TICL Journal

Volume 29, No. 2
Summer 2000 Issue

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ISSN 1530-390X

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Premises Security Litigation: Should Landowners Be Liable When Assailants Target Their Victims?

By Alan Kaminsky and Cynthia A. Holfester

Landowners have long argued that they should not be held responsible for crimes committed upon their premises by third parties. Amongst their assertions is the contention that an increase in security would not have prevented the underlying crime. Recent decisions from the Appellate Division of both the First and Second Departments suggest that in situations where crime victims are targeted by their assailants, such arguments presented by landowners may be meritorious.

While the general rule that a landowner owes no duty to protect against harm caused by the criminal acts of a third-party remains,[1] recent trends in the law have all but eradicated its every day application. Indeed, the evolving law today has imposed upon a landlord a duty to prevent "foreseeable" attacks (as opposed to unforeseeable attacks where no prior history of such attacks exists) where landlords have notice and knowledge of the possibility or probability of harm.[2]

This paradigm was expounded for the first time in *Nallan v. Helmsley-Spear, Inc*., *supra*. In *Nallan*, the plaintiff had been shot by an unknown perpetrator while in the lobby of the defendant's office building. The plaintiff established that there had been 107 reported crimes in the building during the 21-month period preceding the incident. In reversing the decisions of both the trial court and the Appellate Division, which had entered judgment in favor of the defendants, the Court of Appeals stressed that knowledge of a history of criminal activities in a building obligates the building owner to take reasonable steps to minimize the foreseeable danger to visitors. Such an obligation, the Court explained, is but a natural corollary to the landowner's common-law duty to make public areas of property reasonably safe for those who might enter. Accordingly, the plaintiff's complaint was reinstated and the case was remitted for trial.

While the *Nallan* case left open the question of how much proof is necessary to establish foreseeable risk of harm, in *Jacqueline S. v. City of New York,* the Court of Appeals clarified that there is no requirement that the prior criminal activity relied on to establish foreseeability be of the same type of criminal conduct to which a plaintiff is subjected, nor that it take place in the exact location where a plaintiff is harmed. Rather, the Court adopted a multi-factor subjective test to help determine if the prior criminal activity complained of constitutes sufficient "experiential evidence" to indicate a foreseeable risk. Specifically, foreseeability "must depend upon the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question."[3]

Where a landlord breaches its duty to provide minimal security, a tenant who is victimized by a criminal in the building may recover damages from the landlord if the failure to provide adequate security was a proximate cause of the assault.[4] If proximate cause is not established, however, the failure to provide adequate security will not result in an imposition of liability upon a negligent landlord. With respect to this, the issue frequently faced by courts is whether to treat the landlord's conduct as the proximate cause of the tenant's injury or to consider the third party's intervening criminal act as a superceding cause of the tenant's injury, relieving the landlord of liability.[5] According to established principles,

> The act of a third person in committing an intentional tort or crime is a superceding cause of harm to another . . . unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.[6]

One class of cases where courts have held that a third party criminal act severed the chain of causation is where the landlords have demonstrated that the plaintiff was targeted for the attack on its premises. The Appellate Divisions of both the First and Second Departments have held that, in negligent security cases, the fact that a plaintiff-victim was targeted for a crime will sever the causal link between the acts of the assailant and any negligence stemming from the landowner's failure to provide adequate security.[7] One explanation is that where a victim is targeted for an attack, it is unlikely that any reasonable security measures implemented by the landlord would have deterred the criminal participants.[8]

For example, in *Rivera v. New York City Housing Authority*,[9] the plaintiff sustained serious injuries when two assailants entered her apartment and stabbed her multiple times. Plaintiff commenced an action against her landlord, claiming that it was negligent in failing to provide adequate security, including a functioning lock on the building's front door. Apparently the perpetrators had gained entry to the apartment by means of a ruse, but the record was devoid of any evidence establishing how they entered the building in the first instance. In fact, the only evidence in the record dealing with this

critical issue was the plaintiff's surmise that the broken lock on the front door afforded them access.

