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A View from the Chair

Thank you for your membership in the Torts, Insurance and Compensation Law Section. As a member of the Section, you receive not only the TICL *Journal* twice a year but also the Section newsletter *Cover to Cover* and the *Construction & Surety Law Newsletter*. For issues that you may have missed, back issues and articles from all three publications are available to TICL Section members on the TICL homepage at the New York State Bar Association's Web site www.nysba.org/ticl.

The Web site also keeps a current list of upcoming CLE programs sponsored by the TICL Section with a link to the registration form for each program for your convenience. Between April and June of 2004, for example, there are four TICL-sponsored, state-wide CLE programs being held: *Mold: A Comprehensive Primer on Claims and Litigation; Commercial Lines Insurance Coverage; Discovery 2004*; and *Ethics and Professionalism*.

The TICL Section's Web site also provides the names and e-mail addresses of not only the TICL Section's executive committee members but also of the members of the TICL Section's substantive law committees. All these people are available to you for networking and brainstorming. Further, I and they urge you not only to network and brainstorm with them but also to join them in service on the committees. Substantive-law committee membership is open to any TICL Section member and has no term limit. No invitation is required and no one kicks you off after a pre-determined period of time. Moreover, membership on the substantive-law committees provides you with an entrée into more active participation in the TICL Section which will open up leadership opportunities not only in the TICL Section but the NYSBA proper.

I urge you to attend the TICL Section's fall meeting in Savannah, Georgia on October 14-17, 2004. The fall meeting will feature a broad range of CLE programs at a stellar location. In addition to the de rigueur golfing tournament, we are planning activities including one with the Savannah Bar Association to provide you with the inside track on the city made famous by the book and movie *Midnight in the Garden of Good and Evil*.

We look forward to your continued membership in the TICL Section, to your membership on our substantive-law committees, and to seeing you in Savannah in October.

Eileen E. Buholtz

P.S.: To those of you reading this message with a guilty conscience because you are not a member of our Section, you may join by following the instructions on our webpage or on your NYSBA membership renewal form. The TICL Section is the fourth largest Section of the NYSBA and we'd appreciate your help in making us number one.

Editor's Foreword

The past six months have been busy months for the Torts, Insurance & Compensation Law Section. Our leadership has had to analyze the many new pieces of legislation proposed in Albany, as well as to publicize our views on many decisions in cases affecting the trial and insurance practices of our members.

Our Section has worked diligently to provide a Web site that brings all these matters to our members at the touch of a computer.

The Executive Committee has been alerted to any number of interesting cases to pass on to the committees, including the latest on pollution exclusion and declaratory judgment actions.

Our views were solicited on whether the jury selection system should be changed, made more restrictive or left as is. Our executive board made known its preference to support a proper *voir dire*. It has made known its desire to have the Bar Association and A. Thomas Levin, Bar President, give greater representation in matters affecting our Section and its members.

Our Section also discussed legislation eliminating the demand for a specific dollar amount in the complaint.

Our executive board dealt with bills involving seeking to cap the liability of obstetricians and gynecologists, subrogation rights to recover liens on medical benefits, and ethics issues in the formation of an Ethics Committee for the State Bar. It even had to deal with the issue of legislating on chewing gum to make it less sticky on sidewalks!

Paul S. Edelman

Navigating the Maze of Electronic Discovery

By Thomas D. Keleher and Lillian Abbott Pfohl

Complying with discovery requests is becoming more and more burdensome as the search extends beyond file cabinets and boxes in warehouses to floppy disks, magnetic tapes, zip drivers and other forms of electronic document storage. Heavy reliance on word processing, electronic mail and electronic data means astronomical amounts of data are available for review. For example, the simple PC resting on your desk can store several million pages of text. This article explores what is discoverable, the sanctions for failing to properly preserve electronic evidence, and why every corporation needs a document retention policy.

> *"Complying with discovery requests is becoming more and more burdensome as the search extends beyond file cabinets and boxes in warehouses to floppy disks, magnetic tapes, zip drivers and other forms of electronic document storage."*

Generally, all forms of electronic evidence are discoverable if they are relevant, responsive, and non-privileged under the federal rules.[1] Moreover, even before receiving any formal discovery requests, under Rule 26's initial disclosure requirement, a party must search for and describe documents and data compilations it may use to support its claims and defenses.

While the terms used to describe electronic evidence may be esoteric ("clones," "cookies," "cache files," etc.), the impact of Rule 34 is simple: few areas of our professional lives are safe from discovery. For example, employees' home or personal computers may be discoverable if they use the computer at least partly for work-related reasons (which employees are increasingly doing by remote access).[2] Video conferences and voice-mail messages, when stored on computers in digital form, may also be discoverable.[3] Even an attorney's litigation support system (a computer program that sorts, organizes and retrieves information related to the litigation) may be discoverable if the requesting party has shown substantial need, undue hardship and the absence of any opinion work product.[4]

The burden of producing this electronic evidence is compounded by the fact that, even where a corporation believes it has produced all of its electronic evidence, it may not have fulfilled its obligation under Rule 34. Electronic evidence may exist simultaneously on one or more levels of storage (e.g., "active data," "replicant data," "residual data," and "embedded data"). So, even if a document is "deleted" from one level of storage, it may still exist on another level.

Where a court suspects that a party has not produced all of its electronic evidence, the court may take a variety of measures, including permitting the requesting party to inspect the producing party's computer system and assisting the requesting party in retrieving data, or appointing a computer specialist to recreate a "mirror image" of the producing party's hard drive.[5] Even where a party has produced all of its electronic evidence in paper "hard copy" form, if the requesting party can interpret the information only in electronic form, a court may require the producing party to produce the information in electronic form as well, and even go so far as to require the producing party to develop a computer program to retrieve and interpret the requested information.[6]

As a result, the costs of complying with discovery requests have skyrocketed. For example, recently the cost of producing the e-mails of just nine employees over a two-year period was estimated to be between $43,110 and $84,060.[7] The cost of producing the e-mails of 56 employees was estimated to be between $395,944 and $9,750,000.[8] In another case, the cost of just restoring (without searching) the information from approximately 1,000 backup tapes was estimated to be between $850,000 and $1,400,000.[9]

While the producing party may object under Rule 26 of the Federal Rules of Civil Procedure on the ground that producing the electronic evidence is unduly burdensome, this argument often fails. Sometimes, courts shift to the requesting party the cost of producing electronic evidence or at least the cost not associated with reviewing the evidence for privileged or confidential material.[10] Often, however, courts let such discovery costs lie where they fall, reasoning that if a party chooses an electronic storage method, having to create a retrieval program is a foreseeable risk.[11]

Courts are also splitting the costs of retrieving data between the parties. Recently, in *Zubulake v. UBS Warburg*,[12] the plaintiff was ordered to pay 25 percent of the cost for restoring and searching back-up tapes. The court emphasized such cost-saving was appropriate "only when electronic data is relatively inaccessible, such as in backup tapes."[13]

At this point, it may seem tempting to simply hit the delete key and destroy the evidence. However, this is rarely a successful strategy. First, it is nearly impossible to destroy all versions of electronic evidence. Second, under federal and New York State law, both the intentional and negligent destruction (or "spoliation") of electronic information may result in a wide range of sanctions. Furthermore, under New York State law, the negligent destruction of evidence may be grounds for the independent tort of spoliation.

"Generally, under federal law, the duty to preserve evidence arises when a party is, or should be, aware that evidence in its possession or control is relevant to litigation or probable litigation."

Spoliation Under Federal Law

Generally, under federal law, the duty to preserve evidence arises when a party is, or should be, aware that evidence in its possession or control is relevant to litigation or probable litigation. Precisely when the duty to preserve evidence arises depends on the facts of the case and varies by jurisdiction. However, the law is uniform in at least one respect: the duty to preserve relevant evidence extends to computer-based information, including databases, reports, memoranda, letters and e-mail messages.[14]

When a party breaches this duty, a federal court may sanction that party based on either Rule 37 of the Federal Rules of Civil Procedure or the court's inherent powers to punish those who abuse the judicial process. The most important factors in deciding whether to sanction a party for spoliation are the extent to which another party has been prejudiced by the spoliation and the responsible party's culpability or knowledge of the destruction.

Federal courts are somewhat reluctant, but willing, to impose sanctions for the negligent spoliation of electronic evidence.[15] However, federal courts routinely impose a wide range of sanctions for the intentional spoliation of electronic evidence, including:

- The payment of attorney's fees and other costs resulting from the destruction.[16]
- The drawing of an adverse inference that the party who destroyed the potentially relevant evidence did so out of a realization that the evidence was unfavorable.[17]
- Precluding a party from presenting its own evidence.[18]
- Ordering default or dismissal.[19]

Spoliation Under New York Law

Generally, under New York law, the duty to preserve relevant evidence arises once litigation is foreseeable, for example, where a party has either actual or constructive notice that litigation is likely to be commenced. As in federal court, a New York State court may base its authority to sanction spoliators on the rules of civil procedure or its inherent authority. Moreover, like a federal court, a New York State court may impose a wide variety of sanctions, including dismissal, for the spoliation of electronic evidence.[20]

Furthermore, New York courts appear to be more willing than federal courts to impose severe sanctions for the negligent spoliation of evidence.[21] Only the Fourth Department appears reluctant to do so.[22]

"Generally, under New York law, the duty to preserve relevant evidence arises once litigation is foreseeable . . . where a party has either actual or constructive notice that litigation is likely to be commenced."

These holdings are troublesome inasmuch as there are a variety of ways in which relevant electronic documents can be deleted "innocently," e.g., (1) where not all employees who might possess relevant information are aware of the need to preserve relevant materials, (2) where an employee who knows of the duty to preserve forgets to do so or believes a particular document is not relevant, (3) where a deleted electronic document still exists on a computer hard drive or a back-up tape and it is overwritten after the receipt of notice of the litigation, and (4) where an electronic document is deleted as a result of a record-retention policy.

Moreover, one New York court recently recognized an independent tort for negligent spoliation of evidence.[23] The *Fada* court based its decision, in part, on *Weigl v. Quincy Specialties Co.*,[24] which held that New York recognizes a common law cause of action against an employer for negligently impairing an employee's right to sue a third-party tortfeasor (notwithstanding the employee having received workers' compensation benefits) based upon the employer's alleged destruction of a lab coat that purportedly caught fire and engulfed the employee in flames. Thus, it appears that, in certain circumstances, a corporation may be sued for spoliation where it otherwise would not be a party. This "spoliator beware" trend is expanding in several other states, including California and Florida.

Document Retention Policies

A possible defense against spoliation changes is a clear, consistently enforced document retention policy.

At its most basic, a document retention policy describes what records—both paper and electronic—should be saved, in what format, and for how long. Tailoring an effective document retention policy to an individual business requires that companies take into account both their business and legal needs for information, with special consideration given to any regulatory concerns. Features of a document retention policy include:

- Creating clear guidelines appropriate for different types of records, both paper and electronic. The policy should also address where and how records will be stored.
- Distinguishing between business records and personal records. In addition, the policy should also cover company materials employees may have on their home computers, personal digital assistants and other electronic devices.
- Designating certain records for permanent storage, and setting up systems for such storage. Careful attention must be given to cataloguing information in such a way that it is easily retrievable.
- Establishing guidelines for how documents will be destroyed. For example, confidential materials such as employee records should be destroyed in such a way as to maintain their confidentiality.
- Establishing how long different types of records must be kept.
- Establishing how different types of records should be destroyed. This includes how the policy will be enforced, such as through software programs which automatically delete e-mails after a certain period of time.
- Designating a person or group responsible for managing and enforcing the policy.

