

New York State Law Digest



REPORTING IMPORTANT OPINIONS OF THE COURT OF APPEALS
AND IN SPECIAL SITUATIONS OF OTHER COURTS

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NEW YORK'S SHIELD LAW

FINDING N.Y. LAW ABSOLUTE IN INSULATING REPORTERS' SOURCES, COURT EVEN DENIES SUBPOENA THAT MIGHT SUBJECT REPORTER TO OTHER STATE'S LESS PROTECTIVE LAW

The petitioner (P) in this case, *Holmes v. Winter*, 22 N.Y.3d 300, N.Y.S.2d (Dec. 10, 2013; 4-3 decision), is the accused in the notorious mass shooting that occurred in a Colorado theater, killing 12 and wounding 70. P's notebook was afterwards discovered, containing data relevant to the shootings. The Colorado district court issued a gag order barring revelation of its content or even the fact of the notebook's discovery. R, a Fox reporter, in disregard of that order, published the news about the notebook's discovery, described its contents, and "indicated that she learned about it from two unidentified law enforcement sources".

P then moved in the Colorado court for sanctions against those sources, but of course had to identify them first. The court held a hearing on that, at which P called a number of witnesses. P then sought and got a subpoena from the Colorado court under Colorado's version of the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings. Under that law, Colorado now became the "demanding" state and New York – which has also adopted a version of the Uniform Act – the "sending" state. (That's the state where R is located and whose courts would be needed to force R to go to testify in the "demanding" state.)

Following the certification procedures prescribed by the Uniform Act, P secured the subpoena in Colorado and presented it to the New York court. It is the New York courts' response to that subpoena, which sought to have New York issue its own subpoena in implementation, that produces the decision. The subpoena is denied.

The majority of four, writing through Judge Graffeo, produces an opinion that can only be described as a dream for news reporters. Stressing the all important value of a free press, the Court reviews New York law at length and finds that statutory and constitutional as well as decisional authority make New York "the strongest in the nation ... [in] safeguarding the anonymity of those who provide information in confidence" to reporters. Under New York law this privilege for reporters is absolute, says the Court.

The next question is one that would ordinarily be deemed to fall under the category of Conflict of Laws. Even if the reporter's promise of confidentiality was made in the foreign state, and even if the foreign state would itself not offer such broad immunity, would New York's law still apply?

According to the Court of Appeals majority, it would. The Court offers its reasons, but the dissenters are not convinced.

The dissenters see the issue as one of conflict of laws and would invoke the Restatement, which they see as making Colorado's the governing law on these facts under the "most significant relationship" test. The test applies to each issue in a conflicts setting the law of the place having the "most significant relationship" to the issue. The two-judge dissenting opinion by Judge Smith sees Colorado as having that relationship and would leave it to the Colorado court to decide whether its subpoena was violated and how the violation may be punished. Judge Read, the third dissenter, takes essentially the same position by adopting the majority opinion of the appellate division.

The Court of Appeals majority finds New York policy so potent on this Shield Law issue that it says a court in New York, the "sending" state, instead of recognizing the Colorado interests at the outset and just granting the subpoena and leaving the rest to the Colorado court, should itself answer the key question – whether R should be compelled to reveal her sources – and make the answer dispositive of the very question of whether to issue the subpoena. That's what the majority does; it holds that R should not be compelled to make that revelation and denies the subpoena on that ground.

So powerful a reach does the Court give New York law that it says it makes no difference where the reporter was when receiving the disputed data. The reporter here was apparently in Colorado at the time, but the Court does not see that as a barrier to applying New York's Shield Law. The Court finds that in this world of email and texting (and of course the telephone), the reporter could as well have asked the questions and received the answers while sitting at her desk in New York.

The dissent says that the majority is in essence even holding that

a New York reporter takes the protection of New York's Shield Law with her when she travels – presumably, anywhere in the world. This seems ... an excessive expansion of New York's jurisdiction, one that is unlikely to be honored by other states or countries or to attain the predictability that the majority says is its goal.

