No. 614 February 2011

INTEREST ON ARBITRATION AWARD IN PERSONAL INJURY CASE
Where Jury Has Found Liability, Later Award of Damages by Arbitrator Carries Interest from Verdict, Not Just Award

This is a problem that arises mainly in personal injury cases, for the reason that under one of the applicable statutes, CPLR 5001, interest in such actions does not start – as it does on virtually all other claims – from the accrual of the claim, but only from the verdict. According to the CPLR's drafters, the reason for this is that there are "difficult policy considerations" in the subject, notably in regard to the element of pain and suffering, which is such a key part of damages in a personal injury case. This is especially so when an assessment of potential future losses is needed: it entails much speculation.

So the drafters left it alone. But while the personal injury claim does not bear interest in the CPLR 5001 category, it does bear interest in the CPLR 5002 category: interest on the verdict (or decision in a judge-tried case) until judgment. That interest, moreover, is incorporated into the judgment along with the sum found as damages (in essence a compounding of interest) with interest then running on the whole judgment – now governed by CPLR 5003 – until the judgment is paid.

Ordinarily the CPLR 5002 period of interest is of little consequence, because interest on the claim itself would be running anyway and would pick up again with the entry of judgment even if the parties forgot to invoke CPLR 5002 and consider interest for the hiatus (usually short) between verdict and judgment. (See Siegel, New York Practice 4th Ed. § 411, and the Commentaries on McKinney's CPLR 5002.) The only loss – truly inconsequential – would be that produced by the compounding that takes place when the CPLR 5002 interest is included in the judgment along with damages.

The reciprocal action of these elements meets a significant challenge, however, when a bifurcated trial is ordered in the personal injury action, i.e., where the liability aspect is ordered to trial first, with the damages aspect to be tried separately afterwards (and only, of course, if the first trial establishes liability). In that situation a substantial period can elapse between the liability verdict and the later damages finding, giving the CPLR 5002 interest a significance it lacks in other cases.

A long hiatus would perhaps be most likely if an interlocutory judgment is entered on the liability finding, and it goes to immediate appeal, with the damages trial suspended in the interim. If the judgment is affirmed and the case goes back to try damages, the delay may have been many months or even years.

Whatever generates the delay, does the sum of damages then found bear category two interest (i.e., interest under CPLR 5002) only as of the damages finding, or is the interest deemed to start from the time of the earlier verdict of liability? The liability verdict, answered the Court of Appeals in the landmark decision on this subject: its 1991 decision in *Love v. State of New York*, on which we did a lead note in Digest 384.

That of course settled the point – in most cases. But what of the situation in which, for one reason or another, the damages trial does not take place in court, but in arbitration? When the arbitrator decides on damages, does the interest – this is still category two interest we're talking about under CPLR 5002 – get measured only from the moment of the arbitration award, or does it, too, get measured from the old liability finding? Same answer, says the Court of Appeals: the old liability finding. *Grobman v. Chernoff*, 15 N.Y.3d 525, 914 N.Y.S.2d 731 (Nov. 30, 2010).

There was a bit of a confused background in *Grobman*, a no-fault situation in which arbitration plays a big role. Unless the case involves, for example, a "serious injury" – which enables it to be brought as an ordinary personal injury action in court – it is restricted to the arbitral process. Here it just started out as a court action, leading to the bifurcation and the trial of liability first, with liability found and then a damages trial ensuing. All was appealed, and on the appeal the verdict was found defective – its damages elements irreconcilable – and the case was remanded for a new trial. Only now was an application made to compel arbitration, and after further skirmishes and yet another appeal, the liability verdict was sustained as having resolved the "serious injury" question and the arbitration left to address damages only.

It did, producing an award of $125,000, but nothing was said about interest. So now arose the issue of whether interest runs from the award, or from the earlier time – now some ways back – when liability was first established. The supreme court held that it runs from the arbitration award, but ultimately the appellate division rejected that and held that it runs from the liability finding, i.e., the court held that the *Love* decision applies.

The Court of Appeals agrees, and affirms. In an opinion by Judge Read, it says that "[w]hile the parties ... were free to submit the issue of prejudgment interest to the arbitrator", it sees no such submission as having been made in this case. The agreement just submitted "Damages", and damages and prejudgment interest are not the same thing. Damages

> compensate plaintiffs in money for their losses, while prejudgment interest [subquoting now from the Love decision] 'is simply the cost of having the use of another person's money for a specified period'.

A lesson here, at least in a situation (like Grobman) in which there is likely to be a substantial time lapse between the finding of liability and the resolution of damages, is for both sides to think about the matter and, if it is to be submitted to arbitration, address and decide the point in the arbitration agreement.