The landlord's motion for summary judgment was denied by the lower court. On appeal, the First Department reversed, holding that the landlord could not be held liable for the plaintiff's injuries absent proof as to the manner in which the perpetrators gained access to the premises, and proof that they were intruders rather than residents or guests thereof. The Court also held that the causal connection was further undermined by the clear evidence that this attack was motivated by a preconceived criminal conspiracy to murder plaintiff's stepbrother, who lived with her in the apartment. According to the First Department, this criminal design, admitted by one of the participants, rendered it most unlikely that any reasonable security measures would have deterred the criminal participants. As a result, it ordered that the complaint be dismissed.

Similarly, in *Harris v. New York City Housing Auth.*,[10] the decedent was murdered in a building owned and controlled by the defendant. The plaintiff, the decedent's mother, commenced an action against the defendant, alleging that the decedent's murder was due to the defendant's failure to install and maintain a lock on the front door of the building where the murder occurred. The Supreme Court granted the Housing Authority's motion for summary judgment, and the Second Department affirmed. In so ruling, the Appellate Division found that the record demonstrated that the decedent was the victim of a targeted murder by a long-time enemy who had tried to kill him on at least one prior occasion. Such an intentional act, according to the Appellate Division, was an unforeseeable, intervening force which severed the causal nexus between any alleged negligence on the part of the defendant, and the complained-of injury.

In *Tarter v. Schildkraut*, *supra*, a tenant who was shot in the vestibule of her apartment building by her ex-lover commenced an action against the landlord, alleging that the landlord was negligent in not providing a lock on the outer door. The jilted lover had followed the plaintiff into the vestibule of the apartment building where she resided and shot her at point blank range with a shotgun. The outer door of the vestibule was furnished with a lock which did not function; the inner door was equipped with a functioning lock, which the tenant was attempting to open when she was shot. The court found that the criminal act of the tenant's ex-lover was unforeseeable as a matter of law. Only one other criminal incident appeared to have been committed in the vestibule area, and that occurred approximately three years prior to the assault on the tenant. Even if the jury could have concluded that the landlord had notice of this single incident, the court found that this alone did not provide a basis from which the jury could infer that there had been recurring criminal activity requiring that special security measures be taken. The court also added that the tenant's ex-lover was intent on harming her and had stalked her for that purpose. Given the motivation for the assault, the court found that his acts were truly extraordinary and served to "break the causal connection" between any negligence on the part of the landlord and the tenant's injuries.[11]

Based on the foregoing, it is clear that in New York, if a landlord can demonstrate that the presence of the plaintiff's assailants on the subject property was not causally related to any alleged negligence on the landlord's part, the landlord will not be held liable for the plaintiff's injuries. While a landlord's duty to provide minimal security is in no way diminished in these cases, it is clear that where plaintiffs are targets of their perpetrators' attacks, courts will dismiss their actions as a matter of law.

Endnotes

1. *Guadagno v. Terrace Tenants Corp*., 262 A.D.2d 355, 691 N.Y.S.2d 149 (2d Dep't 1999).
2. *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 598 N.Y.2d 160 (1993); *Nallan v. Helmsley-Spear Inc*., 50 N.Y.2d 507 (1980).
3. *Jacqueline S*., *supra*, 81 N.Y.2d at 295, 598 N.Y.S.2d at 163.
4. *Miller v. State of New York*, 62 N.Y.2d 506 (1984).
5. Haines, *Landlords or Tenants: Who Bears the Costs of Crime?*, 2 Cardozo L. Rev. 299 (1981).
6. Restatement (Second of Torts) § 448 (1965).
7. *Tarter v. Schildkraut*, 151 A.D.2d 414 (1st Dep't 1989); *Rivera v. New York City Housing Authority*, 239 A.D.2d 114 (1st Dep't 1997); *Harris v. New York City Hosing Auth*., 211 A.D.2d 616 (2d Dep't 1995); *Chang Soo Jang v. Andrew Jackson Condominium,* 687 N.Y.S.2d 731 (2d Dep't 1999).
8. Interestingly, these cases present a fine distinction between this line of reasoning, and the holding of the Court of Appeals in *Price v. New York City Housing Authority*, 92 N.Y.2d 553 (1998). There, the Court held that a landowner could present expert testimony to show that an assailant's state of mind was such that he would not have been deterred by an increase in security, but only if the plaintiff opened the door to such testimony during her presentation of evidence.
9. 239 A.D.2d 114 (1st Dep't 1997).
10. 211 A.D.2d 616 (2d Dep't 1995).
11. *Tarten*, *supra*, 151 A.D.2d at 416; *see also Camacho v. Edelman*, 176 A.D.2d 453 (1st Dep't 1991) (where there was little evidence of criminal activity in the apartment building, plaintiff's stabbing by tenant's ex-boyfriend was an unforeseeable act); *Omar Yeinshi v. Two Trees, Inc. and Morrisania Assoc*., Index No. 14435/90 (Sup. Ct., Bronx Co. Jan. 5, 1994) (J. Crispino) (unforeseeable attack on plaintiff shot and torched by professional hitman in the defendant's apartment building).