A major point of discussion in the majority opinion is the Court's 1993 decision in *Matter of Codey*, 82 N.Y.2d 521, 605 N.Y.S.2d 661. In *Codey*, acknowledges the majority,

we articulated the general rule that a claim that the evidence sought will be inadmissible in the demanding state based on the applicability of a privilege is simply not a proper basis for a sending state ... to deny the subpoena request[.]

but the Court also finds in that opinion the qualification that

in some future case a strong public policy of this State, even one embodied in an evidentiary privilege, might justify the refusal of relief under [the Shield Law].

R argued that *Holmes* was such a case, and the majority agrees.

Most of the discussions of Shield Law issues have been in criminal cases. (*Holmes* is an example.) Since our bailiwick in the Digest is civil cases, we rarely see them. The point is made in *Holmes*, however, that the Shield Law, in providing its broad protection to journalists, “does not distinguish between criminal and civil matters”, quoting from its 1984 decision in *Beach v. Shanley*, 62 N.Y.2d 241, 476 N.Y.S.2d 765. Hence we address and treat the *Holmes* case in this Digest lead note.

The pedestal on which the heroic *Holmes* decision stands may be a bit shaky because of the cold winds blowing in from the dissents. But by any standard it offers a heavy cudgel that reporters – and probably reporters everywhere – will be keeping in their arsenal. As the dissent anticipates, though, reporters may find it an impotent tool outside New York.

OTHER DECISIONS

COLLECTIVE BARGAINING AGREEMENTS

Whether School District Employees Have Vested Right to Same Health Coverage They Had at Retirement Turns on Construction of CBA

Co-pay provisions were included in the applicable collective bargaining contracts. The four plaintiff/employees who brought this action against the school officials had already retired, and their assumption was that their co-pay obligations could not now be increased. They were increased, however, generating this action against the school district and officials for a declaratory judgment that the increase was a violation of the terms of the collective bargaining agreement in effect at the moment of the plaintiffs’ retirements. That agreement secured the plaintiffs through age 70. They sought to reinstate those co-pay provisions, and damages for their incidental expenditures caused by the unlawful modifications.

While the appellate division granted the defendants summary judgment, the Court of Appeals, in an opinion by Chief Judge Lippman, reverses the appellate division and remands for the resolution of factual issues it finds still unresolved in the case. [*Kolbe v. Tibbetts*](#), 22 N.Y.3d 344, N.Y.S.2d (Dec. 12, 2013).

The main contract provision at issue reads that “[t]he coverage provided shall be the coverage which is in effect for the unit at such time as the employee retires”, and that, says the Court, stressing the “shall be” language,

unambiguously establishes that plaintiffs have a vested right to the “same coverage” during retirement as they had when they retired, until they reach age 70.

The plaintiffs argued that the CBA thus protects them “from unilateral alteration” of that vested right.

The Court finds the “crux” of the parties continued disagreement to be, not the “existence” of the vested right, but its “scope”. The plaintiffs argued that the language obligates the district to provide them with “exactly the same plans described in the CBAs”. That coin has a flip side, however: could the plaintiffs then be allowed to benefit from an “employer matching program” introduced in a subsequent CBA?

The defendants argued for “a more flexible interpretation”, i.e., that “same coverage” in the agreement means only “equivalent coverage”, which would allow the district some discretion

to modify retirees’ benefits so long as such modifications do not substantially alter the overall package.

It all turns on what the parties intended, and here in *Kolbe* the Court sees the parties as having advanced “two plausible interpretations of the operative provision” in the CBAs, a circumstance which under contract law permits the court to allow extrinsic evidence of the parties’ intent.

The appellate division’s grant of summary judgment for the defendants is reversed and the case remanded for further proceedings.

