

Trial Lawyers Section Digest

A publication of the Trial Lawyers Section
of the New York State Bar Association

Message from the Chair

A year goes by fast! As I wind down my year as Chair of the Trial Lawyers Section, I look back upon a great year of many accomplishments that we can all be proud of. It's been an honor to serve as Chair of such an outstanding group of lawyers.

Our mission as a Section is to promote and advance the interests of trial practice and the trial lawyers who are our members. With the active support of so many of our members, we successfully carried out this mission. We offered many continuing legal education programs throughout the year, along with many other programs sponsored or cosponsored by our Section. Many of these programs were specifically for trial lawyers. Many others were of interest to all NYSBA members, including numerous diversity initiatives held throughout the state.

One program that our Section proudly sponsored over the past year was the Trial Academy, a weeklong program created by the Young Lawyers Section, held each spring at Cornell Law School for already admitted attorneys. This is an excellent way for the more experienced members of our Section to support (mostly) younger lawyers in the development of their trial practice skills. I've been a member of the teaching faculty of the Trial Academy for the past four years, as have other members



of our Section. This program stands out as one NYSBA's finest.

Another outstanding program that our Section sponsored over the past year was the National Law School Trial Competition. We have sponsored this program in New York for many years thanks to Section member and past Chair Tom Valet. Over the years this program has developed trial skills of countless students attending the various law schools in New York, continuing to benefit them long after they've entered the practice of law. This program and the Trial Academy are more important now than ever, particularly in the civil practice arena, as it has become increasingly more difficult to develop competent trial skills with far fewer cases going to trial than in the past. We look forward to supporting these programs for many years to come.

Our signature Summer Meeting was a great success, and well attended, in Newport, Rhode Island. We all managed to learn some new trial tactics amidst all the fun that Newport provides. Our recent Fall Meeting in New York City was equally successful. We are now busy planning for the NYSBA Annual Meeting which will take place in New York City in January. During the

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Annual Meeting, in conjunction with the Torts, Insurance and Compensation Law Section, we will hold an all-day continuing legal education seminar. We've lined up an outstanding panel of speakers on such topics as premises and dram shop liability, the latest in social media and discovery, insurance coverage, and employer liability. Please plan to attend and support the Section.

During the Annual Meeting we will also hold our annual Section reception and dinner. This is always a well-attended event during which we will present awards and honor members of the judiciary and practitioners for their past contributions to the profession. We expect, as in past years, many judges and leading practitioners to be in attendance.

All of the CLEs and other programs that take place throughout the year require a considerable amount of time and commitment by Section members. Special thanks to all of you who gave of your time over the past year to make these programs successful.

Lastly, I want to thank the members of our Section for trusting in me to serve as Chair for the past year. It was a fun and enjoyable experience that I will always look back on fondly. I look forward to remaining involved and active under the incoming leadership of Charlie Siegel, who will take over as Chair in January. Under Charlie's leadership I look forward to our Section having another great year.

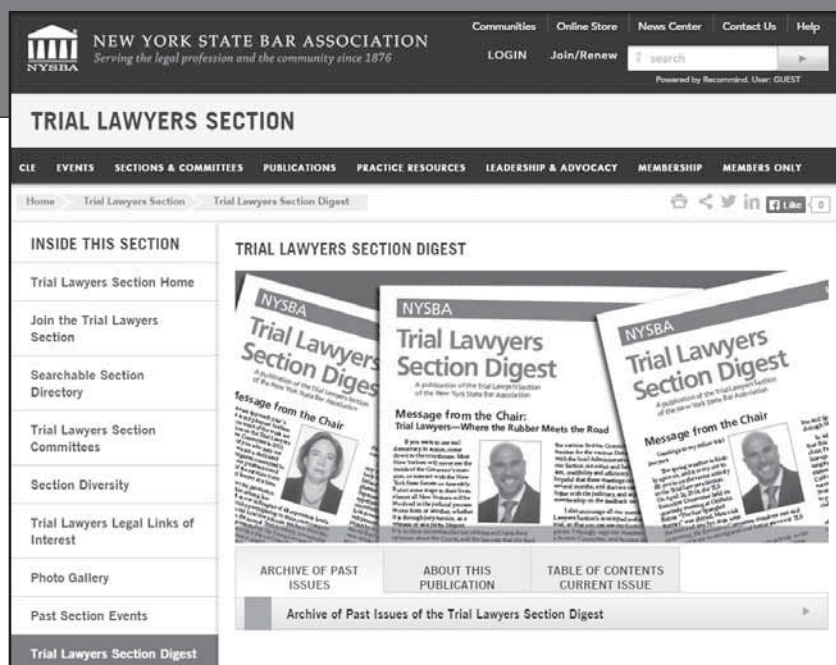
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Third Party Crime in the Retail and Hospitality Industry: Are You Protected?