Alan Kaminsky, a partner at Wilson, Elser, Moskowitz, Edelman & Dicker, represents landowners in premises-security cases. He is the author of *A Complete Guide to Premises Security Litigation*, published by the American Bar Association. Cynthia A. Holfester is an associate at the firm.

Who Wants to Be an Insurance Law Scholar? Residency, Occupancy and Physical Contact

By Jonathan A. Dachs

With apologies to Regis Philbin and ABC Television, I have set forth below a series of challenging questions by which the reader can test his or her expertise on three complicated and frequently litigated issues in Insurance Law. The "hint" offered at the beginning of each section below should be considered your first "lifeline." Since there are only two possible answers for each question, you already have a "50-50" lifeline. I suppose there is nothing I can do to prevent you from asking a friend for the "final answers." GOOD LUCK!

Residency

The issue of residency, relevant to the question of whether a particular individual is, or may be, an insured under a policy, is among the most complicated and frequently litigated issues in insurance law. Indeed, the term "residence" is often construed differently by the courts, depending upon the context in which it is used. Insofar as courts generally tend to interpret insurance policy provisions so as to provide, if possible, a source of indemnification or protection to an injured person, the term "residence" will generally be construed narrowly where it is used in a provision that excludes residents of the named insured's household, such as in a homeowner's policy. On the other hand, the term "residence" will generally be construed broadly when it is used in a provision that extends coverage to such individuals, such as a liability or uninsured/underinsured motorist policy. Accordingly, the practitioner, when citing cases on the issue of residency, should be cognizant of the context in which the term is used.

Questions

1. The insured's 80-year-old father was visiting his son from Taiwan. He had been living in his son's house for five months and had prepared, but not yet signed, an application for a six-month visa extension when he was killed in a fire at his son's home. The father had no bank accounts in the U.S., no American driver's license, and still owned an apartment in Taiwan.

   Was the father a resident of his son's home such that his estate would be precluded from recovering under the son's homeowner's policy?

   Yes ____ No ____ (See "Final Answers" below)

2. The claimant resided with the named insured stepfather and his mother until he enlisted in the U.S. Army for a period of three years. While in the military service, he was at all times quartered in the military barracks. While he was assigned to a military unit stationed in Hawaii, he was involved in an automobile accident with an uninsured motor vehicle. After he was discharged from service, he returned to the house of his mother and stepfather, where he lived until he got married.

   Was the claimant a resident of his mother and stepfather's household such that he could recover UM benefits under their automobile policy?

   Yes ____ No ____

3. The claimant lived all his life with his mother, the insured, until he enlisted in the Navy at the age of 17. He left all his personal possessions at his mother's home, and returned there to visit his mother at every available opportunity. Two years later, he was driving a motorcycle en route to his mother's house on leave from his ship when he was killed in an accident with an uninsured motor vehicle in Virginia.

   Was the claimant a resident of his mother's household such that his estate could recover UM benefits under her automobile policy?