A key component of an effective document retention policy is a quick and effective way to halt the process of document destruction if litigation looms. Under federal law, a company is required to preserve evidence when it is, or should be, aware that evidence in its possession or control is relevant to litigation, whether pending or probable. State law requires preservation of evidence once litigation is foreseeable. Under either standard, the failure to halt the routine destruction of documents can result in sanctions for the destruction of evidence, whether intentional or negligent. All document destruction should cease once litigation is threatened or begun. This includes both paper and electronic documents, as well as back-up records of documents. There should be a system for altering the IT department to stop any automatic purges. The freeze should continue until at least such a time that documents can be reviewed and cataloged by appropriate personnel and any modifications to the retention policy can be made. Even a reasonable document retention policy will not withstand scrutiny if a company destroys documents it should have known would be material.[25]

While the Second Circuit and the New York courts have yet to articulate a test for evaluating the reasonableness of a document retention policy, courts and commentators often cite the three-factor test set forth by the Eighth Circuit in *Lewry v. Remington Arms Co.*[26] *Lewry* advised district courts to first consider whether a document retention policy is reasonable "in light of the facts and circumstance surrounding the relevant documents."[27] For example, "[a] three-year retention policy may be sufficient for documents such as appointment books or telephone messages, but inadequate for documents such as consumer complaints."[28] Second, a court should consider whether there were outstanding lawsuits concerning the documents.[29] Third, "the court should determine whether the document retention policy was instituted in bad faith."[30] "Bad faith" includes failing to recognize some documents should be preserved notwithstanding the policy. "[A] corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy."[31]

Companies in heavily regulated businesses, such as banking and securities, need to pay careful attention to any regulatory requirements for document retention. For example, banks must maintain a copy of any Suspicious Activity Report, along with any supporting documentation, for five years.[32] However, even those in less regulated lines of work may find that government regulations govern some aspects of document retention. In *Byrnie v. Cromwell*,[33] the court imposed an adverse inference as a spoliation sanction where a school destroyed employment records it was required to keep under Title VII and the Americans with Disabilities Act. The Second Circuit held "such a regulation can create the requisite obligation to retain records, even if litigation involving the records is not reasonably foreseeable." The court noted that for such a duty to attach, the party seeking the inference as a sanction must be a member of the class the agency sought to protect in promulgating such rules.

While there is no guarantee a document retention policy will forestall sanctions, undirected document destruction often leads a court to impose sanctions, which can be severe. As one court stated while imposing a $1 million fine and other sanctions for document destruction:

> [w]hile there is no proof that Prudential, through its employees, engaged in conduct intended to thwart discovery through the purposeful destruction of documents, its haphazard and uncoordinated approach to document retention indisputably denies its party opponents potential evidence to establish facts in dispute. Because the destroyed records in Cambridge are permanently lost, the Court will draw the inference that the destroyed materials are relevant and if available would lead to the proof of a claim.[34]

Endnotes

1. *See* Fed. R. Civ. P. 34 Advisory Committee's Note (permitting discovery of "electronic data compilations").
2. *See Simon Property Group v. mySimon, Inc.*, 194 F.R.D. 639, 641 (S.D. Ind. 2000); *Playboy Enters., Inc. v. Welles,* 60 F. Supp. 2d 1050, 1053 (S.D. Cal. 1999).
3. *See Kleiner v. Burns*, 2000 U.S. District LEXIS 21850 at *9–11 (D. Kan. Dec. 22, 2000).
4. *See Scovish v. Upjohn Co.*, 1995 Conn. Super. LEXIS 3288 at *2–11 (Conn. Super. Ct. Nov. 22, 1995).
5. *See GTFM, Inc. v. Wal-Mart Stores, Inc.*, 2000 WL 335558 at *1 (S.D.N.Y. 2000); *Playboy*, 60 F. Supp. 2d at 1055.
6. *See Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 649934 at *1 (S.D.N.Y. Nov. 3, 1995); Fed. R. Civ. P. 34 Advisory Committee's Note ("respondent may be required to use his devices to translate the data into usable form").
7. *See Rowe Entm't, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 425 (S.D.N.Y. 2002).
8. *Id*. at 424–25.
9. *See Linnen v. A.H. Robins Co.*, 1999 WL 462015 at *4 (Mass. Super. Ct. 1999).
10. *See Rowe Entm't*, 205 F.R.D. at 429–33; *Anti-Monopoly, Inc.*, 1996 WL 22976 at *2.
11. *See Sanders v. Levy*, 558 F.2d 636, 650 (2d Cir. 1977), *rev'd on other grounds sub nom*, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978); *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 WL 360526, *2 (N.D. Ill. 1995); *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 462–64 (D. Utah 1985).
12. 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y. May 13, 2003).
13. *Id*. at *12.
14. *See, e.g.*, *New York State NOW v. Cuomo*, 1998 U.S. Dist. LEXIS 10520 at *3–4 (S.D.N.Y. July 13, 1998).
15. *Compare New York State NOW*, 1998 U.S. Dist. LEXIS 10520, *6–9 (refusing to sanction for unintentional deletion of computer database) *with Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75–6 (S.D.N.Y. 1991) (concluding that adverse inference should arise for negligent spoliation because prejudice to opponent is same, regardless of spoliator's intent).
16. *See, e.g.*, *In re Prudential Ins. Co.*, 169 F.R.D. 598, 615–17 (D. N.J. 1997) (imposing sanction of $1,000,000 where defendant's employees deleted many documents despite court order to preserve documents and employer's directions to retain documents).
17. *See, e.g.*, *Saul v. Tivoli Systems Inc.*, 2001 U.S. Dist. LEXIS 9873 at *54–6 (S.D.N.Y. July 16, 2001).
18. *See, e.g.*, *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1383–84 (7th Cir. 1993).
19. *See, e.g.*, *Computer Assocs. Int'l, Inc. v. American Fundware, Inc.*, 133 F.R.D. 166, 169–70 (D. Colo. 1990).
20. *See, e.g.*, *Playball at Hauppauge, Inc. v. Narotzky*, 296 A.D.2d 449, 450 (2d Dep't 2002) (dismissing claim as sanction for spoliation of computer data); *Long Island Diagnostic Imaging, P.C. v. Stony Brook Diagnostic Assocs.*, 286 A.D.2d 320 (2d Dep't 2001) (dismissing counterclaim and third-party complaint as sanction for spoliation of computer databases).
21. *See, e.g.*, *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 172–73 (1st Dep't 1997) (dismissing third-party complaint); *Squitieri v. City of New York*, 248 A.D.2d 201, 202 (1st Dep't 1998) (dismissing third-party claim); *DiDomenico v. C&S Aeromatik Supplies, Inc.*, 252 A.D.2d 41, 52–53 (2d Dep't 1998) (striking answer and counterclaim) *Ya Min Ren v. Prof'l Steam-Cleaning, Inc.*, 271 A.D.2d 602, 602–3 (2d Dep't 2000) (precluding offering of certain evidence); *Cummings v. Cent. Tractor Farm & County, Inc.*, 281 A.D.2d 792, 793–94 (3d Dep't 2001) (dismissing complaint).
22. *See, e.g.*, *Rogala v. Syracuse Hous. Auth.*, 272 A.D.2d 888–89 (4th Dep't 2000) (holding that appropriate sanction for defendant's negligent spoliation of evidence was order precluding defendant from offering evidence in question unless made available for inspection 30 days prior to trial, rather than striking its answer); *Conderman v. Rochester Gas & Elec. Corp.*, 262 A.D.2d 1068, 1069–70 (4th Dep't 1999) (holding that a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices during an emergency situation when no litigation was pending).
23. *See Fada Indus. Inc. v. Falchi Bldg. Co.*, 189 Misc. 2d 1, 4–5 (Sup. Ct., Queens Co. 2001) (holding that a separate cause of action for negligent spoliation of evidence may be asserted by an insured, in a third-party action, against an insurer based upon the insurer's alleged loss or destruction of key evidence crucial to the insured's defense in the underlying action).
24. 158 Misc. 2d 753, 756–57 (Sup. Ct., N.Y. Co. 1993).
25. *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. at 72–4.
26. 836 F.2d 1104, 1111–12 (8th Cir. 1988).
27. *Lewry*, 836 F.2d at 1112.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Lewry*, 838 F.2d at 1112.
32. 12 C.F.R. 21.11.
33. 243 F.3d 93 (2d Cir. 2001).
34. *In re Prudential Ins. Co.*, 169 F.R.D. at 615.

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Bankruptcy Can Affect Actions for Medical Malpractice

By Steven Wilkins, M.D., J.D.

A client enters your office with a common tale. She is well dressed and articulate, and tells a story of medical negligence that makes you indignant, even livid with rage. In addition to her illness, and the pain and suffering she endured, the constant trips to doctors and hospitals led to her losing her job. She subsisted on her savings for a little while, but while her medical care continued, she was forced to file for bankruptcy. She lost everything to her illness and its aftermath. It is now two years later, the bankruptcy petition is still pending, and she is now ready to pursue a medical malpractice action.

"The question of when an interest in a lawsuit becomes property that must be included in a bankruptcy petition has been interpreted in a manner extremely unfavorable to plaintiffs involved in bankruptcy actions."

Of course your usual procedures of medical record retrieval, physician evaluation of the records, and filing of an action will take their usual course, perhaps rushed somewhat by an impending deadline due to the statute of limitations, but what about the bankruptcy? How does it impact upon the case? What things can be done to ensure that any impact is minimal?

Civil actions, including actions for malpractice, are considered property under 11 U.S.C. section 541 of the Federal Bankruptcy Code.[1] Therefore, a lawsuit is considered property, and the right to sue passes to the bankruptcy trustee upon commencement of the bankruptcy proceeding. Any astute defense counsel will recognize that the plaintiff no longer has standing to bring the lawsuit and will move for a summary judgment. Is this true even when the lawsuit isn't even filed until after the bankruptcy petition? Surprisingly, yes in some cases. The question of when an interest in a lawsuit becomes property that must be included in a bankruptcy petition has been interpreted in a manner extremely unfavorable to plaintiffs involved in bankruptcy actions.

When a civil action is filed *before* bankruptcy proceedings, the action is deemed property and must be included in a bankruptcy petition, and subsequently the malpractice action must be filed in the trustee's name.[2] This is only logical. Filing of a court action clearly justifies labeling the potential interest in a lawsuit as property. In fact, though, the Third Department in *Cafferty v. Thompson* held that it is the time of the negligent act and not the time of the creation of a lawsuit by its filing that are determinative. Even the mere awareness of the existence of facts that should make a reasonable person aware of the possibility of a lawsuit is enough.[3]

In *Cafferty*, a real estate developer filed for bankruptcy under Chapter 11 in 1992. In 1993, he instituted an action for legal malpractice based on acts prior to the bankruptcy proceedings. He was discharged from bankruptcy in 1994 and shortly thereafter commenced a nearly identical legal malpractice action. The appellate court held that the right to pursue the legal malpractice claim vested in the bankruptcy trustee because the developer failed to list the claim as an asset in the prior bankruptcy proceeding. Assertions that the developer was unaware of the potential for a claim until late 1993 were deemed insufficient. Since the alleged negligent acts preceded the filing for bankruptcy, the right to sue belonged to the bankruptcy trustee.

What about cases where the negligent acts can only be found in medical records and therefore are outside the knowledge of the plaintiff until after the bankruptcy, even though the acts were committed before it? Once again, the Third Department, in *Hansen v Madani*, held that even this is not enough.[4]

In *Hansen*, the appellate court held that failure to list a potential malpractice claim during a 1992 bankruptcy petition, based on the negligent removal of a tumor in 1991, would not survive a motion to dismiss based on the lack of capacity to sue even though the malpractice case was not filed until 1994. In so ruling, the court reiterated that upon filing of a voluntary bankruptcy petition, all property that a debtor owns or subsequently acquires, including a cause of action, vests in the bankruptcy estate. It went on to explain that failure to list the property in the schedule of assets filed with the court bars the pursuit of the action. The same principle was also confirmed in *Goldstein v. St. John's Episcopal Hospital*.[5] The "*or subsequently acquires*" is the sticking point.

How far does this estoppel reach? Is the filing of a bankruptcy petition a continued bar to the filing of civil actions, other than in the name of the trustee, for the life of the bankrupt person? It doesn't go that far, but *Schepmoes v. Hilles* provides the time limit.[6] In *Schepmoes*, the cause of action was based on a pre-1980 fraud, and the breach related to a real estate contract. In 1980, Chapter 13 bankruptcy was filed by the plaintiff. In 1981, the bankruptcy estate was closed. The court held that the plaintiff's cause of action must be included in the bankruptcy schedule of property as long as the cause of action accrued before the end of the bankruptcy proceedings. Since the claim originated prior to closure of the bankruptcy proceeding, the plaintiff was barred from bringing it.

In our imaginary case, if *Schepmoes* is controlling, then the fact that the bankruptcy petition is still open becomes important. Unless the act of malpractice occurred after the closing of the petition, the caption would have to be made or amended to reflect the trustee's interest. The bankruptcy schedule of property would also have to be amended to include the malpractice action. Failure to do either of these could lead to a dismissal of the claim.[7]

What if the bankruptcy trustee is persuaded to abandon the interest in the claim from the transferred property? This may be okay, but only if (1) the property is listed in the schedule and (2) an express abandonment is issued. In *Hansen,* when plaintiffs were served with an amended answer that included an affirmative defense of lack of capacity to sue, the plaintiffs had the bankruptcy case reopened and they filed an amended schedule of assets. Although the trial court believed the lack of capacity had been cured, the appellate court reversed. The higher court stated that even after the bankruptcy case was reopened, plaintiffs remained precluded from bringing the action because the claim remained the property of the bankruptcy trustee. In fact, they continued, even the substitution of the trustee as the plaintiff in the caption did not cure the incapacity.