By T. Andrew Brown and Louise Boillat

I. Introduction

Claims for liability arising from criminal acts committed by a third party upon a shopper, restaurant or hotel guest can result in significant economic, human and brand-related costs. An awareness of legal trends involving third-party crime can assist the store, restaurant or hotel owner in preventing and/or managing these costs.

The duty of a store, restaurant or hotel owner to keep its property in a reasonably safe condition includes a duty to protect persons lawfully on the property from the foreseeable criminal acts of a third party. Foreseeability of harm is the measure of the business owner's duty of care. Foreseeability in the context of third party crime focuses on whether the owner knows or has reason to know from prior history of criminal activity on or in close proximity to the property, that there is a likelihood of criminal conduct that would endanger members of the public.

In instances where the criminal conduct is foreseeable, the store, restaurant or hotel owner has a duty to take reasonable security precautions. If the owner fails to institute reasonable security measures or institutes them in a negligent manner, the owner can be held liable to an injured plaintiff.

II. Duty of the Retail, Restaurant and Hotel Owner

Although the store, restaurant or hotel owner is not an insurer of a visitor's safety, the owner has an affirmative duty to maintain the property in a reasonably safe condition for those who use it. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507 (1980); *Basso v. Miller*, 40 N.Y.2d 233 (1976).

The duty to maintain the property in a reasonably safe condition includes the duty to take minimal precautions to protect the public from the reasonably foreseeable criminal acts of third persons. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507 (1980); *Tarter v. Schildkraut*, 151 A.D.2d 414 (1st Dep't 1989).

The duty of a business owner to take minimal security precautions to protect the public depends upon whether the owner has reason to know from a prior history of criminal activity on the premises, or in near proximity, that there is a likelihood of criminal conduct that would endanger the safety of a visitor. *Mulvihill v. Wegmans Food Markets, Inc.*, 266 A.D.2d 851 (4th Dep't 1999); *Guarcello v. Rouse SI Shopping Center, Inc.*, 204 A.D.2d 685 (2d Dep't 1994).

An owner does not have the duty to take protective measures unless there is a foreseeable risk of harm resulting from the criminal activities of third parties on the premises. *Vasser v. Gordon*, 224 A.D.2d 611 (2nd Dep't 1996); *Banayan v. F.W. Woolworth Co.*, 211 A.D.2d 591 (1st Dep't 1995).

If the danger from a criminal act was foreseeable, however, the owner may be held liable. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507 (1980).

A. Assumption of Duty

In the absence of a legal duty to protect the public from criminal activity by third parties, a store, restaurant or hotel owner who voluntarily assumes a duty to provide security measures is required to do so carefully and may be liable for damages incurred due to negligence.

The mere assumption of a duty to provide security does *not* automatically create liability. Rather, an assumed duty arises where the failure to exercise due care increases the risk of harm to the plaintiff or where the harm suffered was due to plaintiff's reasonable reliance on the voluntary undertaking and tailored his or her own conduct accordingly. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507 (1980).

Once a defendant undertakes to perform an act for the plaintiff's benefit, the act must be performed with due care for the safety of the plaintiff. *Ruiz v. Griffin*, 71 A.D.3d 1112 (2d Dep't 2010) (Plaintiff's decedent, the manager of an Old Navy store, was shot in the parking lot. Due to anonymous threats against decedent, he was escorted from the store to his car by two loss prevention agents. Just before the shooting, one agent stopped at his own car to obtain cigarettes and the other agent waited for that agent while decedent walked alone to his car. Summary judgment for the defendant reversed.)

Commentary: Security and safety equipment (including cameras, locks, alarms, etc.) should be periodically assessed to assure functionality and operability.