   Yes ____ No ____

4. The claimant, a citizen of Portugal, was visiting his daughter, the insured, when he was injured in an accident. His immigration status required him to return to his homeland before a specified date.

   Was the claimant a resident of his daughter's household such that he could make claim for UM benefits under his daughter's automobile policy?

   Yes ____ No ____

5. The claimant moved out of his parents' house and moved in with his aunt. He continued to list his parents' address as his mailing address and on his driver's license, credit cards and voter registration, as well as on the police report of the accident. He also kept his clothes in a bedroom at his parents' house.

Was the claimant a resident of his parents' household such that he could recover under his parents' automobile policy?

Yes ____ No ____

6. The claimant moved all of her belongings out of her apartment and into the apartment of her father and stepmother on the weekend before her accident. She slept in her own separate bedroom in her father and stepmother's home. During the month prior to the accident, the claimant had been moving her belongings into her father and stepmother's home and had changed her mailing address to theirs. At the time of the accident, her father and stepmother's home was her only address and residence. Her intention was to remodel a garage apartment and eventually reside there. Since extensive work was required, which would have taken approximately nine months, she planned to live at her father and stepmother's house during that period of time. At the time of the accident, she lived at their house for only one week.

   Was the claimant a resident of her father and stepmother's household such that she could make claim under their automobile policy?

   Yes ____ No ____

7. The claimant, a 28-year-old, lived with his girlfriend in a three-room apartment located in a smaller structure on his parents' property. The apartment also housed a woodworking shop and claimant paid his parents $200/mo. rent. The apartment, which included a bathroom and kitchen, shared a mailbox and telephone line with the main house, but had its own lock, to which the parents did not have a key. The claimant was responsible to his parents for his portion of the phone bill. He took meals separately from his family and was self-employed.

   Was the claimant a resident of his parents' household such that he was entitled to coverage under his parents' automobile liability policy?

   Yes ____ No ____

8. The claimant's parents resided in Staten Island, but traveled a great deal for business. When it was time for her to attend kindergarten, her parents moved her to her brother's home in Malone, New York, where she attended school. All her clothing and personal belongings were transferred to Malone, New York. She was injured in an accident in Malone, New York when she caught her hand in a meat grinder.

   Was the claimant a resident of her parents' household such that she was excluded from coverage under her parents' homeowner's policy, which excluded coverage for personal injury to any person insured under the policy?

   Yes ____ No ____

9. The defendant was an adult who had his own residence. When he and his family left the insured's residence to move to another rental property of theirs, he took all of his clothing and furniture with him. The new address was where he received his mail and his motorcycle and hunting licenses reflected the new address. He actually resided at the new address for more than 14 months prior to the accident.

   Was the defendant a resident of the first property as well as the second property such that coverage under the homeowner's policy of the first property was applicable to his liability?

   Yes ____ No ____

10. The claimant, an 80-year-old widow, resided in Brooklyn, New York, but relocated to her son's residence in New Jersey for three weeks to recuperate from an injury. While staying with her son, she continued to pay rent, receive mail and otherwise maintain her Brooklyn apartment, to which she eventually returned.

    Was the claimant a resident of her son's household such that she was entitled to make a claim under her son's policy?

    Yes ____ No ____

11. The claimant stored some of her belongings at her father's house and would visit him approximately once a month.

    Was the claimant a resident of her father's household such that she was entitled to make a claim for UM benefits under her father's policy?

    Yes ____ No ____

12. The claimant rented an apartment in New York City, where he resided more than 80% of the time, but also spent "a substantial amount of time" at his father's house. He maintained his own room at his father's house, kept his clothes, books and records there, was free to come and go as he wished, had his own key to the house, listed his father's house as his own residence address on his voter registration and driver's license, as well as on his Federal and state income tax returns, and received mail there.

    Was the claimant a resident of his father's household such that he was entitled to make a claim for UM benefits under his father's policy?