GENERAL PRACTICE

NOTICE OF DEFECT

Municipality Plowing Snow on Parking Lot and Able to Foresee It Could Melt and Then Freeze to Ice Is Not Entitled to Notice Before Being Held Liable to Falling Pedestrian

We've had several cases over the years on the frequently met statutory requirement that a municipality be given written notice of a defect in an area of its responsibility before a liability

can be imposed on it for an injury to someone caused by the defect. This preliminary notice is a substantive condition precedent to liability (not to be confused with the notice of claim requirement such as contained in General Municipal Law § 50-e).

There's an exception, however, dispensing with the preliminary notice, recognized by the Court of Appeals in several cases, including its 1999 *Amabile* decision (Digest 476). Now, meeting the matter again in *San Marco v. Village/Town of Mount Kisco*, ... N.Y. 3d ...., ... N.Y.S.2d ...., 2010 WL 5104993 (Dec. 16, 2010; 4-3 decision), the Court cites Amabile for the proposition that

> a prior written notice statute does not protect a municipality from liability if it can be proven that the 'locality created the defect or hazard through an affirmative act of negligence'.

In *San Marco*, the issue was whether this exception would apply to a case in which a municipality, plowing snow on a parking lot, piled it up nearby, at the meters, and the snow afterwards melted and formed black ice on which a pedestrian slipped and was seriously injured. A majority of the Court holds that this may indeed qualify as an exception to the "notice of defect" rule, at least to the extent of denying the municipality summary judgment. It finds in *San Marco* that issues of fact exist, such as whether the municipality knew of the hazard it might be creating in view of surrounding and foreseeable weather conditions. If it did, and did not take steps to remove the hazard, the case could fall under the "created the defect" exception and dispense with the notice requirement.

In an opinion by Chief Judge Lippman, the Court says that these statutes

> were never intended to and ought not to exempt a municipality from liability as a matter of law where [its] negligence in the maintenance of a municipally owned parking facility triggers the foreseeable development of black ice as soon as the temperature shifts.

Piling the snow close by instead of removing it from the area altogether was a "cost-saving, pragmatic solution" to the snow problem for this municipality, but it presented a "foreseeable, indeed known, risk of melting and refreezing", says the Court.

The three-judge dissent, written by Judge Smith, sees this as confusing "the issue of written notice with the issue of negligence". It may be unfair, says the dissent,

> to leave plaintiffs uncompensated for an injury that a municipality negligently caused, but that is what prior written notice requirements do. Such requirements may be harsh, but they are [quoting *Amabile*] 'a valid exercise of legislative authority'.

The written notice requirement did apply in this case, as the dissent sees it, and because it wasn't given the case should have been dismissed.

MUNICIPAL LIABILITY FOR POLICE SHOOTINGS

Pedestrian Shot by Police Officers Aiming at Robbery Suspect Has No Claim Against City Where Proof Shows None of Officers Saw Any Pedestrians in Area

Several officers were pursuing an armed robbery suspect who was shooting at them. He hid behind a van and they behind a trailer further up the street, soon assisted by other officers who appeared. Plaintiff P and her baby were in fact there, however, lying on the ground behind another vehicle. P had been socializing with neighbors when the sound of gunshots sent them into a house and P to the ground for protection.

One of the officers shot at the suspect while the suspect was firing at another officer. All the officers said they didn't see P, but an "errant bullet" struck P's elbow, and she brought this suit against the city claiming the officers violated the police department's own procedures on the use of deadly force. Specifically, a provision stating that officers "shall not discharge their weapons when doing so will unnecessarily endanger innocent persons".

In an opinion by Judge Pigott, a majority of the Court of Appeals reads the testimony as reciting that all the officers saw no pedestrians at all in the area. On that basis the Court holds as a matter of law that no case was made out for a violation of the subject guideline, the premise of this suit, and it therefore dismisses the complaint. *Johnson v. City of New York,* 15 N.Y.3d 676, ... N.Y.S.2d .... (Nov. 23, 2010; 4-3 decision).

The three-judge dissent, in an opinion by Judge Jones, does not find the record all that one-sided. They see in it some evidence that the officers "failed to look for innocent persons before firing their weapons", as the dissent deems them required to do under the guideline. Officers in these circumstances must exercise "reasoned judgment", asserts the dissent, and whether they did can't be decided as a matter of law. That was the ultimate issue in the case, in the dissent's view, and it's one of fact for a jury to resolve.

"REGULATORY" DEADLINES

Rule Requiring Administrative Action on Medicaid Benefits Within 90 Days After "Fair Hearing" Request Is Not So "Mandatory" That Violation Requires Benefits Be Awarded

It has always been an unpleasant chore for a court to decide whether a given time period for doing something is "mandatory", which makes its violation jurisdictional, or merely "directory" (or "precatory"), which gives the court some leeway in its construction and application. The Court of Appeals ends up with a polemic on the pair of words in its recent decision in *Dickinson v. Daines,* 15 N.Y.3d 571, ... N.Y.S.2d .... (Nov. 23, 2010).