III. Foreseeability of Harm by Criminal Activity

The foreseeability of harm by criminal activity is what measures the store, restaurant or hotel owner's duty of care. *Maheshwari v. City of New York*, 2 N.Y.3d 288 (2004); *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507 (1980).

Foreseeability of third party crime depends upon whether the owner knows, or has reason to know, from prior history of criminal activities on the premises or in near proximity, that there is a likelihood of crimi-

nal conduct that would harm a member of the public. *Maheshwari v. City of New York*, 2 N.Y.3d 288 (2004).

Whether knowledge of prior criminal activities is sufficient to make criminal conduct foreseeable to the owner of the property depends upon the location, nature and extent of the prior criminal activities and their similarity, proximity or other relationship to the crime in question. *Jacquelyn S. by Ludovina S. v. City of New York*, 81 N.Y.2d 288 (1993); *Cayo By Cayo v. Supermarkets General Corp.*, 247 A.D.2d 421 (2d Dep't 1998).

Commentary: Where the store, restaurant or hotel can show that the intentional act by the third-party was not foreseeable, through proof of the location, nature and extent of prior criminal activity, then a summary judgment motion should be made.

A. Duty to Discover

A store, restaurant or hotel owner has an affirmative *duty* to exercise reasonable care *to discover* that such acts are being done or are likely to be done. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507 (1980).

Commentary: The retail or hospitality owner should investigate what type of criminal activity has occurred on or near the particular property in question in the recent past and determine what reasonable security measures should be instituted to deter that type of criminal activity.

B. Ambient Neighborhood Crime

Ambient neighborhood crime alone is insufficient to establish liability. *Milton v. I.B. P.O.E. of the World Forest City Lodge #180*, 121 A.D.3d 1391 (3d Dep't 2014); *Regina v. Broadway-Bronx Motel Co.*, 23 A.D.3d 255 (1st Dep't 2005); *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149 (2d Dep't 1999).

C. General Awareness of Crime

A business owner's general awareness of similar crimes nationwide (e.g., mall shooting) or unsupported assertions that ATMs attract criminal activity are insufficient to support a plaintiff's burden to prove notice and foreseeability.

In *Haire v. Bonelli*, 107 A.D.3d 1204 (3d Dep't 2013), plaintiffs were shot during a random shooting spree at a mall. The Court held that a general awareness of incidents of mall shootings in other locations throughout the country and an acknowledgement that such an event could happen anywhere does not amount to an admission by defendants that such an event was reasonably foreseeable.

In *Williams v. Citibank, N.A.*, 247 A.D.2d 49 (1st Dep't 1998), the plaintiff was attacked in the vestibule of the bank's ATM facility. Plaintiff's unsupported assertion that ATMs attract criminal activity was insufficient to show that defendant was on notice of previous criminal activity at this particular facility. The Court reasoned that, although a person using an ATM might be subject to

a robbery is conceivable, conceivability is not the equivalent of foreseeability.

D. Cases Where Criminal Act Was Foreseeable or Plaintiff Presented a Question of Fact of Foreseeability

- *Banayan v. F.W. Woolworth Co.*, 211 A.D.2d 591 (1st Dep't 1995) (Plaintiff and her sister testified that the assistant store manager witnessed the assault upon plaintiff from a short distance and heard cries for help but made no effort to stop the attack.)
- *Staveris v. 125 Holding Co.*, 272 A.D.2d 185 (1st Dep't 2000) (Plaintiff, who was assaulted in parking lot, provided ample detail of time, location, nature and extent of prior crimes.)
- *Guarcello v. Rouse SI Shopping Ctr.*, 204 A.D.2d 685 (2d Dep't 1994) (Infant plaintiff assaulted by group of youths who were loitering in a corridor outside a video arcade and outside the shopping mall entrance. Shopping mall owner was aware of continuing problem of gangs of youths loitering around the mall entrance and outside the video arcade and that these youths frequently became involved in violent altercations.)
- *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507 (1980) (Plaintiff shot in back by unknown assailant as he leaned over to sign guest register that had been placed on a desk located in the lobby of a midtown Manhattan office building. The lobby attendant was away from his post. Plaintiff introduced evidence of 107 reported crimes in the building in the 21 months preceding the shooting, 10 of which were crimes against the person. Although there was no indication that any of the crimes took place in the lobby, a rational jury could have found that a criminal incident in the lobby was foreseeable.)
- *Montag v. YMCA of Oneida County*, 105 A.D.2d 1131 (4th Dep't 1984) (After an employee left the security desk outside the women's locker room, an unknown male entered and assaulted plaintiff. Jury could infer that because defendant instituted security measures defendant was aware of the potential risk to members if the facilities were left unattended and that defendant was negligent in failing to provide the due care needed under the circumstances.)
- *Kahane v. Marriott Hotel Corp.*, 249 A.D.2d 164 (1st Dep't 1998) (A well-known and controversial speaker was shot and killed in the hotel banquet room. The hotel had received a call the day of the event from an unknown caller advising he was aware decedent would be speaking and asking whether metal detectors would be in place, noting they had been used at prior appearances by decedent. An issue of fact existed as to whether the hotel should have foreseen the risk of harm.)