The failure in *Hansen* was that there was no abandonment by the trustee of the claim, and only abandonment returns the claim to the possession of the original plaintiff. What's more, in some cases, such as a Chapter 11 bankruptcy, the absence of a named trustee may make abandonment difficult or impossible. A court order may be the only means of obtaining one.

Let's continue the scenario. Since you hadn't yet read this article, you filed your action only in the name of the plaintiff and not in the name of the trustee. The schedule of property has not been amended and you really don't want to go through the hassle of doing so. The answer has already been served, and thankfully, no affirmative defense asserting bankruptcy and an improper plaintiff were made. Are you home free? Sorry, but the answer is probably no.

Courts have generously allowed defendants to amend their answers to assert affirmative defenses of bankruptcy.[8] In fact, in one case, the appellate court reversed a trial court ruling that had denied a defendant's amending of an answer even though the granting is supposed to be discretionary.[9] In another case, though, a delay of sixteen months after knowledge of the bankruptcy was considered to be too long and no amending was allowed, due to the lack of due diligence.[10] Therefore, unless sixteen months have passed, even if the defendants have not yet so moved, you are still at risk that they will be permitted to do so in the future.

Are there any alternatives once a defendant raises an affirmative defense based on bankruptcy? If you can't timely amend the schedule of property and obtain an abandonment from the trustee, all hope is not lost. The final alternative once a dismissal for failure to list the cause of action is granted, is to merely recommence the action within six months, as permitted by CPLR 205. This provision is applicable in any case where the dismissal is by other than voluntary discontinuance and is not on the merits. In *Pinto,* this very principle was recommended.[11]

Overall, the plaintiff forced into bankruptcy may cause a few additional bumps on the road to a recovery, but the ride will be smoothed by knowledge of the challenges that it presents.

Endnotes

1. 11 U.S.C. § 541. Property of the estate

    (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

        (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property *as of the commencement of the case*. (Italics added).

2. *Pinto v. Ancona*, 262 A.D.2d 472 (2d Dep't 1999).
3. *Cafferty v. Thompson*, 223 A.D.2d 99 (3d Dep't 1996).
4. *Hansen v. Madani*, 263 A.D.2d 881 (3d Dep't 1999).
5. *Goldstein v. St. John's Episcopal Hospital*, 267 A.D.2d 426 (2d Dep't 1999).
6. *Schepmoes v. Hilles*, 122 A.D.2d 35 (2d Dep't 1986).
7. Hansen, 263 A.D.2d at 883.
8. *Polow v. Quiros*, 128 A.D.2d 763 (2d Dep't 1987).
9. *Roberts v. Alexander*, 224 A.D.2d 677 (2d Dep't 1996).
10. *Nisselson v. Stephens*, 268 A.D.2d 463 (2d Dep't. 2000).
11. *Pinto*, 262 A.D.2d at 473.

Employers May Avoid Select Automobile Liability Through Employee Use Restrictions, While Car Rental Companies Do Not Enjoy the Same Protection

By John M. Shields

Pursuant to Vehicle and Traffic Law Section 388, a driver's negligent operation of a motor vehicle is imputed to the owner of the vehicle, thus making the owner vicariously liable for any injuries resulting from the driver's actions. The underlying intentions behind VTL § 388 are to encourage prudent selection of drivers and to increase the likelihood that an injured person will have a financially solvent source to pursue for compensation.

The Court of Appeals, in *Murdza v. Zimmerman*,[1] recently held that an employer, due to the influential employment relationship, can avoid liability under VTL § 388 through the implementation of employee restrictions on use of the employer's vehicles. Conversely, due to the sheer number of leased vehicles on the highway and the absence of a direct relationship between the lessor and the ultimate driver of a rental car, rental agents cannot avoid vicarious liability by adopting vehicle use restrictions.

Murdza v. Zimmerman

In *Murdza*, the plaintiff was a pedestrian who was struck by a van driven by an individual who had been given permission to use the van by his girlfriend.[2] The van, owned by the lessors and leased to the lessee, was entrusted to the lessee's employee, who allowed her boyfriend to use the vehicle.[3] Although an employee handbook specifically restricted use of company vehicles to employees and their licensed spouses, the agreement leasing the van to the lessee contained no similar use restrictions.[4]

The plaintiff in *Murdza* commenced a negligence action in Federal Court against the driver, the employer, the holding company and the leasing company.[5] The Court granted that part of *Murdza*'s summary judgment motion against the driver as a result of his negligent operation of the vehicle, but dismissed the case against the corporate defendants.[6] The plaintiff argued that the corporate defendants were owners of the van, and therefore liable for the driver's negligence.[7] While the employer, parent company and leasing company separately argued that the restrictions on the vehicle's use in the employer's handbook established that the driver drove the van without consent.[8]

On appeal, the Second Circuit noted that VTL § 388(1) "establishes a rebuttable presumption that a vehicle is operated with the owner's consent."[9] The Circuit Court then certified the case to the New York State Court of Appeals to determine whether the employer, holding company and lessor effectively rebutted the presumption of consent of the owner, so as to make them immune as a matter of law from imposition of owner's liability under § 388(1), by reason of the restrictive provision in the employee manual.[10]

Negligent Operation of a Motor Vehicle Should Result in Recourse Against a Financially Responsible Defendant

Vehicle and Traffic Law § 388(1) makes every owner of a vehicle liable for injuries resulting from negligence in the use or operation of such vehicle "by any person using or operating the same with the permission, express or implied, of such owner."[11] The statute altered the common law rule that a vehicle owner could only be held liable for the negligence of a permissive driver under agency or respondeat superior theories.[12]

Section 388 expresses the policy that a person injured by the negligent operation of a motor vehicle should have recourse to a financially responsible defendant.[13] Indeed, section 388 was designed to remove the hardship which the common-law rule visited upon innocent persons by preventing an owner from escaping liability by claiming that the car was being used without authority or not in his business.[14]

An equally important policy reflected in VTL § 388 is the heightened degree of care owners are encouraged to exercise when selecting and supervising drivers permitted to operate their vehicles.[15] Thus, Section 388 simultaneously increases the likelihood of compensation for those injured in motor vehicle accidents and decreases the probability of such accidents, by encouraging an owner's prudent selection of drivers.[16]

Rebuttable Presumption of Owner's Consent

Proof of consent often may depend on the testimony of an adversarial owner.[17] Recognizing this potential conflict, the Court has held that proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission.[18] Once the plaintiff meets its initial burden of establishing ownership, a logical inference of lawful operation with the owner's consent may be drawn from the possession of the operator.[19] This presumption may be rebutted, however, by substantial evidence sufficient to show that a vehicle was not operated with the owner's consent.[20] Where substantial evidence established that permission was conditioned upon driving in a certain locality only or conditioned upon instructions not to allow any riders, the owner has been relieved from liability when an accident occurred subsequent to a breach of the restriction.[21]

In *Motor Vehicle Acc. Ind. Corp. v. Continental Nat. Amer. Group*,[22] the Court deemed a car rental agency to have "constructively" consented to a third-party driver's operation of its rental vehicle, despite a lease provision restricting the use of the vehicle to the lessee and his immediate family.[23] As a result of the constructive consent, the car rental agency is subject to statutory liability under section 388 for permissive use of the vehicle.[24]

High Probability that Leased Vehicles Are Used by Additional Drivers

The finding of constructive consent, despite the owner's restrictions, rested, in part, on the public policy concerns surrounding the large number of rental vehicles on the highway, and the inevitability that these vehicles may become involved in accidents.[25] Unlike restrictions placed on the use of an individual's vehicle by a friend, restrictions by car rental agencies implicate more serious concerns, as they affect the use of a greater number of vehicles over longer time periods.[26] Any departure from such lease restrictions could leave an injured victim without the recourse to a financially responsible defendant contemplated by § 388.[27]

The restrictions sought to be imposed by the insurer violate the public policy of the State.[28] The rental agency knew or should have known that there is a reasonable probability that the car will be driven by another person.[29] Accordingly, rental agencies are to be charged with constructive consent, which satisfies the requirements of VTL § 388.[30] Constructive consent is an attempt to balance the policy goals of the statute and the realities of an automobile-based society.[31]

The linchpin to the finding of constructive consent in the *Motor Vehicle* decision was the third-party driver's permissive use through the lessee.[32] Only because the lessee gave the third-party driver consent to drive the rental vehicle did the Court find that he was considered to be operating the car with the constructive consent of the lessor and the "permission" envisioned by the provisions of § 388.[33] Absent the lessee's consent, the third-party's operation would have been that of a thief.[34] Indeed, the decision in *Motor Vehicle* sensibly recognized that none of the public policy concerns surrounding section 388 mandate absolute liability on the part of a car rental agency for operators who do so without the permission of any party in the chain of lawful possession.[35] A finding of constructive consent and its attendant liability under section 388 requires a consensual link between the negligent operator and one whose possession of the vehicle is authorized.[36] Otherwise, implied consent under section 388(1) would amount to strict liability, which appears to be in conflict with the purpose of the statute.[37]

By permitting an employee's use of its vehicle, the employer stands in a unique position compared to a car rental agency.[38] "While it is foreseeable that a rented vehicle would come into the hands of any number of operators by the very nature of the quasi-ownership relationship created by a lease, the bailment of a vehicle to an employee spawns a markedly different relationship with its own set of expectations."[39] The employment relationship and frequent contact between an employee and employer enable enforcement of restrictions on vehicle operation placed on the employee.[40] Permitting an employer to explicitly restrict those who may operate its vehicles, while simultaneously restricting its liability, encourages cautious selection of drivers.[41] Even if the employee had consented to her boyfriend's use of the van, the employer's employee handbook explicitly restricted those who may operate its vehicles and thereby rebutted the presumption of liability under VTL § 388(1).[42]

Unlike the employer's role as a bailor-employer, the holding and leasing companies are lessors of the van and therefore fall squarely within the public policy considerations discussed in the decision in *Motor Vehicle*.[43] As such, they may not benefit as a matter of law from restrictions adopted by their lessee that they themselves could not use to limit their ownership liability under Section 388.[44] Lessor status is only half of the constructive consent equation.[45] There is a question of fact as to whether the boyfriend operated the vehicle with the employer's permission.[46] Whether the holding company and lessor constructively consented to the boyfriend's use of the van depends not on the restrictions in the employee handbook, but on his status as either a thief or a permissive user.[47]

Conclusion

As a result of the decision in *Murdza*, employers may now avoid liability for the negligent act of unauthorized drivers of the employers' vehicles. Ultimately, the indirect consequence of the decision in *Murdza* may be an effort of all informed employers to include restrictive disclaimers in their employment policies in order to benefit from the potential avoidance of liability. Although public policy prevents automobile rental agents from similarly escaping liability, the *Murdza* holding may undermine the underpinnings of VTL § 388 by allowing financially solvent employers to escape financial exposure through the simple act of drafting an employee automobile use restriction. By assuring liability exposure of vehicle lessors, while allowing employers to avoid liability, the *Murdza* decision may prompt the automobile rental industry to re-evaluate its policies and respond in some fashion to the potentially disproportionate share of financial responsibility.