The opening paragraph of the *Dickinson* opinion summarizes the result of the dispute in this case:

> We hold that violation of a regulatory deadline for rendering a decision after a fair hearing does not require the State to pay Medicaid benefits to a person not otherwise entitled to them.

(The applicant wasn't entitled to the benefits because she had resources exceeding the levels at which Medicaid kicks in.)

On the mandatory/directory question so often discussed in the cases when time limits concerning "government business" is involved, the Court admonishes that a "simple choice" between the two characterizations "does not adequately describe all possible ways of applying the regulation". In any event not in this case, involving a Department of Health regulation permitting a "fair hearing" request by an applicant who has been denied Medicaid benefits and requiring a decision within 90 days after the hearing request is made. The 90 days was missed here and the applicant says that this by itself amounts to a kind of default, and that in this context it should result in the granting of the relief she seeks. In an opinion by Judge Smith, the Court rejects the argument as simplistic.

In the shorthand of some of the cases, holding a time period "mandatory" means that the period's passing divests the hearer of jurisdiction and awards, by default, the relief sought. Holding it merely "directory" or "precatory", on the other hand, means that it's being treated as a suggestion only, not a mandate, and may therefore be allowed to validate a decision notwithstanding its lateness.

However this verbal division of terms may resolve other situations, it would be eccentric to apply in this one, for several reasons, perhaps the principal one being that upon initial application the benefits sought here were denied by the county Department of Social Services. The applicant then sought the hearing and it wasn't held until the 91st day and not decided until the 190th day.

In the usual rhythm of a recitation like this, the reader's expectation would be that the decision was against the applicant, but – irony that this be – the decision was in the applicant's favor. Applying the "mandatory" argument at this point would have voided the favorable decision then and there and brought the applicant back to the agency's pre-appeal denial of benefits.

Upon further review by the commissioner, however, the favorable (to the applicant) administrative appellate decision was reversed and now the benefits were denied. The applicant wanted that decision overturned for untimeliness, so as to give effect to the decision that that decision overturned – which was itself untimely! The applicant was thus trying to make a selective untimeliness argument, choosing – from between two untimely decisions – the one that gave her the benefits sought. The scene is just not one in which the arbitrary application of a label can offer a reasoned resolution.

And anyway, observes the Court, the time limitation in this case was not imposed by the legislature but by the agency itself, leading the Court to observe that the

> parties have cited no case, and we know of none, in which a time limit ... imposed on an administrative agency by its own regulation was held to be mandatory.

The Court's 1982 King decision (Digest 278), in which time was deemed to be "of the essence", is found to be an exception; the Court finds stronger guidance in a general statement then made in the King case itself – the observation that prescriptions in regard to the time, form and mode of proceeding by public functionaries are generally directory, as they are not of the essence of the thing to be done, but are given simply with a view to secure system, uniformity and dispatch in the conduct of public business.

FREEDOM OF INFORMATION LAW

Teachers' Union Denied Access to Names of Teachers Employed by Charter Schools

Section 87(2) of the Public Officers Law contains exemptions for certain items that would otherwise be disclosable under the FOIL. Among these are disclosures that amount to an "unwarranted invasion of personal privacy". Subparagraph iii of § 89(2)(b) defines that to include an organization's attempt to secure lists to be used for "fund-raising purposes". In its 1989 *Federation* decision (Digest 353), the Court of Appeals invoked the provision to deny gun clubs access to police department lists of permit holders, seeing it as just a fund-raising project. Citing even earlier cases, it described the policy of the FOIL as helping the public to secure data to aid it in making "intelligent, informed choices with respect to both the direction and scope of governmental activities", and even saw in the fund-raising exception – an explicit exception in the statute – nothing disloyal to that policy.

Now comes the New York State United Teachers (NYSUT) with an effort to learn the names of teachers at a number of charter schools. The names were sought along with payroll records, title, and salaries. The schools furnished much of that, but withheld the names. NYSUT then brought this combined Article 78 proceeding/declaratory judgment action to compel the names' disclosure, too. It won in the supreme court and appellate division, but loses in the Court of Appeals, where a closely divided panel denies the names' disclosure. *New York State United Teachers v. Brighter Choice Charter School*, 15 N.Y.3d 560, ... N.Y.S.2d .... (Nov. 18, 2010; 4-3 decision).

The majority, in an opinion by Judge Pigott, finds the *Federation* case in point and applies it. It finds no indication that NYSUT intends through the FOIL to use the names to "expose government abuses or evaluate governmental activities", aims consistent with the purposes of the FOIL; it's just using FOIL "as a convenient mechanism for contacting prospective members". That's its right, but under the privacy exception FOIL is not a tool for it, the majority concludes.