- *Bisignano v. Raabe*, 128 A.D.3d 751 (2d Dep’t 2015) (Infant plaintiff’s girlfriend testified that 30 minutes before plaintiff was assaulted at the church fair, she spoke to a security guard and advised him there was a confrontation and it was getting worse.)

E. Cases Where Criminal Act Was Not Foreseeable or Plaintiff Failed to Present a Question of Fact of Foreseeability

- *Petrus v. Saci, Inc.*, 18 A.D.3d 848 (2d Dep’t 2005) (Nightclub could not be held liable to patron who was injured when he was assaulted by two unknown assailants in a sudden and unexpected altercation that the nightclub could not have reasonably anticipated or prevented.)
- *Afanador v. Coney Bath, LLC*, 91 A.D.3d 683 (2d Dep’t 2012) (Plaintiff was stabbed suddenly and unexpectedly by an unidentified assailant after fight broke out in restaurant. Plaintiff failed to show defendant could have reasonably anticipated or prevented the attack.)
- *Rednour v. Hilton Hotels Corp.*, 283 A.D.2d 221 (1st Dep’t 2001) (Plaintiff, a homeless man, was assaulted after talking to a prostitute inside the Waldorf-Astoria Hotel. The attack was a sudden and unforeseeable incident.)
- *Gray v. Forest City Enters.*, 244 A.D.2d 974 (4th Dep’t 1997) (An unknown assailant attacked plaintiff as she was walking past JCPenney’s loading dock on her way to her vehicle in the mall parking lot. The store owner established it had no notice of a prior history of muggings outside its store. Evidence that the mall had notice of six prior criminal incidents at the mall, none of which occurred at the loading dock, does not establish that the attack upon plaintiff was foreseeable.)
- *Mulvihill v. Wegmans Food Markets, Inc.*, 266 A.D.2d 851 (4th Dep’t 1999) (Plaintiff was attacked by a group of males in defendant’s parking lot at 2:00 a.m. The incidents that occurred in the parking lot and the store during the three years before plaintiff’s assault were so dissimilar in nature from the violent attack upon plaintiff as to be insufficient to raise a triable factual issue as to foreseeability.)
- *Charleen F. v. Cord Meyer Development Corp.*, 212 A.D.2d 572 (2d Dep’t 1995) (Plaintiff, an employee of a lingerie store located in a shopping center, was raped at gunpoint during a robbery in the store. Plaintiff failed to show that the defendants had reason to know from past experience that there was a likelihood that a store employee or customer would be attacked by a third party.)

- *Lomedico v. Cassillo*, 56 A.D.3d 1271 (4th Dep’t 2008) (Plaintiff’s son was injured during a fight with other high school students in Wal-Mart’s parking lot. Wal-Mart established they were unaware of any facts that would put them on notice that an assault would occur in their parking lot. They established there was no history of prior assaults or other violent crimes in the parking lot, nor was there a history of students gathering to fight.)
- *Reidy v. Burger King Corp.*, 250 A.D.2d 747 (2d Dep’t 1998) (Plaintiff, who was assaulted in the ladies’ room of a Burger King restaurant in a mall, failed to provide sufficient proof of criminal activity to raise a triable issue of fact.)