Endnotes

1. 99 N.Y.2d 375, 756 N.Y.S.2d 505 (2003).
2. *Murdza* at 505.
3. *Id.*
4. *Id.* at 505-06.
5. *See Murdza v. Zimmerman*, 2000 U.S. Dist. LEXIS 18768 (W.D.N.Y. 2000).
6. *Murdza,* 756 N.Y.S.2d at 506.
7. *Id.*
8. *Id.*
9. *Murdza v. D.L. Peterson Trust*, 292 F.3d 328, 330 (2d Cir. 2002).
10. *Id* at 330, 333; *Murdza v. Zimmerman*, 2003 U.S. App. LEXIS 4213, * 3-4.
11. *Murdza,* 756 N.Y.S.2d at 506; *Lancer v. Republic Franklin Insurance*, 759 N.Y.S.2d 734 (2d Dep't 2003).
12. *Murdza* at 506, citing *Morris v. Snappy Car Rental*, 84 N.Y.2d 21, 27, 614 N.Y.S.2d 362 (1994).
13. *Murdza* at 506-07.
14. *Id.* at 507.
15. *Murdza* at 507.
16. *Id.*
17. *Murdza* at 507.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. 35 N.Y.2d 260, 360 N.Y.S.2d 859 (1974).
23. *Murdza* at 507; *Lancer* at *6.
24. *Id.*
25. *Murdza* at 508, citing *Motor Vehicle* at 263; *Lancer* at *6.
26. *Murdza* at 508.
27. *Id*; *Lancer* at *7.
28. *Murdza* at 508, citing *Motor Vehicle* at 264.
29. *Id.*
30. *Id.*
31. *Murdza* at 508.
32. *Murdza* at 508.
33. *Id*, citing *Motor Vehicle* at 265.
34. *Murdza* at 508; *Lancer* at *8.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Murdza* at 508, citing *Motor Vehicle* at 264.
39. *Murdza* at 508.
40. *Id.*
41. *Id.* at 508-09.
42. *Id.* at 509.
43. *Murdza* at 509.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

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Garage Keeper Liability

By Gary A. Cusano

As a general matter, a garage owner may incur liability with respect to persons upon his property, property in his care, and the use or ownership of motor vehicles.

A. Liability with Respect to Persons on Garage Property

The liability of a garage owner to one injured upon his property is governed by the reasonable care standard generally applicable in negligence cases to other landowners, "the standard of reasonable care under the circumstances whereby forseeability shall be a measure of liability."[1]

Then, in an extension of another general rule with respect to liability, a garage owner who hires an independent contractor is not liable for the latter's torts where the hiring party reserves no right to control the manner in which the work is done.[2]

Similarly, a garage owner is generally not liable for the independent acts of patrons with respect to off-premises pedestrians. For example, a garage owner was not held liable when a patron struck a pedestrian while driving a car out of the garage and across the sidewalk because the garage had no duty to protect pedestrians from the negligent conduct of its patrons nor could the garage be burdened with a duty to control the tortfeasor where the driver could disregard any precautions it might take. In addition, the court found that the garage keeper could not foresee that a driver would violate his duty to a pedestrian and ignore the requirement that he stop prior to crossing a sidewalk.[3]

B. Liability with Respect to Property Entrusted to the Garage Owner

A garage owner may incur liability with respect to losses associated with the following scenarios: the theft of a vehicle (where the garage keeper left a set of ignition keys in clear view on a pegboard in an unlocked and unattended garage office)[4]; injury to or loss of the vehicle and/or its contents[5]; the theft of articles left in the garage[6]; damage to vehicles by fire[7]; and damage to vehicles by other means, such as freezing.[8] Liability may arise in these situations because proof of storage in the garage and proof that it was damaged or stolen while under the control of the garage owner raises a presumption of negligence which the garage owner must meet and overcome.

The ordinary parking arrangement creates a bailor/bailee relationship between the customer and the garage owner.[9] The key concepts are "dominion and control" and a bailment is created when custody and control of the vehicle are delivered to the garage owner. Bailments arise, as a general matter, only with respect to motor vehicles and items directly used in the operation of motor vehicles, not with respect to personal property left in the car.[10]

Not every arrangement between a garage owner and a vehicle owner gives rise to a bailment, and thus whether or not a bailment has been created, and whether the bailment is mutually beneficial to both parties or merely gratuitous will determine whether liability will be imposed. This is ultimately a question of intent, express or implied on the part of the parties, and the facts of each situation are scrutinized.[11] When the garage owner does not exercise dominion and control over the vehicle and the owner of the vehicle parks on the garage owner's property it is merely a temporary license, and the failure to return the car to the owner, absent other factors, will not create a presumption of negligence on the part of the garage owner.[12]

If a bailment does exist with respect to a vehicle which is stolen or damaged while in the garage owner's possession, a presumption of negligence exists.[13] The customer has the burden to prove lack of due care in safeguarding the vehicle in order to recover for his loss. The customer must show that he delivered the vehicle to the garage owner and that upon his request for the vehicle, that the garage owner either refused or failed to return it. The burden then shifts to the garage keeper to prove that he was not negligent.

However, proof by the garage owner that the vehicle was damaged or stolen through an intervening criminal act is usually enough to overcome the initial presumption of negligence, and to shift the burden back to the plaintiff to prove that the intervening act resulted from the garage owner's negligence. This has been held to be true even where the intervening act was perpetrated by one of the garage owner's employees.[14]

There are different types of bailments. They can either be for the benefit of both parties or gratuitous. A bailment for the benefit of both parties typically exists where a vehicle is left with a garage owner for storage, or so that work may be done on it, and the garage owner is compensated by the motor vehicle owner. In this situation the garage owner is required to use ordinary care to protect the vehicle. A gratuitous bailment exists where the garage owner is not compensated for vehicle storage. In this situation he need only exercise slight care, and can be liable only for gross negligence.[15]

A bailment does not exist in every situation where a vehicle is left in the care of a garage owner.[16] Some courts have held that a garage owner is held to the normal standard of care, as set forth in *Basso v. Miller*, *supra.*[17] In this type of situation, there is no presumption of negligence on the part of the garage keeper, and his negligence must be proven by the plaintiff. Cases in this area often deal with situations where a motor vehicle owner parks in a public garage, locks his car and takes his keys. There is no delivery to, or control of, the vehicle by the garage owner, and hence no bailment.

However, a certain degree of care is always required by the garage owner. In *Greenberg*, the Court held that although no bailment arose when the plaintiff entered a self-service parking garage, accepted a ticket from an automated machine, then parked the vehicle and retained the keys, the defendant parking lot operator was nonetheless liable for damages to the vehicle (absent proof of any disclaimer of liability) because the defendant was negligent in failing to have the lot patrolled by anyone at the location.[18]

General Obligations Law § 5-325 provides that no person who operates for consideration a garage or other parking area with the capacity for housing four or more motor vehicles may exculpate himself from liability for damages for injury to person or property resulting from his or his employees' negligence. Any such agreement is void. However under this law damages for theft, fire or explosion may be limited in the storage agreement. Such damages may not be limited to less than $25,000. However, this statute does not bar an agreement to create a non-bailment situation,[19] but it does bar agreements which purport to totally or partially limit the liability of a garage keeper under normal negligence principles.[20]

C. Liability of Garage Owner as Owner/Operator of a Vehicle

As a general matter, the liability of a garage owner as the owner and/or operator of a motor vehicle is governed by the rules which apply to all motor vehicle owners and operators. The lessor of a motor vehicle is an "owner," and liable for the negligence of drivers operating its vehicle with consent, within the meaning of Vehicle and Traffic Law § 388. However, where that negligence causes an injury to someone other than the driver, the owner may seek indemnification and/or contribution from the driver.[21]

The bailor[22] or lessor of a motor vehicle may be liable for injuries caused by the negligence of the lessee. Ordinarily there is no issue as to whether the lessee has permissive use of the vehicle.[23] However, where a vehicle is operated in a fashion contrary to the express instructions of the bailor/owner, that entity may avoid liability[24] unless the restrictions on use placed on the lease vehicle by the owner are contrary to the "recognized realities" of such transactions. For instance, in *Motor Vehicle Accident Indemnification Corp.*,[25] the Court held that the insurer of a rental agency may not disclaim financial responsibility for the negligence of a person operating a rented vehicle with the permission of the lessee, in violation of the agreement between the rental agency and lessee, because such restrictions violate public policy by denying injured victims adequate protection.

While VTL § 388 gives rise to a presumption that the vehicle is being operated with the owner's consent, the presumption may be rebutted by substantial evidence to the contrary. With respect to fraudulent leasing situations, it has been held that although the vehicle was leased with a stolen credit card and false identification, the rental agency's conduct in renting the vehicle to lessee and permitting him to operate it (although under a mistaken or false identity) subjected it to liability from an injured third party.[26] However, another decision has held that where a car was rented and not returned when the rental agreement had expired, and where the lessor wrote to the address given by the lessee demanding immediate return of the vehicle and later found out that the address did not exist, liability was avoided because the rental agency had sufficiently rebutted the presumption of consent.[27]

Where a garage owner rents both a vehicle and driver's services, the owner will be liable for the negligence of the driver. However, if the garage owner is seen as having surrendered complete control of the driver and/or vehicle to the lessee, he may be able to avoid liability.[28]

The Court of Appeals has held that the insurer of an automobile dealership has no duty to defend a customer test-driving an automobile, where the customer has his own insurance.[29]

These situations often involve a "customer exclusion" in the garage policy and their legal effect is to switch the onus for paying an accident claim to any coverage the customer/driver may have, and if none, to limit the amount payable under the dealer's policy to the New York statutory minimum, which is normally $25,000 to $50,000. Although this clause seems to contradict New York's public policy by limiting the availability of the dealer's full policy limit, it has been upheld consistently by the courts.[30]

As a practical matter, for dealers facing customer test-drive accidents, the customer exclusion, in effect, makes the customer's carrier primary to the garage policy and relieves the garage carrier from the obligation of providing legal defense to the customer. However, if a plaintiff sues the customer and the dealer, and wins a judgment exceeding the customer's coverage, the dealer will still face paying the unpaid portion of the judgment due to its vicarious liability. This is not a true situation where excess coverage is triggered when a judgment exceeds the underlying coverage, since the dealer technically has the right to collect its share back from the driver, for whom it is being held vicariously liable. But in the real world, most people do not have sufficient insurance to cover more than their assets. Therefore, if the customer's policy is exhausted by a judgment, he is not likely to have personal assets with which to indemnify the dealer for an excess verdict.

Endnotes

1. *Basso v. Miller*, 40 N.Y. 2d 233, 386 N.Y.S.2d 564 (1976); *Scurti v. City of New York*, 40 N.Y.2d 433, 387 N.Y.S.2d 55 (1976).
2. *Anderson v. Oliver's Garage & Serv. Station,* 186 A.D.2d 608, 588 N.Y.S.2d 604 (2d Dep't 1992).
3. *Pulka v. Edelman,* 40 N.Y.2d 781, 390 N.Y.S.2d 393 (1976).
4. *Motors Ins. Corp. v. American Garages, Inc.*, 94 Misc. 2d 338, 404 N.Y.S.2d 803 (Civ. Ct., N.Y. Co. 1978).
5. *University Garage v. Heiser*, 142 N.Y.S. 315 (Sup. Ct. App. T. 1979).
6. *Rubin v. Forwarders' Auto Trucking Corp.*, 111 Misc. 376, 181 N.Y.S. 451 (Sup. Ct. App. T. 1920).
7. *Hobbie v. Ryan*, 130 Misc. 221, 223 N.Y.S. 654 (Sup. Ct., Saratoga Co. 1927).
8. *Smith v. Economical Garage*, 107 Misc. 430, 176 N.Y.S. 479 (Sup. Ct. App. T. 1919).
9. *Motors Ins. Corp. v. American Garages Inc.*, 98 Misc. 2d 887, 414 N.Y.S.2d 841 (Sup. Ct. App. T. 1979).
10. *Greenberg v. Kinney Systems*, 141 Misc. 2d 706, 534 N.Y.S.2d, 85 (Civ. Ct., Queens Co. 1988).
11. *Palazzo v. Katz Parking Sys*., 64 Misc. 2d 720, 315 N.Y.S.2d 384 (Civ. Ct., Bronx. Co. 1970); *see also Jays Creation Inc. v. Hertz Corp.*, 42 A.D.2d 534, 344 N.Y.S.2d 784 (1st Dep't 1973).
12. *Motors Ins. Corp.*, 98 Misc. 2d 887.
13. *Palazzo,* 64 Misc. 2d 720.
14. *Castorina v. Rosen*, 290 N.Y. 445, 49 N.E.2d 521 (1943). The Court held that where the plaintiff left his automobile with defendants and their watchman took the vehicle without permission and damaged it, defendants were improperly held liable in the absence of evidence of negligence.
15. *Jays Creations, Inc.*, 42 A.D.2d 534.
16. Some non-bailment situations are created by express contract between the parties. *Rembert v. Co-op City Parking Garage #2*, 86 Misc. 2d 399, 381 N.Y.S.2d 160 (Sup. Ct., N.Y. Co. 1972).
17. *See Garlock v. Multiple Parking Servs., Inc.*, 103 Misc. 2d 943, 427 N.Y.S.2d 670 (Buffalo City Ct., Erie Co. 1980); *Linares v. Edison Parking, Inc.*, 414 N.Y.S.2d 661 (Civ. Ct., N.Y. Co. 1979).
18. *See Greenberg v. Kinney Systems*, 141 Misc. 2d 706, 534 N.Y.S.2d 85 (Civ. Ct., Queens Co. 1988); *see also Horowitz v. Ambassador Assoc., Inc.*, 108 Misc. 2d 412; 437 N.Y.S.2d 608 (Civ. Ct., Bronx Co. 1981).
19. *Rembert*, 86 Misc. 2d 399.
20. *Motors Ins. Corp. v. American Garages Inc.*, 98 Misc. 2d 887, 414 N.Y.S.2d 841 (Sup. Ct. App. T. 1979).
21. *See* CPLR 1401–1411.
22. Note that insofar as situations in this area are described in terms of the law of bailment, the garage owner, as owner of a vehicle provided to others for use, is the bailor, rather than the bailee.
23. *See Hardeman v. Mendon Leasing Corp.*, 87 A.D.2d 232, 450 N.Y.S.2d 808 (1st Dep't 1982).
24. *Capalario v. Zurich*, 52 A.D.2d 1037, 384 N.Y.S.2d 628 (4th Dep't 1976).
25. *Motor Vehicle Accident Indem. Corp. v. Continental Nat'l Am. Group Co.,* 35 N.Y.2d 260, 360 N.Y.S.2d 859 (1974).
26. *Allstate Ins. Co. v. Dailey*, 47 A.D.2d 375, 367 N.Y.S.2d 87 (2d Dep't 1975).
27. *Molina v. NYRAC, Inc.*, 228 A.D.2d 655, 645 N.Y.S.2d 819 (2d Dep't 1996).
28. *See* Vehicle and Traffic Law; *see also Irwin v. Klein*, 271 N.Y. 477, 3 N.E.2d 601 (1936).
29. The lead cases are *Davis v. DeFrank*, 27 N.Y.2d 924, 303 N.Y.S.2d 427 (1970) and *Mills v. Liberty Mutual*, 30 N.Y.2d 546, 330 N.Y.S.2d 609 (1972).
30. *See Progressive Northeastern Ins. Co. v. Motors Ins. Co.*, 288 A.D.2d 363, 733 N.Y.S.2d 226 (2d Dep't 2001) and *State Farm Mut. Auto. Ins. Co. v. John Deere Ins. Co*. 288 A.D.2d 294, 733 N.Y.S.2d 198 (2d Dep't 2001).