“MEDICAL MONITORING”

Divided Court of Appeals Holds New York Does Not Recognize Independent Claim for Monitoring by Smokers Not Yet Showing Symptoms

The New York Court of Appeals, on certified questions from the Second Circuit, holds that New York does not recognize “an independent equitable cause of action for medical monitoring”. The monitoring was sought by smokers seeking periodic medical attention to determine their physical condition so as to determine in turn what course to take if a smoke-related injury manifests itself. The gist of the Court’s holding, in an opinion by Judge Pigott, is that while such medical monitoring programs exist, they exist only as an element of relief in cases in which an injury in

tort has already been established. [*Caronia v. Philip Morris USA, Inc.*](#), 2013 WL 6589454 (Dec. 17, 2013; 4-2 decision).

On the issue of whether an injury has in fact been established when the cause is the inhalation of a substance and no injury is yet manifest, the Court turns once again to a treatment of its 1936 *Schmidt* case, also discussed elsewhere in this Digest.

The dissent, written by Chief Judge Lippman, finds it well within the traditions of the common law to create new claims like the one seeking medical monitoring here, but the majority finds the many issues presented by such a program inappropriate to judicial resolution and would leave the matter to the legislature. The majority does say, however, if only in passing, that the Court “undoubtedly has the authority to recognize a new tort cause of action”, but it finds that in a complicated matter like this “[t]he Legislature is plainly in the better position to study the impact and consequences of creating” such a recognition. Both sides address “the impact and consequences” in some detail, which involves New York caselaw and a comparison of the law of other courts (state and federal, including the U.S. Supreme Court).

In its review of New York’s own appellate division decisions, the Court finds that they

have consistently found that medical monitoring is an element of damages that may be recovered only after a physical injury has been proven.

That there may be a conflict on this point, however, is acknowledged by the majority in a footnote reciting that

[t]o the extent that any of these ... cases can be read as recognizing an independent cause of action for medical monitoring absent allegation of any physical injury or property damage, they should not be followed.

Included among the majority’s many qualms about a caselaw-created independent monitoring claim are its likely economic effects. The Court is apprehensive, for example, about the possible

inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure.

The majority does preserve what it finds already to be New York law: the assurance that plaintiffs who have sustained physical injury from smoking may continue to seek medical monitoring of their condition, especially for the purpose of taking steps to avoid aggravating the injury. On that issue, too, the *Schmidt* treatment is relevant.

In stark contrast to the majority’s reticence is the dissent’s booming advocacy of the step requested by the plaintiffs. “It is difficult”, says the dissent,

to envision a scenario more worthy of the exercise of this Court's equitable powers.

Requiring cigarette manufacturers to supply monitoring programs could, says the dissent, constitute an important deterrent: it would prompt the tobacco maker to reduce its cigarettes' tar content, for example.

The majority is apprehensive of a "flooding" of the courts by millions of uninjured potential plaintiffs, "depleting the purported tortfeasor's resources for those who have actually sustained damage".

Adopting the plaintiffs' request would require a determination of precisely who would be allowed to sue. Would plaintiffs have to show at least that they were smokers? What about the inhalers of second-hand smoke, which has also been found to contribute to smoke-related lung cancer? Recognizing the vulnerability of non-smokers would surely complicate the formulation of a list of plaintiffs, which would have to include not only all those who smoke, but also most of those who merely breathe.

Complications like these do tend to suggest that a proper monitoring program and a determination of those eligible for it would more appropriately be left to the legislature. If that means the courts' passing the buck to the legislature, we may simply acknowledge that the legislature is only an intermediary in that context, having its own omnibus passee: the administrative agency.

Smoking statistics have been followed by many since the Surgeon General first addressed the subject. But one also hears the statistic that 7 out of 10 smokers have given up reading the Surgeon General's Report.

COLLATERAL ESTOPPEL FOR ADMINISTRATIVE DETERMINATIONS?

Workers' Comp Award to Employee for On-the-Job Injury, Later Lifted When No "Further Causally-Related Disability" Found, Can't Be Basis for Collateral Estoppel in Negligence Action

Hence the Court of Appeals denies the estoppel in [*Auqui v. Seven Thirty One Limited Partnership*](#), 22 N.Y.3d 246, N.Y.S.2d (Dec. 10, 2013).