IV. Reasonable Security Measures

Once it is demonstrated that a store, restaurant or hotel owner owed a duty to protect members of the public, plaintiff must prove that defendant breached that duty by failing to maintain “minimal security measures.” *Miller v. State of New York*, 62 N.Y.2d 506, 513 (1984). See also *James v. Jamie Towers Housing Co.*, 99 N.Y.2d 639, 641 (2003) (“minimal security precautions”).

The law does not require the owner to provide the most advanced or state of the art security but, rather, only “reasonable” security measures. *Leyva v. Riverbay Corp.*, 206 A.D.2d 150, 155 (1st Dep’t 1994); *Tarter v. Schildkraut*, 151 A.D.2d 414, 415 (1st Dep’t 1989).

The question of what safety precautions may reasonably be required of the owner is usually a question of fact for the jury, taking into account factors such as the seriousness of the risk, the severity of the potential injuries and the cost or burden imposed on the landowner of each safety measure. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507 (1980); *Iannelli v. Powers*, 114 A.D.2d 157 (2d Dep’t 1986).

A. When Internal Operating Rules Are Admissible

While internal operating rules may be admissible as evidence of whether reasonable care has been taken and as evidence of defendant’s negligence or non-negligence, such rules must be excluded, as a matter of law, if they require a standard of care that transcends reasonable care. *Danbois v. New York Central Railroad Co.*, 12 N.Y.2d 234 (1963); *Lesser v. Manhattan & Bronx Surface Transit Operating Authority*, 157 A.D.2d 352 (1st Dep’t 1990).

A defendant’s internal operating rules will be admitted, however, to establish the lack of any rules for handling security issues. *Gerbino v. Tinseltown USA*, 13 A.D.3d 1068 (4th Dep’t 2004); *Banayan v. F.W. Woolworth Co.*, 211 A.D.2d 591 (1st Dep’t 1995).

Commentary: Retail, restaurant and hotel owners should aggressively challenge a plaintiff’s efforts to rely on a breach of internal operating rules and procedures or an attempt to demonstrate negligence by that fact alone

where such rules or procedures go beyond what is required by statute or common law.

B. When Plaintiff Must Produce an Expert

Absent testimony from plaintiff's security expert, the jury may not be allowed to speculate what safety measures were lacking or what additional safety measures, if any, could have been reasonably undertaken by the defendant. *Iannelli v. Powers*, 114 A.D.2d 157 (2d Dep't 1986). (Plaintiff failed to produce a qualified expert in the field of building security. Judgment in favor of the plaintiff was reversed.) Cf. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507 (1980) (Plaintiff's expert testified that the mere presence of an official attendant, even if unarmed, would have deterred criminal activity in the lobby of the office building.)

Where, on the other hand, a retailer has no security plan, no uniformed guards, no security cameras and limited store personnel on a Sunday the week before Christmas, the issue is not beyond the ken of the average juror and does not call for professional knowledge. *Banayan v. F.W. Woolworth*, 211 A.D.2d 591 (1st Dep't 1995).

V. Out-of-Possession Landlord

An out-of-possession landlord is *not* liable for injuries that occur on the property unless the landlord has retained control over the property or is contractually obligated to repair unsafe conditions. *Ogilvie v. McDonald's*, 300 A.D.2d 376 (2d Dep't 2002). *Reidy v. Burger King Corp.*, 250 A.D.2d 747 (2d Dep't 1998); *Baker v. Getty Oil Co.*, 242 A.D.2d 644 (2d Dep't 1997). (Property owner/lessor, as well as lessee/sublessor, Getty Oil, did not retain degree of control over the premises and day-to-day business operation that would permit the imposition of liability.)

The mere reservation of a right to enter and inspect the premises is insufficient to impose liability upon the landlord. *Ogilvie v. McDonald's Corp.*, *supra*. (Plaintiff was shot during the course of her employment. Property owners were out-of-possession landlords and sublessor McDonalds demonstrated it was not responsible for security and did not retain control over the day-to-day operations of the franchise sufficient to warrant imposition of liability.)

VI. Security Contractors

Generally, a victim of a crime does not have a claim against a security company retained by the property owner unless the contractor increases the risk, the plaintiff reasonably relies upon the performance of the contract, or the contractor entirely replaces the property owner's duties to maintain the premises safely. *Murshed v. New York Hotel Trades Council*, 71 A.D.3d 578 (1st Dep't 2010); *Gerbino v. Tinseltown USA*, 13 A.D.3d 1068 (4th Dep't 2004). See also *Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136 (2002).