The dissent, written by Judge Ciparick, would distinguish *Federation* on two grounds. One is that the data is sought here "not about private citizens, but about public employees". Another is that it finds "a strong public policy, embodied in the Taylor Law ... in favor of organization and collective bargaining by public employees", so that in the dissent's view FOIL policy would be advanced by the disclosures.

JUVENILE DELINQUENCY

After Family Court Puts 14-Year-Old on Year's Probation in Special Program, It Can't Later Put Her in Detention Without VOP Petition

VOP stands for violation of probation. Here, in *Matter of Jazmin A.*, 15 N.Y.3d 439, 914 N.Y.S.2d 72 (Nov. 17, 2010), Jazmin was involved in an altercation in which, among other things, she used a knife that slashed her stepfather. The presentment agency filed a petition resulting in a family court order placing her on one-year probation upon her agreement to obey the order's terms about behavior. She then violated the terms, including missing school and

staying out all night, producing an unfavorable probation report based on which the family court remanded her "to the custody of the Commissioner of Juvenile Justice".

Family court could not do that in this situation except upon the filing of a VOP petition, so, because at the time there had been no such filing, Jazmin's law guardian appealed to the appellate division. That court reversed, but by the time it did so further proceedings had taken place in family court, including the requisite VOP petition, making the case moot. The appellate division was made aware of this, and mootness generally bars further proceedings, but the appellate division nevertheless went ahead with its reversal decision by invoking an exception to the mootness doctrine: the situation in which, although moot in the case before it, the issue presented is "substantial and novel" and "likely to recur and evade review". The court then granted leave to appeal its decision to the Court of Appeals.

The Court affirms, invoking the mootness exception for the same reasons the appellate division did and affirming the decision on the merits (about a VOP petition being a prerequisite to a follow-up family court detention order). In an opinion by Judge Read, the Court cites the statute in point, Family Court Act § 360.3(2)(b), which explicitly authorizes a family court order of detention *after* the filing of a proper VOP. It sees that as an implied bar to the granting of such an order before the filing.

The Court also rejects an argument that was based on a colloquy in family court in which Jazmin, according to the agency, had waived a VOP petition. The Court describes this as a "brief exchange" in which it sees no waiver, even "assuming that such a waiver could be obtained from a minor in Jazmin's situation".

LABOR LAW 241(6)

Differences Between Parts of Industrial Code Mean Owner and Contractor Are Not Vicariously Liable for Worker's Asbestos-Based Injuries

We have another entry from that litigious Labor Law trio of §§ 200, 240, 241, this one on § 241 in particular.

Section 241 of the Labor Law deals with the liability of owners and contractors for worker injuries resulting from construction and demolition work. Its first five subdivisions are specific requirements and a violation of one of them leads to absolute liability. But a violation of subdivision 6 does not; in its second sentence it just authorizes the labor department to enact regulations "to carry [these requirements] into effect", and the Court of Appeals in its 1993 *Ross* decision (Digest 404), among others, held that only if a regulation so adopted contains a "specific, positive command" does the violation result in the imputation of liability to owners and contractors.

No violation of such a specific command is shown in *Nostrum v. A.W. Chesterton Co.*, 15 N.Y.3d 502, 914 N.Y.S.2d 725 (Nov. 18, 2010), with the result that the 241(6) claim of vicarious liability against Ds (the owner and contractor) does not succeed.

P was a boilermaker injured by asbestos insulation at certain energy facilities. Because Ds didn't control P's work, their liability depended solely on whether a § 241(6) violation could be shown. Here Parts 12 and 23 of the Industrial Code regulations came in. With citation of a number of its earlier cases, the Court points out that for a Part 23 violation – which "governs the protection of workers in construction, demolition and excavation operations" – vicarious liability of owner and contractor liability does kick in. But that's not so of a Part 12 violation unless Part 23 can be shown to cover it as well. The only relevant cover Part 23 offers here, the Court finds, is for injuries generated in an "unventilated confined area". The injury alleged in this case was not sustained in such an area, so the link needed to invoke owner and contractor liability under Labor Law § 214(6) is found absent, and the claim predicated on that ground fails.

In an opinion by Judge Graffeo, the Court says more specifically that

> a plaintiff may bring a section 241 (6) claim based on a violation of a part 12 rule only where the injury occurred in an unventilated confined area, thereby triggering section 23-1.7(g)'s [the rule in point] 'pass through' provision.

To accept the plaintiff's contention that vicarious liability can be based on a Part 12 violation "regardless of the location of the exposure", the Court adds, would render that provision meaningless.