The defendant in the negligence action had sought it, but the findings made in the compensation proceeding, while perhaps overlapping in some degree those that would be required for an ordinary negligence judgment, are not the same. And without being the same, they can't support an estoppel. In an opinion by Chief Judge Lippman, the Court recites several reasons for this.

Citing its 2003 *Jeffreys* decision (Digest 528), a major opinion in point, the Court points out that an indispensable element in all such attempts is a showing that the disputed issue is the same. The defendant was not able to show that in this case, and

it is the defendant – the party seeking here to invoke the estoppel – who has the burden of proof on the issue.

The Workers' Compensation Law, says the Court, uses the term "disability" to mean an inability to work, and it makes the determination, says the Court, in point of both the degree of disability "(total or partial)" and its duration "(temporary or permanent)". Before the agency, the "focus ... is on a claimant's ability to perform the duties of his or her employment". In "contrast", the Court continues, "a negligence action is much broader in scope ... intended to make an injured party whole for the enduring consequences" of the injury.

Necessarily, then, the negligence action is focused on the larger question of the impact of the injury over the course of plaintiff's lifetime.

Another salient, of course, is that workers' compensation benefits are dispensed "regardless of fault" for any work-related injury, whereas the fault element is a key feature of a negligence recovery in an ordinary tort action.

In the tort action the plaintiff has only one shot at a recovery. Again in contrast, says the Court, citing now its 2012 *Bissell* decision (Digest 630), "in the workers' compensation context it is possible to wait and see what happens" and, as actually occurred in *Auqui*, to adjust payments and if need be cancel all further payments altogether.

The Court is sensitive of past litigation that resolved the once disputed general issue of whether the findings of an administrative agency can ever be dispositive of similar issues in a related tort action. They can be, the Court stresses, admonishing therefore that its decision here in *Auqui*

should not be read to impair the general rule that the determinations of administrative agencies are entitled to collateral estoppel effect. That rule is well-settled and should continue to be applied where, unlike here, there is identity of issue between the prior administrative proceeding and the subsequent litigation.

There is no such identity here. Hence in this case an estoppel does not lie.

SEX OFFENDER PUNISHMENT

Under Article 10 of Mental Hygiene Law, Finding of "Mental Abnormality" Justifies Confinement Only If Offender Found "Dangerous"

The law allows either of two dispositions after a sex offender has been found to have the kind of "mental abnormality" that requires "civil management". The court can direct either "confinement" or "strict and intensive supervision and treatment" (acronymed to SIST).

SIST contemplates outpatient treatment, a majority of the Court of Appeals says. It finds that the disposition made by the lower courts in this case, purporting to invoke the SIST path, placed the offender in an institution that amounted to confinement without following the procedures needed for such a disposition. It reverses and remands for further proceedings. [*State v. Nelson D.*](#), 22 N.Y.3d 233, N.Y.S.2d (Nov. 26, 2013; 4-3 decision).

Absent a finding of the need for confinement, placement of the kind ordered in *Nelson D.* amounts to a deprivation of liberty, the Court finds. It sees support for its conclusion in the language of the statute itself, obviating address to any constitutional due process issue.

The majority, in an opinion by Judge Rivera, rely on the Court’s 2012 *Myron P.* decision (Digest 638), which held that the MHL under its Article 10 makes available “two dispositional choices – either confinement or strict and intensive supervision and treatment”. Which it is to be depends on the level of danger the individual poses to public safety, a matter for the court to decide in each case.

“[T]he basic and undeniable character of confinement is the inability to leave at will from government custody”, the majority declares. This led to a difference of opinion about what a “secure facility” is. The place to which Nelson D. was confined in this case apparently did not qualify as a “secure facility”, but the Court holds that under the statute it didn’t have to. Whether the facility itself could be described as a “secure” one, holds the Court, the offender was confined to it and his freedom of movement was thereby restricted.