A property owner who contracts for security services, however, may be able to seek contribution or indemnity pursuant to the contract if the security contractor negligently performed its duties. See *Sprung v. Command Security Corp.*, 38 A.D.3d 478 (1st Dep't 2007).

VII. Limitations on Liability

Some states have enacted tort reform legislation in order to remedy the inequities created by joint and several liability on low-fault, deep-pocket defendants. In New York, for example, statutory law (CPLR 1601) modifies the common law rule of joint and several liability by making a joint tortfeasor whose share of fault is 50% or less liable for plaintiff's non-economic (pain and suffering) loss *only* to the extent of that tortfeasor's share of the total non-economic loss. As a result, a low-fault tortfeasor is only liable for its actual percentage of fault, rather than the full amount of plaintiff's noneconomic loss.

In New York, one of the statutory exceptions to the limitation of liability provides that the limitation does not apply to actions requiring "proof of intent" (CPLR 1602). The New York Court of Appeals has held that this exception to the limitation of liability does *not* apply to cases where plaintiff alleges the defendant negligently failed to provide protection from a non-party assailant. *Chianese v. Meier*, 98 N.Y.2d 270 (2002) (Court sustained an apportionment of liability among defendant building owner, defendant managing agent and non-party assailant, who had acted intentionally.)

Commentary: By apportioning fault to the third-party criminal who is often judgment-proof, a store, restaurant or hotel owner may reduce its potential for liability.

VIII. Conclusion

The owner of a retail store, restaurant or hotel may be liable for injuries caused by the criminal acts of a third person upon a person lawfully on the property. Although business owners and tenants have a common law duty to minimize foreseeable dangers on their property, including criminal acts of third parties, they are not insurers of a visitor's safety.

The defense of an owner or tenant should commence with an investigation of the facts to determine whether the defendant had control over the property; whether there was a history of similar criminal activity on the property or in close proximity; what, if any, security measures were in place and were they operational at the time; did the defendant have a security contractor from whom contribution and/or indemnity may be sought; and does the law provide for joint and several liability and, if so, are there limitations on that liability that are advantageous to the owner.

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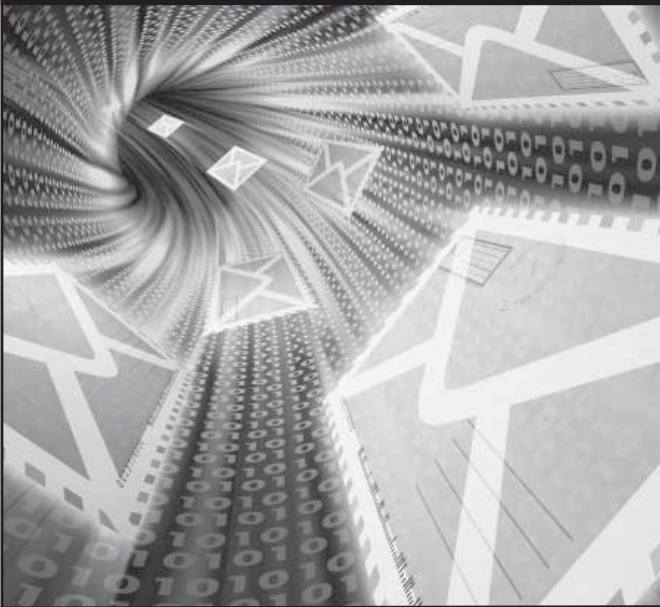
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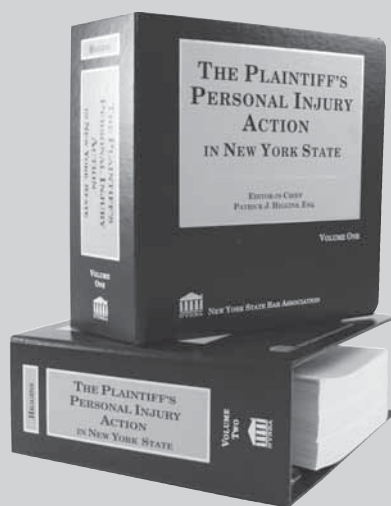
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