    Yes ____ No ____

13. The claimant was 17 years old and was "staying" with his parents at the time he was involved in an automobile accident. Some time after he had turned 16, he had dropped out of high school and moved into a trailer with his girlfriend, where he resided for the next 1½ years. He claimed to have re-established residency with his parents shortly before the accident. The Police Accident Report set forth claimant's address as his parents' address, his driver's license listed his parents' address, and he designated that address on his tax returns. However, the evidence also established that he had used his parents' address for those purposes throughout the entire earlier period when he concededly did not reside with them.

    Was the claimant a resident of his parents' household such that he was entitled to coverage (defense and indemnity) under his parents' automobile liability policy?

    Yes ____ No ____

14. The claimant, a student at Ithaca College, resided there. However, a room was maintained for him in his mother's household, his driver's license, school documents, and selective service registration listed his mother's home as his address, he stored clothing and personal belongings there, had a key to her house, received his mail there, and spent school breaks there.

    Was the claimant a resident of his mother's household such that he was entitled to coverage (defense and indemnity) under his mother's automobile liability policy?

    Yes ____ No ____

15. The named insured's grandson lived in the second-floor apartment of a two-family home. The insured lived in the first-floor apartment. The premises consisted of two apartments which, although they shared a common heating system and mailbox, had separate utility (gas and electric) connections, and separate kitchen and bathroom facilities. He occasionally ate together with the insured in her apartment, but each apartment had a separate locked inner entrance door which excluded entry at will.

    Was the named insured's grandson a member of the insured's household such that an exclusion in the insured's homeowner's policy for injury to relatives residing in the insured's household was applicable?

    Yes ____ No ____

16. The insured's son was living with friends in an apartment in Buffalo for which he was paying rent. Immediately prior thereto he had lived for 1-2 weeks at a hotel, where he stayed after his father had asked him to leave his residence. The father stated that his son did not live with him at the time the son was involved in a shooting incident and that if the son had asked to return to his residence, he would have refused his request.

    Was the son a resident of his father's household such that he was entitled to coverage (defense and indemnity) under his father's homeowner's policy?

    Yes ____ No ____

17. The claimant had his own key to his mother's home and was free to come and go at will, kept clothing and received mail there, and spent 3-4 nights each week there.

    Was the claimant a resident of his mother's household such that he was entitled to make a claim for UM benefits under his mother's policy?

    Yes ____ No ____

18. The defendant moved out of his parents' residence and moved into another's home, taking most of his clothes with him. He returned to his parents' residence for visits which lasted only a few hours. He advised the unemployment insurance office of his change of address when he moved out. He used his new address on his driver's license. At the time of his discharge from military service, he returned to the new residence.

    Was the defendant a resident of his parents' household such that he was entitled to coverage (defense and indemnity) under his parents' homeowner's policy?

    Yes ____ No ____

19. The claimant minor's parents were divorced and custody was granted to his mother, with visitation during the week and on weekends to his father. When the mother lived in Brooklyn, the father visited him every Wednesday and each weekend. When the mother moved to New Jersey, the child spent weekends in Brooklyn visiting with his father, who resided with his paternal grandmother. By the time he entered first grade, he resided with his mother in Pennsylvania. He visited his father in Brooklyn at least twice a month for a year and thereafter on every third weekend. Summertime visitation usually lasted two to three consecutive weeks, until he reached the age of 14. The father then remarried and moved with his new wife and her two children to a three-bedroom house in Staten Island. He converted the garage to a fourth bedroom for the claimant, who kept his clothing, baseball card and matchbox car collections, toiletries and jewelry there. The claimant had his own key to his father's house and received some mail there.

On one occasion, after an argument between his mother and stepfather, the claimant took a bus from Pennsylvania to New York and resided with his father in Staten Island until things calmed down in Pennsylvania. While visiting with his father, he obtained a New York State Department of Environmental Conservation Hunter Education Certificate of Qualification. His driver's license, however, was from Pennsylvania.

At the time of his involvement in a boating accident in Pennsylvania, the claimant attended Pocono Mountain High School in Pennsylvania. He later entered the University of Pennsylvania at a Pennsylvania resident tuition rate.

Was the claimant a resident of his father's household such that he was entitled to coverage (defense and indemnity) under his father's policy?

