substantiated by medical testimony. *Lichtman v. Heit*, 752 N.Y.S.2d 649 (1st Dep't 2002).

**SERIOUS INJURY THRESHOLD, Summary Judgment:** Defendant failed to establish through the minimal proof submitted in support of the motion, which did not include a doctor's affidavit, that the injuries were not causally related to the subject accident and failed to address whether plaintiff's alleged injuries were significant or consequential. *Seymour v. Roe*, 755 N.Y.S.2d 452 (3d Dep't 2003).

## Negligence (General)

**BREACH OF DUTY:** An injured party that fell as a result of a furniture moving contractor employee's failure to replace a railing, the legs of which had been cut to facilitate moving, was not required to prove that contractor had actual or constructive notice. *Jabbour v. Finnegan's Moving & Warehouse Corp.*, 749 N.Y.S.2d 531 (1st Dep't 2002).

**BREACH OF DUTY:** A patron sustaining serious physical injuries after falling from a retaining wall near the loading dock separated from the bar's parking lot by a grassy slope containing several bushes and trees could not recover from bar owner or lessee. The court held that it was not foreseeable that patron, in a highly intoxicated state, would leave the parking area to urinate behind the bushes rather than use the establishment's indoor facilities. *Hendrick's v. Lee's Family Inc.*, 754 N.Y.S.2d 318 (3d Dep't 2003).

**EXISTENCE OF DUTY:** Party has no duty to follow voluntarily adopted policy, especially where there is no legal obligation to follow the policy and the plaintiff cannot show detrimental reliance. *Boehme v. A.P.P.L.E.*, 749 N.Y.S.2d 49 (2d Dep't 2002).

**LIABILITY:** No liability can be imposed upon party that merely furnishes occasion for an accident by stopping his or her vehicle in the roadway. Where a party merely furnishes the occasion for an accident, by, for example stopping a vehicle in the roadway, but does not cause the accident, liability may not be imposed against him or her. Thus, while presence of defendant's automobile, which was stopped in the right travel lane of the roadway, furnished the occasion for the accident, it was not the cause of the three-car collision. In fact, the accident was caused by the failure of the third vehicle, which hit either one or both of the two cars that had stopped closer to the defendant's car, to stop in time. *Katz v. Klagsbrun*, 750 N.Y.S.2d 308 (2d Dep't 2002).

## Premises Liability

**OUT-OF-POSSESSION OWNER:** Despite retaining the rights to re-enter, conduct inspections, and make necessary repairs of the premises in the event the tenant failed to do so, an out-of-possession landlord cannot be held liable for injuries sustained as a result of a slip and fall on an icy sidewalk where such owner had no duty under the lease to maintain or repair the premises.

*Ahmad v. City of New York*, 748 N.Y.S.2d 777 (2d Dep't 2002).

**PROPERTY OWNER, Intoxicated Persons:** Where a property owner merely permitted the use of its premises in exchange for a donation of $100 and had no involvement in the hosting of a party, such property owner will not be held liable for purported injuries allegedly sustained as a result of being assaulted by an intoxicated person since such property owner had no duty to supervise or otherwise control the premises to prevent a person from being assaulted by an allegedly intoxicated person. *McGlynn v. St. Andrew The Apostle Church*, 750 N.Y.S.2d 47 (1st Dep't 2002).

**RETENTION OF INSPECTION RIGHTS:** In an action commenced by a construction worker against both the contractor and the owner of the construction site, the submission of evidence that said owner may have exercised general supervisory authority at the site for the purposes of overseeing the progress of the work and inspecting the product of the work is insufficient to impose liability against this owner under Labor Law § 200 and common-law negligence. *Alexandre v. City of New York*, 750 N.Y.S.2d 651 (1st Dep't 2002).

**SIDEWALK, Abutting Landowner:** Where a person suffers injury as a result of a trip and fall on a sidewalk that was caused to be raised by the roots of a tree, an abutting landowner is not liable responsible for these injuries even where it is shown that such owner planted said tree. *Gitterman v. City of New York*, 751 N.Y.S.2d 478 (1st Dep't 2002).

**SLIP AND FALL, Habit of Removal:** Where an injured party produces only evidence as to the general habit of the property owner in removing snow from an adjoining sidewalk, such evidence is insufficient to raise an issue of fact as to whether said property owner engaged in the removal of the snow that resulted in the slip and fall. *Nadel v. Cucinella*, 750 N.Y.S.2d 588 (1st Dep't 2002).

**SLIP AND FALL, Parking Lot:** General awareness that water could turn to ice is insufficient to constitute constructive notice of an ice patch. Plaintiff fell on ice patch, described as very thin and colorless, in a parking lot. Thus, the plaintiff failed to establish that the parking lot owner had actual or constructive notice of ice patch. Likewise, the court found the claim that defendant created the condition through negligent snow removal speculative in nature. *Carricato v. Jefferson Valley Mall Ltd. Partnership*, 749 N.Y.S.2d 575 (2d Dep't 2002).

**SLIP AND FALL, Snow and Ice:** In slip-and-fall cases involving snow and ice, a property owner is not liable unless he or she created the defect or had actual or constructive notice of its existence. Parking lot owner's general awareness that some dangerous conditions may have existed is not sufficient to establish constructive notice. Plaintiff must establish constructive notice of the specific condition which caused the plaintiff to fall—for example, ice concealed by mud. Thus, parking lot owner established prima facie entitlement to judgment as matter of law on plaintiff's slip-and-fall claim by showing that: owner neither (1) created the condition; nor (2) had actual or constructive notice of the condition; and (3) there were no visible patches of ice in the parking lot. *Voss v. D&C Parking*, 749 N.Y.S.2d 76 (2d Dep't 2002).

**TRIP AND FALL:** A property owner will not be held liable for injuries sustained by a wedding guest who tripped and fell when attempting to step onto an outside dance floor where such property was leased to the bride and groom and said owner did not retain sufficient control of the tent area and dance floor nor select or install the dance floor. *Notkin v. Vineyards*, 748 N.Y.S.2d 765 (2d Dep't 2002).

**TRIP AND FALL, Observable Defect:** Where a patron tripped and fell in a pothole in a parking lot, the readily observable nature of such pothole does not negate an owner's duty to keep the premises in a safe condition; however, the readily observable nature is pertinent to the issue of comparative negligence. *Gaffney v. Port Authority of New York and New Jersey*, 753 N.Y.S.2d 808 (1st Dep't 2003).

**Particular case summaries were prepared by the attorneys at Sliwa & Lane. Sliwa & Lane serves the counties of Allegheny, Cattaraugus, Cayuga, Chautauqua, Erie, Genesee, Livingston, Monroe, Niagara, Orleans, Wyoming, and Yates, and all of New York State with its Coverage Practice. The entire document has been edited for this publication by Michael Pastrick. Mr. Pastrick is a third-year law student at SUNY at Buffalo.**

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