Election Notice

Pursuant to Article IV, Section 2 of our By Laws, the Section is soliciting nominations for Chair, Vice Chair, Secretary and District Representatives, and any nominations should be forwarded to my attention.

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Making a Lightning Bug

By John Bosco

Mark Twain said that "[t]he difference between the almost right word & the right word is really a large matter—it's the difference between the lightning bug and the lightning." In their explanation of causation, the keepers of the doctrine developed a distaste for the word "proximate" so they discarded it.[1] Unwilling to let causation stand on its own, they selected the word "substantial" as a better companion for "cause." In so doing, they have introduced the language of size into causation. This is contrary to New York law. When a lack of size is considered in causation, it eliminates liability. In the state of New York, however, the lack of size of a defendant's conduct is supposed to diminish liability, not eliminate it. Instead of making lightning, the keepers of the doctrine of the doctrine of causation have made a lightning bug—an inferior type of illumination—to enlighten the minds of jurors on the subject of causation.

"[T]he express policy of the state of New York is clear: size pertains to culpability and a lack of size does not knock a culpable defendant off the liability hook."

On opening, in summation and in the request to charge, a plaintiff's attorney ought to talk about causation in the following manner. Causation is the chain of events that began somewhere, includes the defendant's conduct and ended in the accident. In deciding the question of causation, the role of the jury is to decide whether the defendant's conduct is a link in the chain of causation or a stranger to the chain. It is not the job of the jury to evaluate the size of the links in the chain of causation. Links in the chain of causation can be big or small. If a defendant's conduct is a link, it is a cause of an accident no matter its size; only if a defendant's conduct lies outside the chain of causation is a finding of no causation justified. The doctrine of causation is *not* intended to filter out small-cause cases, only no-cause cases.

In a liability trial in the state of New York, there are two parts: culpability and causation. By law, the size of a defendant's conduct is accounted for in the culpability part of a liability trial. According to the relative sizes of conduct[2] a jury allocates percentages of culpability. Differences in size merit differences in percentages. A small size merits a small percentage; a large size merits a large percentage. Therefore, the express policy of the state of New York is clear: size pertains to culpability and a lack of size does not knock a culpable defendant off the liability hook.

While deliberating on culpability in the liability part of a trial, jurors form opinions, as New York law requires, about the size of a defendant's conduct. It is simply "make believe" to pretend that jurors leave these opinions behind when they move on to deliberate about causation. A juror who has already formed an opinion that a defendant's equitable share is "small" will undoubtedly argue that the defendant's conduct was not a substantial factor and, hence, for a verdict of no causation.[3] At what percentage does such an argument cease to be persuasive? Ask yourselves, "Does 10%, 20% or 30% evoke in your minds something substantial, or does 70%, 80% or 90%?" Without direction, juries are left to speculate about the whereabouts of the point of transformation from "trivial" to "substantial" and tend to pick, induced by the word "substantial," higher rather than lower percentages. Assuming a 2-1 scored in the bottom of the ninth in a baseball game, a single is certainly a cause of a victory even though it took a homer to clear the bases. Yet, if size were pertinent to causation, a single, being a lot smaller than a homer, might not measure up. Causes that are small are still causes.

The problem of a lack of size often stays hidden in the one-on-one case but shows itself in the one-on-many case. In fact, as the number of defendants grows, the likelihood also grows that a jury will dismiss defendants on account of the small size of their conduct even though the jury firmly believes they are a cause of the accident. Having been instructed that it's necessary for a defendant's conduct to be "substantial," can anyone blame a jury for finding "no causation" in a case of four defendants each of which the jury believes is merely 25% responsible for an accident? What about a two-defendant case in which a jury believes one defendant is 95% responsible and the other only 5%?

Revisiting size in causation also invites duplicity into the halls of justice. A jury can have absolutely no doubt that a defendant's conduct was a cause of an accident. The very same jury may also believe that the size of a defendant's conduct falls below the level needed to be "substantial." The jury, however, is not given the opportunity to announce a defense verdict based on a lack of size. It is forced to commit forensic fraud.

Believing that there is causation, it is constrained to announce a verdict of no causation. Given the current wording of the causation interrogatory on the special verdict sheet, it is impossible to know whether a jury is making a finding of no causation based on a lack of size or a lack of cause.

> *"To consider size in causation permits a jury to eliminate liability instead of merely reducing it—a result contrary to the laws of the state of New York."*

Because size belongs to culpability not causation, the causation interrogatory should simply ask, "Was Defendant's conduct a cause of the accident?" Isn't this what a jury is supposed to decide on the question of causation? Moreover, doesn't it have a nice, sonorous, onomatopoeic flow to it from conduct through causation to accident, imitating the flow of causation from cause to effect? Size matters but it should matter only once, not twice, solely in culpability, never in causation. To consider size in both culpability and causation cheats the plaintiff by double-charging him. To consider size in causation permits a jury to eliminate liability instead of merely reducing it—a result contrary to the laws of the state of New York.

Endnotes

1. *See* Comments to PJI 2:70; *DiMaggio v. O'Connor Contr.*, 175 Misc. 2d 253, 668 N.Y.S.2d 449 (1998).
2. *See, e.g.*, CPLR 1411 and 1601.
3. *See* concurring opinion and dissent in *Kovit v. Estate of Hallums*, 690 N.Y.S.2d 82; 2002 WL 32137120 (2d Dep't 2002).

Liability on an Insurance Contract Made at Lloyd's

By Richard J. Astor

Language

Articulating and elucidating the Lloyd's enterprise is impeded by widespread misuse of technical terms and the absence of appropriate technical terms. This article uses the following terms:

assured-at-Lloyd's: a person insured by a SYA participant. "Lloyd's policyholder" is not an appropriate generic term: not all insurance sold at Lloyd's is evidenced by a Lloyd's policy;

BBSN State: (1) the Lloyd's enterprise conducts and is regulatorily permitted to conduct business as usual, including (for example) by SYA stamps selling insurance at Lloyd's in return for premium income, the Central Fund and various particular claims payment securitisation trust and other funds continuing to exist and be available to pay claims, and the Lloyd's enterprise otherwise conducting itself and being regulatorily permitted to conduct itself as a going concern; and (2) the Lloyd's enterprise publishes blandishments representing a certain minimum current and future quality of securitisation ("chain of security", "Security at Lloyd's", etc.); and (3) the Lloyd's enterprise is self-averredly, self-regulatorily and external-regulatorily solvent; and (4) no statutory, judicial or other due process has abrogated the apparent rule that every valid claim on an insurance contract made at Lloyd's is payable 100% at Lloyd's, not at some lesser percentage at Equitas Re;

byelaw: a byelaw promulgated by the Council under Lloyd's Act 1982, s.6(2);

Central Fund: as appropriate, the New Central Fund and or the Old Central Fund;

Corporation: the corporation created by Lloyd's Act 1871, s.3 by the name of Lloyd's. The word "Lloyd's" *simpliciter* is not appropriate shorthand for any other component of the Lloyd's enterprise (such as SYA participants). Pandemically mis-described, Lloyd's properly so called is not a society, company, market, regulator or an insurer. It is not synonymous with Members or SYA participants. It is not an investment vehicle. The Corporation's four formal objects are set out at Lloyd's Act 1911, s.4: (numbers in [ ] editorially added):

> The objects of the Society shall be:—[1] The carrying on by Members of the Society of the business of insurance of every description including guarantee business; [2] The advancement and protection of the interests of Members of the Society in connection with the business carried on by them as Members of the Society and in respect of shipping and cargoes and freight and other insurable property or insurable interests or otherwise; [3] The collection publication and diffusion of intelligence and information; [4] The doing of all things incidental or conducive to the fulfilment of the objects of the Society.

Council: the Lloyd's Act 1982, s.3 Council of Lloyd's. Under ibid., s.6(1), the Council;

Equitas Ltd.: Equitas Limited, incorporated in England and Wales, number 3173352. All 780,000,001 £1 ordinary shares are owned by Equitas Re. Equitas Ltd. is the 100% whole account reinsurer of all of Equitas Re's liabilities;

Equitas Re: Equitas Reinsurance Limited, incorporated in England and Wales, number 3136300. Its one £100 ordinary share is owned by Equitas Holdings Limited. Where appropriate, "Equitas Re" refers in this article additionally or instead to Equitas Ltd. Equitas Re is the 100% whole account reinsurer of every non-life liability contracted at Lloyd's by SYA participants before 1993;

EquitasRe-assured-at-Lloyd's: an assured-at-Lloyd's insured (directly or by conventional RTC) by an EquitasRe-reinsured SYA participant;

EquitasRe-reinsured SYA participant: a SYA participant reinsured by Equitas Re;

insurance: where appropriate includes reinsurance;

Lloyd's: see Corporation;

Lloyd's U.S. Credit-for-Reinsurance Common-Use Trust Deed: Amendment and restatement Lloyd's American credit for reinsurance joint asset trust deed dated September 15, 1993 as amended and restated September 7, 1995 and as further amended by Deed of Amendment dated February 7, 1997;

Lloyd's U.S. Surplus-Lines Common-Use Trust Deed: Amendment and Restatement Lloyd's American Surplus or Excess Lines Insurance Joint Asset Trust Deed dated September 15, 1993, as amended and restated September 7, 1995, as further amended by Deed of Amendment dated February 7, 1997 and as further amended, with effect from January 1, 1999, by Deed of Amendment dated November 17, 1998;

managing agency: a company or partnership authorised by the Council and contractually empowered by each individual SYA participant to conduct that SYA participant's insurance business;

Member: a member of the Corporation;

Old Central Fund: the fund originally governed by Central Fund Agreement (May 18, 1927) and now governed by Central Fund Byelaw (No. 4 of 1986) as amended by Central Fund (Amendment) Byelaw (No. 10 of 1987), Central Fund (Amendment No. 2) Byelaw (No. 9 of 1988), Corporate Members (Consequential Amendments) Byelaw (No. 20 of 1993), and New Central Fund Byelaw (No. 23 of 1996);

New Central Fund: the fund governed by New Central Fund Byelaw (No. 23 of 1996) as amended by New Central Fund (Amendment) Byelaw (No. 27 of 1996), New Central Fund (Amendment No. 2) Byelaw (No. 35 of 1996), New Central Fund (Amendment No. 3) Byelaw (No. 22 of 1997) and New Central Fund (Amendment No. 4) Byelaw (No. 32 of 1997);

R&R: Reconstruction and Renewal, the 1996 comprehensive back-office financing and de-financing of the Lloyd's enterprise's pre-1993 non-life insurance liabilities. No assured-at-Lloyd's (as such) was party to any R&R instrument;

RTC: reinsurance-to-close, the device used at Lloyd's to extricate insurance liabilities from the accounts of a participant on one SYA and infiltrate them into the accounts of one or more participants on another SYA (or, exceptionally, to a conventional insurance company). The RTC device (of which there are numerous types) is used to enable the closure of the extricatee's relevant accounts. Usually the inward and outward are the same person but the SYAs are different;

SOD**:** *Settlement Offer Document* (Lloyd's, July 1996) formally proposing to Members various aspects of R&R;

solus**:** a SYA participant personally and directly. A distinction is appropriate between a SYA participant as solus—which he virtually never is so far as concerns the assured-at-Lloyd's—and, on the other hand, as a conduit to various claims payment securitisation funds at Lloyd's. The assured's-at-Lloyd's recourse for a valid claim is to the SYA participant as a conduit, never as a solus;

SYA: syndicate year of account: a syndicate's UY-specific accounting, collectivisation and coordination device, on which one or more Members deploy premium income limit in order to sell insurance at Lloyd's. A SYA is not an investment vehicle;

SYA participant: a participant on a SYA. Only SYA participants sell insurance at Lloyd's;

SYA stamp: all the participants on a particular SYA;

syndicate: an idea in the mind of a managing agency; a regulatory and self-regulatory device. A syndicate does not trade, sell insurance, or have assets, liabilities, members or participants. A syndicate is not an investment vehicle;

UY: underwriting year; the insurance equivalent of a financial year. At Lloyd's, an UY is the twelve months from January 1.