Yes ____ No ____

20. The claimant's parents were divorced and custody was awarded to her mother. She lived with her mother in Manhasset and attended high school there. After graduation from high school, she irregularly visited her father's apartment, occasionally sleeping in his living room overnight. She also kept a few incidental items of clothing in her father's apartment.

    Was the claimant a resident of her father's household such that she was entitled to coverage (defense and indemnity) under her father's homeowner's policy in a subrogation claim?

    Yes ____ No ____

21. The claimant, a minor, resided with his parents. His mother left the marital home without his father's consent and took the claimant with her. While they were thus separated due to the mother's unilateral action, the claimant was injured in an accident with a hit-and-run vehicle.

    Was the claimant a resident of his father's household on the date of the accident such that he was entitled to make a claim for UM benefits under his father's policy?

    Yes ____ No ____

22. The claimant's parents were divorced and joint custody was awarded, although she was under the "primary custody" of her mother. She resided with her mother on "virtually a continuous basis" until she moved to her father's residence seven years later, after an argument with her mother. Both parents maintained a room for her at their houses. The claimant had on previous occasions left her mother's home to stay with her father. She lived primarily with her father at the time of the incident, but she eventually resumed living primarily with her mother. When she resided with her father, she continued to receive her mail at her mother's house, and used her mother's address on her driver's license, registration and school forms. She continued a close personal relationship with her mother, visiting her every day, ate meals at her mother's house, and spent at least two nights there during their estrangement; she was always free to return to her mother's home.

    Was the claimant a resident of her mother's house or her father's house, or both?

    Mother's ___ Father's ___ Both ___

23. The claimant lived in New York City. He met his girlfriend at a concert there in the summer of 1985, and she immediately moved in with him to his father's apartment. In the fall of that year, the claimant went to Colorado to become a "ski bum," while his girlfriend returned to Florida to attend to her sick mother. The claimant and his girlfriend were reunited in New York in June 1986, at which time they began to refer to each other as husband and wife. During the fall of 1986 through the summer of 1987, they used the New York apartment as a base for their travels, which mainly consisted of following the "Grateful Dead" to their various performances. They found temporary jobs in Colorado, at which time the claimant gave his girlfriend a ring, which she wore on the third finger of her left hand. They then visited Eugene, Oregon, where they obtained application to a community college thereat, upon which they falsely stated that they had lived in Oregon for 11 months. They subsequently returned to New York. They attended school in Oregon from September 1987 to December 1987, when they were involved in an accident in which a gas lantern exploded.

    (a) Was Claimant a New York resident?

    Yes ____ No ____

    (b) If so, could Claimant's New York residency be imputed to his girlfriend?

    Yes ____ No ____

"Final Answers"

1. **No.** There was a lack of any attribute of an intention to remain and there were indications of a mind to return to Taiwan. (Coverage was, therefore, applicable). *Allstate Ins. Co. v. Chia-I Lung*, 131 Misc. 2d 586, 501 N.Y.S.2d 260 (Sup. Ct., Nassau Co. 1986).

2. **Yes.** Physical absence from the household does not exempt one from coverage. One need not dwell under the same roof to be a resident of another's household. Claimant never established legal residence elsewhere. "If mere physical presence is sufficient to establish residence, without more, one could change his residence by taking a vacation." *Appleton v. Merchants Mut. Ins. Co.*, 16 A.D.2d 361, 228 N.Y.S.2d 442 (4th Dep't 1962).

3. **Yes.** The claimant did not acquire a residence elsewhere. *Allstate Ins. Co. v. Jahrling*, 16 A.D.2d 501, 229 N.Y.S.2d 707 (3d Dep't 1962).

4. **No.** *State Farm Mut. Ins. Co. v. Leonardo*, 166 A.D.2d 601, 560 N.Y.S.2d 888 (2d Dep't 1990).

5. **Yes.** *Lamonsoff v. Hertz Corp.*, N.Y.L.J., March 12, 1996, p. 26, col. 3 (Sup. Ct., Queens Co. 1991).