The State, says the majority, misinterprets the “clear statutory distinction between confinement” and the “outpatient-based restrictive supervision” contemplated by SIST.

To the minority, in an opinion by Judge Pigott, it’s “clear that the Legislature intended to give courts wide latitude in setting conditions of SIST” and that the lower courts in this case were acting within that latitude.

Both sides describe their reading of the applicable statutes as “clear”, reinforcing the maxim that clarity, like beauty, is in the eye of the beholder.

CONTRACTORS’ LIABILITY

TOWNS AND VILLAGES DAMAGED WHEN ROADWAYS SETTLED YEARS AFTER CONTRACTORS FINISHED WORK ON COUNTY SEWER SYSTEM HAVE NO CLAIM AGAINST CONTRACTORS

Their claims are barred by the statute of limitations. The whole Court of Appeals agrees on that in [*Town of Oyster Bay v. Lizza Industries, Inc.*](#), 2013 WL 6589560

(Dec. 17, 2013), a memorandum decision with a two-judge concurring opinion written by Judge Smith.

If the municipalities' damages claims were treated as an injury to property, they would be subject to the three-year time limit of CPLR 214(4) and be barred under that statute without reference to any other possibilities. The statute in that instance starts running at the time of injury, which in *Oyster Bay* was the completion of the sewer project. That occurred in 1987. Suit wasn't brought until 2009, way beyond the applicable time limit. So the whole Court holds on the injury to property claim, including the concurers.

There was also a contract-type theory, however, urged by the plaintiffs in the alternative. It stressed a third-party beneficiary aspect and hoped thereby for a more favorable limitations ruling. The plaintiffs don't succeed on that, either. They do get a few pages of address to it from the majority, but not even that from the concurers, who reject the contract claim perfunctorily.

The contract claim engages the Court's well known 1995 *Newburgh* decision (Digest 428), in which an owner sued a builder for defective construction of a school library. To the concurers, that alone manifests a "glaring" difference from the present *Oyster Bay* case, in which the plaintiffs never owned the sewers and the counties (Nassau and Suffolk), in undertaking the sewer project, were not building them on the plaintiffs' behalves. This injected issues of privity and third-party beneficiary of the kind involved in *Newburgh*.

The majority in *Oyster Bay*, even in considering the contract-beneficiary argument of the plaintiffs, concluded that it offered no open statute of limitations. It then turned to the injury to property theory and its "accrual" aspects, also finding the injury to property claim untimely.

The concurrence in any event sees in the Court's memo "a misapplication of the *Newburgh* rule", restricting itself to the injury-to-property treatment embodied in the last two paragraphs of the Court's memorandum and concurring only in that part. As noted, however, that part also earned a negative on the statute of limitations issue, so these plaintiffs are the losers by any standard.

As one reads the facts of *Oyster Bay*, an expectation arises that the Court's 1936 *Schmidt* decision and its progeny will come in for much attention. That did not happen. The concurrence just gives it a brief nod in passing.

Schmidt was a 1936 decision that held that the personal injury statute of limitations can run – and run out – even on a wholly undiscoverable injury, such as the inhalation of a poisonous substance that doesn't produce detectable symptoms until years later. *Schmidt* nevertheless held that the inhalation itself marked the moment of injury. The plaintiff who, quite logically, sued only after discovering the injury that the inhalation produced, still found himself out of court. By the *Schmidt*

measure, the statute of limitations had already expired. This meant that a plaintiff engaged in ordinary breathing had best take note that one of his breaths may contain a toxic substance that will later produce a cancer, an act of prognosis that could not be expected without divine intervention.

Though roundly criticized, the *Schmidt* rule endured for exactly half a century until, in 1986, the legislature overruled the case with a statute. (See Siegel, *New York Practice* 5th Ed. § 40.)

A messy history, which the majority perhaps wisely skirted in *Oyster Bay*.