Until Recently, No Need to Know

Until relatively recently, there was little or no need for an assured-at-Lloyd's to consider, or for his Lloyd's broker or his lawyer to research, understand or advise, the precise and particular pocket from which cash would be disbursed—at Lloyd's or anywhere else—to pay a valid claim on an insurance contract made at Lloyd's. By various occult processes in its back office unknown, invisible and irrelevant to the assured-at-Lloyd's, relevant components of the Lloyd's enterprise managed to muster cash from sources best known and available to themselves—usually the liable SYA participants, further to the latters' funding obligations under various back-office instruments such as (for example) the Premiums Trust Deed and Lloyd's Deposit Trust Deed—and send the Lloyd's broker the appropriate sum via the enterprise's so-called Central Accounting system.

So automatic has been this back-office cash conveyor belt that no assured-side lawsuits exist in recent times dealing with an assured's-at-Lloyd's collection rights, no trust funds have been publicly targeted in any collection suits, and no Central Fund monies have been claimed at the instance of any assured-at-Lloyd's. In considering the various myths now current concerning the EquitasRe-assured's-at-Lloyd's recourse rights, one therefore starts with the fact that the claimant bar has had very little reason to become acquainted with how the Lloyd's enterprise actually pays claims, and knows very little about it.

Notions of Dispossession Have Arisen . . .

Two notions have recently gained wide currency among U.S. EquitasRe-assureds-at-Lloyd's: (1) that an EquitasRe-assured's-at-Lloyd's recourse is no longer to the Lloyd's enterprise but, by some legal process the detail of which are unknown, to Equitas Re personally; (2) that when Equitas Re goes into some sort of insolvency process, the EquitasRe-assured's-at-Lloyd's recourse is to the EquitasRe-reinsured SYA participant as solus rather than as a conduit to relevant collateral at Lloyd's. The idea appears now to be firmly established among U.S. assured-side lawyers that the mere existence and exclusive run-off functions of Equitas Re have exonerated the Lloyd's enterprise entirely from its securitisation obligations, and have dispossessed the EquitasRe-assured-at-Lloyd's of his right of 100% indemnity from the Lloyd's enterprise. The notion of recourse to each individual *solus*, at his home address and for his own particular (usually insignificant) participation on a particular insurance contract, is particularly curious.

These notions appear to have arisen not from misinformation from the Lloyd's enterprise as much as by the EquitasRe-assured's-at-Lloyd's own uninformed and credulous lawyers simply inventing them by extrapolation from threats emanating from Equitas Re. The recent article by two U.S. lawyers acting for Equitas Re and for the Lloyd's enterprise, Haarlow and Griffin—*Equitas Under English Law*[1]—has not assisted assured-side lawyers to understand the EquitasRe-assured's-at-Lloyd's true position.

. . . and the EquitasRe-assured-at-Lloyd's Is Now Being Shortchanged; Scope of the Present Article

Particular relevant U.S. trust funds which patently *continue* to be available to pay the claim 100% are being completely overlooked. The EquitasRe-assured-at-Lloyd's is now being encouraged by his lawyer to take whatever decent offer he can get from Equitas Re before the latter becomes insolvent and before he then has to recourse, supposedly, to the EquitasRe-reinsured SYA participant as *solus*. Millions of dollars are being left on the table at Equitas Re because of a simple failure of good lawyering. Various U.S. assured-side lawyers have even sought to make Equitas Re an assumption reinsurer, a bizarre strategy to the extent that it releases the actually liable EquitasRe-reinsured SYA participants as conduits to relevant collateral at Lloyd's. The present article seeks to clarify, in a simplified fashion, various recourse avenues presently open to the EquitasRe-assured-at-Lloyd's and dispels the myth that an EquitasRe-assured-at-Lloyd's has been dispossessed of his right of 100% recourse to the Lloyd's enterprise.

Essential Analytical Technique

In analyzing and ascertaining recourse on insurance contracts sold at Lloyd's, this article uses three terms, and an analytical technique based on them, which may be unfamiliar: "front office" (FO), "mid-office" (MO), and "back office" (BO). Conceptually dividing the Lloyd's enterprise into those three separate offices, for functional, administrative, financial and recourse purposes, immediately elucidates the assured's-at-Lloyd's recourse for a valid claim and reveals the various (sometimes contradictory, mutually inconsistent) levels on which the Lloyd's enterprise functions. It also clarifies the role, functions and place of Equitas Re in the Lloyd's enterprise. Legal and functional analysis of the Lloyd's enterprise that fails to take into account the enterprise's FO, MO and BO will often produce, and already does produce, the wrong or an incomplete answer. That the FO-MO-BO approach, though essential, appears hardly ever to have been actually used by coverage lawyers partly explains how the myths of recourse to the *solus*, and recourse to Equitas Re, have so successfully gained such wide and deep currency, in turn explaining why EquitasRe-assureds'-at-Lloyd's lawyers have counselled and consummated unnecessarily cheap settlements at Equitas Re and formal releases of relevant SYA participants.

The FO, BO and MO Summarised

The gross position—the FO-MO-BO analytical technique is not wholly crystallised, and its detail tends to change to some extent on close examination—is as follows. The FO at Lloyd's is the interface, as befits a front office, between the business and its customers. It comprises the actual or prospective assured-at-Lloyd's, his local broker, his Lloyd's broker, and to a limited extent (this is where the FO begins to merge into the BO) the managing agency of each target SYA stamp. The managing agency to some extent bestrides the FO and BO. Though subscription to a placing slip occurs in the BO, the resulting insurance contract can be said to be to some extent—limited since the assured-at-Lloyd's never comes into contact with any SYA participant—a FO affair. The SYA stamps' outward reinsurance arrangements—including with Equitas Re—take place in the BO, do not to any extent novate the reinsured insurance contract, and are otherwise of no concern whatever to any assured-at-Lloyd's. The risk of non-performing outward reinsurance (whether placed at or other than at Lloyd's) is borne by the Lloyd's enterprise, not by the assured-at-Lloyd's.

The MO comprises the claims payment securitisation trust and other funds to which the assured-at-Lloyd's is expressly or arguably entitled. Funds, not people, inhabit the MO. The class of expressly available trust funds include LIST. As their respective governing instruments expressly state, they are available specifically to pay 100% of qualifying claims. The class of arguably available funds—merely arguable because the governing instrument confers no express right—include the Central Fund and the Corporation's (other) personal assets.

The BO, inaccessible and unknown to the assured-at-Lloyd's, comprises (among others) the managing agency of each SYA stamp, each SYA participant and his various Lloyd's captive funds (if any), the Corporation and the Council. The Central Fund is habitually a BO fund: it is not deployed directly to, nor can it easily be accessed directly by, any assured-at-Lloyd's. Premium earned by the SYA participant is banked in BO premium trust funds. Money used to pay claims derives from premium trust funds, Lloyd's deposits, personal reserve funds, special reserve funds, the fruits of cash calls and the Central Fund—all BO matters ordinarily wholly irrelevant to the assured-at-Lloyd's.

One More Preliminary: Two BO Layers of Activity and Liability

It is right to add, by way of further preliminary, that the Member has two levels of liabilities:

(1) at SYA level, the SYA participant is required to provide, in the BO, various monies to fund what are usually represented to be his own insurance liabilities. At no stage in his participation in the Lloyd's enterprise does the individual natural or corporate Member give, or is required or expected to give, any money directly to any assured-at-Lloyd's. No assured-at-Lloyd's ever collects directly from any SYA participant, or knows or needs to know his financial status. It would never occur to, nor is it any part of the placing functions of, a Lloyd's broker to satisfy itself of the solvency or liquidity of any individual SYA participant, including a corporate one. If an individual liable Member fails to provide funds required under a currently binding BO funding instrument, the Central Fund is automatically deployed as a personal-use-fund float. Absent reimbursement, that deployment becomes a common-use-fund mutualisation. Payment of a claim is in no way hostage to, and it takes place regardless of, any SYA participant's personal insolvency;

(2) at Membership level, the Member is required to provide, in the BO, contributions to the Central Fund in relation to his own and other Members' insurance liabilities. This liability, though quantified based on SYA-level activities, is a function of Membership, not SYA participation. It attaches to the Member personally because (and arguably only to the extent that) he is within the Council's self-regulatory jurisdiction, not from external insurance regulation or (even collaterally) from any insurance contract. It arises from the relevant byelaw (Old Central Fund Byelaw or New Central Fund Byelaw). As for former Members—such as most EquitasRe-reinsured SYA participants—once the Council has permitted Membership to terminate, it no longer has any self-regulatory jurisdiction over the former Member. The notion of perpetual jurisdiction notwithstanding termination of Membership arises in relation to RRC 4 "Closed Year Names," and also in relation to certain PCW Names, but in neither case is the former Member required to hold or pay any money to anyone for any purpose.

It follows that the Central Fund collateralises the assured-at-Lloyd's on two different BO levels: as a personal-use fund float (deployed at SYA level to pay SYA-level liabilities) and as a CU mutualisation fund (deployed at enterprise level to pay SYA-level liabilities). The latter occurs when the SYA participant fails to reimburse the Corporation the amount of the PU fund float, or when the SYA participant has been conventionally outwardly reinsured-to-close, has departed Membership, cannot practicably be found and the Council deploys the Central Fund to guarantee his liabilities. This never occurs ordinarily—because the currently liable SYA participant almost always will by definition be a Member—but is likely to occur in relation to EquitasRe-reinsured liabilities, where Equitas Re departs the scene, the relevant liable SYA participant entered into the Lloyd's R&R settlement agreement and paid his Equitas Premium, and the Council permitted him to then depart from Membership. In any event, no assured-at-Lloyd's appears ever to have collected directly against, or needed to collect directly against, the Central Fund.

No FO Dispossession

No FO activity, person or instrument has dispossessed the EquitasRe-assured-at-Lloyd's of his right to recourse to appropriate MO funds. Indeed, the Lloyd's enterprise continues to make FO blandishments to EquitasRe-assureds-at-Lloyd's that they are fully securitised at Lloyd's. The Lloyd's enterprise has been making blandishments to actual and prospective assureds-at-Lloyd's since at least the 1920s. See for example the centrally published brochure quoted at *Industrial Guarantee Corporation v. Lloyd's* (1924)[2]: "It has justly been said that Lloyd's has solved the problem of combining individual energy, enterprise and initiative with the collective security of a corporate body. From this you will realize that Lloyd's is the largest insurance institution in the world."

The judge (Bailhache, J.) found that some statements made by the Lloyd's enterprise in that brochure were "calculated to mislead" and was very glad not to have to decide whether any Lloyd's enterprise liability resulted. He said:

> If I had to consider this question: what meaning does the pamphlet issued by Lloyd's Committee convey to a person who knows nothing about the business of Lloyd's and is making up his mind whether he shall insure with Lloyd's or whether he shall insure with the companies[,] and if I were asked whether a person reading that pamphlet . . . would reasonably suppose that the Committee of Lloyd's stated there and offered that if he would insure with Lloyd's the Corporation of Lloyd's would be answerable for his insurances, I should consider the question a question of very great

> difficulty, . . . which would have to be decided, not on the one or two erroneous statements in it but upon what is the true effect of the whole pamphlet.

Similar judicial terms were expressed by Bingham MR in *Lloyd's v. Clementson*[3]:

> One may imagine a party in (say) New York considering whether to place a risk with (say) a corporate insurer in Frankfurt or with Lloyd's in London. The New York party will no doubt be influenced by many considerations in making his choice, among them the terms of the cover and the assurance of payment if the risk materialises.

The judicial tendency appears to be in complete sympathy with the prospective assureds'-at-Lloyd's decision-making process and the influences which lead him to decide to buy insurance at Lloyd's rather than from a conventional insurance company. Full judicial consideration of the controversy cannot be far off.

Representations made by the Lloyd's enterprise in 2003 include blandishments such as Lloyd's annual report and accounts for the financial year ended December 31, 2002, p. 47: "The great majority of claims are met from what is described below as the first link in the Lloyd's chain of security. However, the resources described in each further link are also available to ensure that all valid claims by Lloyd's policyholders are met in full."

That document, and brochures published by the Lloyd's enterprise such as "Chain of Security 2003"—of which Lloyd's publishes a special version specifically for the U.S. market—seek to characterise the securitisation in terms of four "links" of a "chain of security." But it cannot be part of the Lloyd's enterprise's commercial or "collective security" thinking, or that of any actual or prospective assured-at-Lloyd's, to seriously suggest that a claimant must himself recourse to any of the individual links or to any solus. The Lloyd's enterprise does not, could not practicably, and regulatorily is not permitted to function on any such basis.

Some FO Attempt to Finesse the Message

The Lloyd's enterprise does seek in such blandishments to discriminate between EquitasRe-assureds-at-Lloyd's and other assureds-at-Lloyd's: see, for example, its 2002 annual report, p. 47:

> The description of the chain of security set out below relates to the support of policies written for the 1993 and subsequent years of account for non-life business and all life business written at Lloyd's. Liabilities in relation to the 1992 and prior years of account for non-life business were reinsured into Equitas as at 31 December 1995, as part of *Reconstruction & Renewal*.

But this legally intriguing, ambiguous subtlety is a distinction without a legally enforceable difference. The Lloyd's enterprise appears to take care not to expressly and unambiguously dispossess the EquitasRe-assured-at-Lloyd's of his right of recourse to the Lloyd's enterprise for payment of 100% of his valid claim, and for sound reasons. In precisely which Front-Office instrument is any such dispossession validly effected, or even mentioned?

There has been no relevant due process in the FO, including no relevant statute, statutory instrument, measure, contract (including novation) or other valid legal process. Such a stunt would have caused justifiable uproar among relevant assureds-at-Lloyd's, and led to court applications around the world for judicial clarification and the cessation of renewal business on the grounds that insurance at Lloyd's was not in fact as secure as represented. No EquitasRe-assured-at-Lloyd's was even party to any R&R contract, each of which was a BO deal independent of any assured-at-Lloyd's. No EquitasRe-assured-at-Lloyd's as such was notified, consulted or informed of R&R's detail. And no post-R&R jurisprudence in any jurisdiction purports to in any way or to any extent dispossess any EquitasRe-assured-at-Lloyd's.

The Lloyd's enterprise's FO attempts to confuse, by finesse, the EquitasRe-assured-at-Lloyd's on recourse are all the more curious given the enterprise's own clear understanding of its own recourse responsibilities, unambiguously stated by it in its own BO communications to Members (see below). The Corporation's then future CEO was especially telling in 1996:

> We have a strong commitment to a basic level of collective security. It is extremely important for Lloyd's licensing position internationally and our commercial credibility in retaining the absolute commitment of our policyholders. Anybody who is insuring with Lloyd's has to get paid so we have to maintain our system of collective security, not just by relying exclusively on mutualized assets like our Central Fund, but by making sure that our whole chain of security offers the highest quality of security to our policyholders.
>
> Nicholas Prettejohn:
> http://www.nyls.edu/content.php?ID'713&PHPSESSID'25d38e98f2d31eae2aca8

65:Implications of the Reconstruction of Lloyd's of London

If challenged, the Lloyd's enterprise would presumably protest indignantly that there is no proper or surreptitious underclass of assured-at-Lloyd's, and repeat the asseveration at the Corporation's 1975 annual report and accounts, p. 6: "By the long-held principle of unlimited financial responsibility which is the bedrock of the Lloyd's Market, by the ceaseless vigilance in the monitoring of the community's activities and by the continued efforts of individual Members in the self-regulation of Lloyd's affairs, the reputation of Lloyd's is sustained."

No MO Dispossession

In which Mid-Office instrument is the EquitasRe-assured-at-Lloyd's actually or purportedly dispossessed of his right of recourse to the Lloyd's enterprise for payment of 100% of his valid claim? No MO activity, fund or instrument has dispossessed the EquitasRe-assured-at-Lloyd's of his express right to recourse to relevant claims payment securitisation funds. Indeed, those regulatorily required funds continue to reside at (for example) Citibank NA and other U.S. banks specifically to pay qualifying claims.

Lloyd's U.S. Surplus-Lines CU Trust Deed ("Deed") illustrates, in language typical of similar claims payment securitisation trust deeds at Lloyd's, the express availability of relevant trust funds.

The Deed's first two recitals set the commercial and regulatory scene (numbers in [ ] editorially added):

> [1] WHEREAS, Underwriters are or have been engaged in the insurance business in the United Kingdom and have or may have Policyholders in the United States of America as a result of accepting insurance exported to them pursuant to surplus or excess lines laws of the several states covering risks therein; and [2] WHEREAS, Underwriters have heretofore established a trust fund in the United States as security for said Policyholders and Third Party Claimants and to qualify as an eligible or approved surplus or excess lines insurer therein[.]

The Deed proceeds to securitise every 'American Policy' as defined at *ibid*., § 1.1 (presently immaterial proviso omitted): "'American Policy' means (i) any contract or policy of insurance issued or any agreement to insure made by one or more Underwriters pursuant to surplus lines or excess lines laws of any state, district, territory, commonwealth or possession of the United States in which Underwriters are not licensed to do an insurance business[.]" Under *ibid*., § 1.22, "'Underwriters' shall mean for purposes of this trust Deed, underwriters at Lloyd's London and such former underwriters at Lloyd's London as continue to have underwriting business at Lloyd's not fully wound up and the personal representatives or trustee in bankruptcy of any such underwriter or former underwriter who has died or become bankrupt."

A "Beneficiary" under the Deed means "any Policyholder (as defined herein) and any Third Party Claimant (as defined herein)" (Deed, § 1.2). Under *ibid*., § 1.15, "'Policyholder' for the purposes of this Trust Deed, shall mean the holder of an American Policy resident or doing business in the United States, and any other persons or associations who are assignees, pledgees, or mortgagees named therein." It is right to point out that the Deed also expressly gives "Policyholder"-type recourse rights to certain third parties too.

Under Deed, § 1.3 "'Claim' means: (i) a claim against one or more Underwriters by a Policyholder, as defined herein, or Third Party Claimant for a loss under an American Policy excluding punitive or exemplary damages awarded to or against a Policyholder and also excluding any extra contractual obligations not expressly covered by the American Policy ("Loss"); or (ii) a claim against one or more Underwriters by a Policyholder for the return of unearned premium under an American Policy ("Unearned Premium")."

Once the Policyholder has a "Matured Claim," the trust fund is available to cut a check direct to him. Under Deed, § 1.12 '"Matured Claim" means a Claim which is enforceable against the Trust Fund as provided for in Paragraph 2.3 of this Trust Deed." The six conditions in *ibid*., § 2.3 are, in summary (reference should be made to the Deed for the detailed particulars):

(1) the Policyholder has obtained a judgment against a relevant Underwriter in any court of competent jurisdiction within the U.S., or has obtained a binding arbitration award, in respect of that Underwriter's liability under an American Policy;

(2) that judgment or award has become final in the sense that the particular litigation or arbitration has been concluded, either through failure to appeal within the time permitted therefor or through final disposition of any appeal or appeals that may be taken;

(3) the Trustee (in this case Citibank NA) has been served with a certified copy of the judgment or award, together with such proof as to its finality as the Trustee may reasonably request;

(4) "receipt" (presumably by the Trustee) of a written statement under oath from the Policyholder's

legal counsel stating, without qualification, that the Policyholder and/or Third Party Claimant has pursued all rights and remedies against that Underwriter under deeds of trust (as amended from time to time) known as The Lloyd's American Trust Deed, Lloyd's Central Fund United States Trust Deed, Lloyd's Central Fund United States Trust Deed (Number 2) and Lloyd's United States Situs Surplus Lines Trust Deed, or any replacement for said trusts, and that the amount of the Policyholder's and/or Third Party Claimant's claim against this Trust is limited to the amount of its total claim which remains unsatisfied after all recourse to such other trusts has been exhausted;

(5) receipt of a written statement under oath from the Policyholder's legal counsel stating, without qualification, that (for example) the Claim does not include exemplary or punitive damages or any extra contractual obligations not expressly covered by the American Policy; and

(6) the expiration of thirty days from the date of the service on the Trustee of that certified copy and all other required proofs without the Trustee having received notice from the Council of Lloyd's that that judgment has been satisfied.

The Deed demonstrates the availability of money in the U.S. specifically to pay claims of EquitasRe-assureds-at-Lloyd's and the paramount need for specialist expertise in Lloyd's-Equitas law.

NO BO Dispossession

In which R&R instrument or other document is the EquitasRe-assured-at-Lloyd's actually or purportedly dispossessed of his right of recourse to the Lloyd's enterprise—including his express right to recourse to appropriate MO funds—for payment of 100% of his valid claim? Not one of the dozens of R&R instruments makes the slightest reference to dispossession. Indeed, realising that the mere aspiration of dispossession would be commercially and regulatorily harmful, the Lloyd's enterprise's BO utterances to Members are entirely to the contrary. For example:

> The Society has a number of contingent liabilities in respect of risks under policies allocated to 1992 or prior years of account. If Equitas is unable to pay the 1992 and prior liabilities in full, the Society will be liable to meet *any* shortfall arising in respect of these policies (SOD, pp. 123–4);
>
> The reinsurance of these liabilities into Equitas is . . . designed to create a "firebreak" between those liabilities and the continuing market. To reinforce this . . ., the Council will prohibit the 1993 and later years of account of any syndicate from reinsuring liabilities of Equitas and from entering into any reinsurance of losses that could arise from or by reference to the proportionate cover provisions of the Reinsurance Contract. . . . Notwithstanding the existence of this "firebreak," the continuing market will continue to be exposed in a number of ways to 1992 and prior liabilities (SOD, p. 7);
>
> The Central Fund underpins the operation of the Lloyd's market, enabling policyholder claims to be met *in full as they fall due* and allowing participants in the market to conduct their affairs on the assumption that the market as a whole will continue to operate as a going concern (SOD, p. 135; italics added).

Central Fund Curiosities

The picture concerning the EquitasRe-assured's-at-Lloyd's recourse to the Central Fund—the tantalising "fourth link" in the apparent "chain of security"—is complicated by three matters: he is not directly affected by any Central Fund byelaw; the Central Fund byelaws purport to give the Council a mere discretion on its disposition, and the Council has now purported to create two Central Funds, an "Old" and a "New." The "Old" is notionally available to pay EquitasRe-reinsured liabilities but is financially inconsequential. The "New" is expressly not available to pay any EquitasRe-reinsured liability absent the consent of Members in Corporation general meeting. This prohibition is not properly disclosed to EquitasRe-assureds-at-Lloyd's or any other class of assured-at-Lloyd's.

New Central Fund Byelaw (23 of 1996) as amended, § 8 provides: "(1) Subject to sub-paragraph (3), moneys or other assets forming part of the Fund may be applied out of the Fund (including application by way of loan or on any other terms as to repayment) for any of the purposes specified in sub-paragraph (2)."

Those purposes are listed in *ibid.*, § 8(2):

> The purposes referred to in sub-paragraph (1) are: (a) directly or indirectly extinguishing or reducing any liability of a member to any person arising out of or in connection with insurance business carried on by that member at Lloyd's; (b) repaying moneys previously borrowed for the purposes of this

byelaw and paying interest, premium or other charges on such moneys; (c) repaying contributions made to the Central Fund under paragraph 4(5) of the Central Fund Byelaw in accordance with paragraph 10 of this byelaw; (d) any other purpose (whether or not similar to any purpose mentioned in (a) to (c) above) which may appear to the Council to further any of the objects of the Society.

Now comes the Council's self-prohibition:

> (3) Subject to sub-paragraph (4), no moneys or other assets shall be applied out of the Fund: (a) by way of payment (other than a payment on arm's length terms in respect of property, assets, services or other benefits) to any member of the Equitas group; or (b) directly for the purpose of extinguishing or reducing any liability of a member in respect of which Equitas Reinsurance Limited has, under an Equitas reinsurance contract, undertaken to reinsure and indemnify that member.

The face-saving provision follows:

> (4) Sub-paragraph (3) shall not preclude the Council from applying moneys or assets out of the Fund for any of the purposes mentioned in sub-paragraph (2): (a) in discharge of any legally binding obligation of the Society arising under a contract entered into or other instrument executed at or before the time at which this byelaw comes into force; or (b) in any other case, with the prior sanction of a resolution of the members of the Society in general meeting.

The purported prohibition is arguably *ultra vires* the Council's Lloyd's Act 1982, s.6(2) byelaw-making powers on various grounds. For example:

(1) it is of a political, not a self-regulatory, quality. Indeed, the prohibition is a gross self-regulatory dereliction, and also suggests fraudulent misrepresentation to the actual and prospective assured-at-Lloyd's (query how much insurance at Lloyd's is renewal business);

(2) given that the Central Fund was originally imposed by agreement, rather than adopted by Members in Corporation general meeting as a byelaw—see generally (for example) Central Fund Agreement, May 18, 1927 and the now obsolete Lloyd's Act 1871, s.24—Members are and always have been an inappropriate repository of the Council's Central Fund self-regulatory discretion;

(3) the Council has promulgated no rules on which Members can properly exercise their discretion;

(4) Members can be expected to exercise their discretion in their own financial self-interest rather than self-regulatorily;

(5) the Council arguably has no power to delegate the discretion to Members: As a matter of delegation re byelaw-making power, see, for example, the apparently closed class of permitted delegates and actors-by at Lloyd's Act 1982, s.6. There is no BO authority on delegating self-regulatory functions to Members in Corporation general meeting.

Alleged "discretion" and the New Central Fund Byelaw prohibition notwithstanding, there appears to be no legally sound reason why the Council is not under a legal obligation to assureds-at-Lloyd's to disburse the Central Fund to pay claims. The discretion and the prohibition alike appear to be thoroughly unsound legally.

"Ringfence" Bottom Line

The alleged "ringfence" at Lloyd's between the non-life liabilities undertaken there before 1993 and the (life and non-life) liabilities undertaken thereafter, methodically analysed using the FO-MO-BO approach, can be demonstrated not to exist—so far as concerns the EquitasRe-assured-at-Lloyd's—other than in the mind of the Lloyd's enterprise.

Endnotes

1. 38 Tort & Ins. L.J. 1 (2003).
2. 19 Lloyd's List Law Reports 78.
3. {1b} [1995] LRLR 307, 326.

The author is a Barrister, an Associate of the Chartered Institute of Arbitrators, a Fellow of the Royal Society of Medicine and a former Visiting Scholar at Harvard Law School. His books include *Astor's Equitas Re Handbook* (2002), *Astor's Insolvency at Lloyd's & Equitas Re* (2003), and *Astor's Law of Lloyd's, 2nd Ed.* (due 2004). Law Office of Richard J. Astor is listed at www.martindale.com.

CPLR 3101(i) Requires Full Disclosure of Surveillance with No Timing Limitation

By John M. Shields

In the field of personal injury litigation, defendants commonly conduct videotaped surveillance of the plaintiff seeking to verify the legitimacy or severity of a plaintiff's injuries. In *Tran v. New Rochelle Hospital Medical Center*,[1] the Court of Appeals recently held that CPLR 3101(i) requires "full disclosure" of surveillance material, with no limitation as to timing, unless and until the legislature declared otherwise.

Tran v. New Rochelle Hospital Medical Center

According to the complaint and deposition testimony in *Tran*, the plaintiff injured his palm when he fell while working.[2] Following medical treatment, the plaintiff was advised by his doctor that he could return to work.[3] Two years later, the plaintiff allegedly suffered another work-related injury to the same hand.[4] Attributing the subsequent injury to weakness caused by the initial injury, the plaintiff commenced an action against the various medical providers that treated the original injury, claiming that they failed to properly diagnose and treat his original injury.[5]

At a pre-trial examination, the plaintiff testified that the condition of his hand had deteriorated to the point where he could no longer work.[6] After the defendants in *Tran* learned that the plaintiff had in fact resumed work, defendants sought an order compelling him to appear for another deposition, to which plaintiff objected.[7]

When the plaintiff learned that the defendants had surreptitiously videotaped him, he moved for disclosure of the tapes.[8] The defendants argued that they should not be required to produce the tapes until after the plaintiff submitted to a further deposition.[9]

DiMichel v. South Buffalo Railway Co. Requires Depositions Prior to Access to Surveillance

In *DiMichel v. South Buffalo Railway Co.*,[10] the Court concluded that plaintiffs could gain pre-trial access to surveillance tapes, but only after the plaintiffs had submitted to depositions. Subsequent to the decision in *DiMichel*, the legislature enacted CPLR 3101(i), which mandates "full disclosure of any films, photographs, video tapes or audio tapes," involving a party to the action.[11]

The Appellate Division in *Tran* determined that the enactment of CPLR 3101(i) did not alter the Court's conclusion in *DiMichel* that surveillance tapes need not be produced until after a plaintiff is deposed.[12] The Court in *DiMichel* concluded that pursuant to CPLR 3101(d)(2) surveillance tapes are materials "prepared in anticipation of litigation," and are therefore subject to a qualified privilege "that can be overcome only by a factual showing of substantial need and undue hardship."[13] Obviously, the defendants have a strong interest in withholding surveillance material until trial, in order to prevent plaintiffs from tailoring their trial testimony to conform to the otherwise detrimental evidence that exists on the tapes.[14]

The Court in *DiMichel* was equally sensitive, however, to the danger that surveillance tapes can easily be altered.[15] Denying plaintiffs pre-trial access to the surveillance material could create an undue hardship because "only by observing the conditions as they appear on film can the plaintiffs respond to possible distortions or prepare to explain seeming inconsistencies to the jury."[16] Accordingly, the Court in *DiMichel* determined that the plaintiffs in *DiMichel* had made the requisite showing under CPLR 3101(d)(2) of substantial need and undue hardship, and were thus entitled to view the tapes prior to trial.[17] To balance the competing interests, the Court in *DiMichel* crafted an accommodation by which surveillance tapes should be turned over before trial, but only after the plaintiff has been deposed.[18]

CPLR 3101(i) Mandates Full Disclosure

Less than a year after the decision in *DiMichel*, the legislature enacted CPLR 3101(i), which provides, in relevant part, that there shall be "full disclosure" of any surveillance material.[19] The plain language of section 3101(i) eliminates any qualified privilege that previously attached to surveillance tapes under *DiMichel*.[20] Thereafter, parties seeking disclosure of any of the items specified under section 3101(i) need not make a showing of "substantial need" and "undue hardship."[21]

The full-disclosure requirement of section 3101(i) is not limited to those materials a party intends to use at trial.[22] The subdivision does not contain any limitation even as to relevancy or subject matter.[23] However, a party remains able to seek a protective order to restrict disclosure based on grounds that justify the issuance of such an order.[24]

On its face, CPLR 3101(i) significantly alters the holding in *DiMichel*.[25] Section 3101(i) does not articulate whether a plaintiff must submit to a deposition before obtaining disclosure of any surveillance tapes.[26] Other courts have held that the legislature did not intend to codify the timing aspect of *DiMichel*.[27]

The holding in *DiMichel*, that the defendant must turn over any surveillance materials following the plaintiff's deposition it intends to use at trial, rested heavily on the premise that surveillance tapes were subject to a qualified privilege under section 3101(d)(2).[28] In removing surveillance tapes from the reach of CPLR 3101(d)(2), the legislature eliminated the qualified privilege to which videotapes were previously subject.[29]

The placement of subdivision (i) within the statutory scheme reveals that the legislature chose to create an entirely new subdivision within section 3101 to deal exclusively with videotapes and similar materials.[30] The Court must assume that the legislature was fully aware that the timing rule announced in *DiMichel* was premised on surveillance tapes falling within section 3101(d)(2).[31]

The legislature's decision to create section 3101(i), subject to no qualified privilege and imposing no express timing requirement, demonstrates that the legislature did not intend to adopt the timing rule established in *DiMichel*.[32] Had the legislature wanted to impose any such limitation, it could have easily done so.[33]

Conclusion

Requiring full disclosure of surveillance tapes before a plaintiff is deposed allows for the prospect of tailored testimony.[34] Although the Court articulated a solution to the tailored-testimony problem in *DiMichel*, the Court is now constrained from imposing a timing requirement under section 3101(i), given the legislature's pointed recasting of the relevant discovery provisions and its mandate for "full disclosure."[35] "Notwithstanding the danger of tailored testimony, section 3101(i) requires full disclosure with no limitation as to timing, unless and until the Legislature declares otherwise."[36]

Endnotes

1. 99 N.Y.2d 383, 756 N.Y.S.2d 509 (2003).
2. *Tran,* 756 N.Y.S.2d at 510.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 510-11.
8. *Id.* at 511.
9. *Id.*
10. 80 N.Y.2d 184, 590 N.Y.S.2d 1 (1992).
11. *Tran,* 756 N.Y.S.2d at 510.
12. *Id.* at 511, citing *Falk v. Inzinna*, 299 A.D.2d 120, 749 N.Y.S.2d 259 (2d Dep't 2002); *Rotundi v. Massachusetts Mut. Life Ins. Co.,* 263 A.D.2d 84, 702 N.Y.S.2d 150 (3d Dep't 2000); *DiNardo v. Koronowski*, 252 A.D.2d 69, 684 N.Y.S.2d 736 (4th Dep't 1998); *see also Perkins*, at *2-3; *Zegarelli v. Hughes*, 756 N.Y.S.2d 674, 675 (A.D. 4th Dep't 2003).
13. *Tran,* 756 N.Y.S.2d at 511, citing *DiMichel*, 80 N.Y.2d at 196.
14. *Id.*
15. *Id.*
16. *Id.*, quoting *DiMichel*, 80 N.Y.2d at 197.
17. *Id.* at 511-12.
18. *Id.* at 512.
19. *Id.* at 512; *Perkins v. Memorial Sloan-Kettering*, 2003 U.S. Dist. LEXIS 5500, *3 (S.D.N.Y. 2003).
20. *Tran*, 756 N.Y.S.2d at 512.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*, citing CPLR 3103.
25. *Id.*
26. *Id.*
27. *Id.* (citations omitted).
28. *Id.*, citing *DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184, 190.
29. *Id.* at 512-13.
30. *Id.* at 513.
31. *Id.*
32. *Id.*
33. *Id.*, citing *Bluebird Partners v. First Fidelity Bank,* 97 N.Y.2d 456, 461, 741 N.Y.S.2d 181 (2002).
34. *Id.*
35. *Id.*; *Huesca v. New York City Fire Dep't*, 756 N.Y.S.2d 873 (A.D. 2d Dep't 2003) (plaintiff's motion to compel production of surveillance material must be granted unconditionally).
36. *Tran*, 756 N.Y.S.2d at 513.

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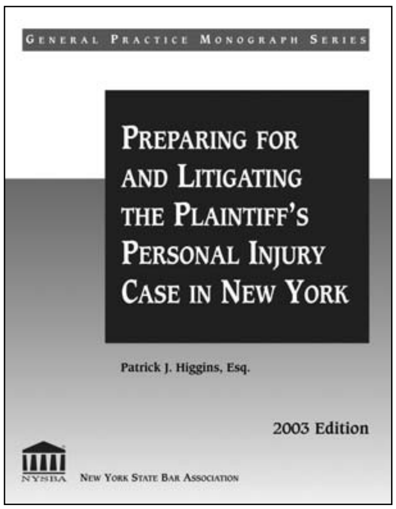

†This monograph, which was originally written by James F. Reid, Esq. and Arthur M. Greene, Esq., was substantially revised and updated by Patrick J. Higgins, Esq. in 2003. David M. Gouldin provided the 1998-2002 Supplements.

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