6. **Yes.** The fact that the claimant only resided there for one week was not probative because the policy put no parameters on the length of time a person must reside in the household before coverage becomes effective.

7. **Maybe.** Although the lower court held that the claimant was a resident of his parents' household, the Appellate Division held that there was a question of fact and, therefore, denied summary judgment to Claimant. *Sekulow v. Nationwide Mutual Ins. Co.*, 193 A.D.2d 395, 597 N.Y.S.2d 60 (1st Dep't 1993).

8. **No.** The claimant was a resident of her brother's household. *Metropolitan Prop. & Cas. Ins. Co. v. Wu-Tsang*, N.Y.L.J., January 7, 1999, p. 23, col. 3 (Sup. Ct., Richmond Co. 1999).

9. **No.** When the defendant moved from the first property to the second, he intended to move permanently. *Walburn v. State Farm Fire & Cas. Co.*, 215 A.D.2d 837, 626 N.Y.S.2d 315 (3d Dep't 1995).

10. **No.** *Aetna Cas. & Sur. Ins. Co. v. Fein*, N.Y.L.J., December 3, 1992, p. 33, col. 1 (Sup. Ct., Nassau Co. 1992).

11. **No.** *Aetna Cas. & Sur. Co. v. Panetta*, 202 A.D.2d 662, 609 N.Y.S.2d 631 (2d Dep't 1994).

12. **No.** *Aetna Cas. & Sur. Co. v. Gutstein*, 169 A.D.2d 718, 564 N.Y.S.2d 778 (2d Dep't 1991), *rev'd* 80 N.Y.2d 773, 587 N.Y.S.2d 268 (1992).

13. **No.** The evidence established that the claimant's reestablished residency with his parents was only temporary, it being his expectation to return to his girlfriend after reconciling with her. *New York Central Mutual Fire Ins. Co. v. Kowalski*, 222 A.D.2d 859, 634 N.Y.S.2d 894 (3d Dep't 1995).

14. **Yes.** *Dutkanych v. USF&G*, 252 A.D.2d 537, 675 N.Y.S.2d 623 (2d Dep't 1998).

15. **No.** *General Assurance Co. v. Schmitt*, 265 A.D.2d 299, 696 N.Y.S.2d 72 (2d Dep't 1999).

16. **No.** *Allstate Ins. Co. v. Gominiak*, 167 A.D.2d 979, 537 N.Y.S.2d 411 (4th Dep't 1989).

17. **Yes.** *Prudential Prop. & Cas. Ins. Co. v. Galioto*, A.D.2d, 697 N.Y.S.2d 415 (4th Dep't 1999).

18. **No.** The evidence clearly indicated the claimant's intention to abandon his parents' residence. *D'Amico v. Pennsylvania Millers Mutual Ins. Co.*, 72 A.D.2d 784, 421 Misc. 2d 605 (2d Dep't 1979).

19. **Yes.** The claimant never intended to abandon his residence with his father. His principal residence with his mother stemmed from his parents' divorce and the resultant impossibility of living with both parents full time. An individual can retain residency at more than one location for purposes of insurance coverage. *Pellegrino v. State Farm Ins. Co.*, 167 Misc. 2d 617, 639 N.Y.S.2d 668 (Sup. Ct., Nassau Co. 1996).

20. **No.** *GEICO v. Troisi*, 249 A.D.2d 363, 671 N.Y.S.2d 111 (2d Dep't 1998).

21. **Yes.** The claimant did not lose his status as a resident of his father's household because his mother removed him therefrom without consent. The mother could not, by her unilateral act, abrogate his contract rights as a third-party beneficiary under the policy. *Allstate Ins. Co. v. Luna*, 36 A.D.2d 622, 319 N.Y.S.2d 139 (2d Dep't 1971).

22. **Both.** The claimant did not lose her status as a resident of her mother's household by temporarily relocating to her father's household. At the time of the accident, she was a resident of the households of both her mother and her father. *Nationwide Ins. Co. v. Allstate Ins. Co.*, 181 A.D.2d 1022, 581 N.Y.S.2d 955 (4th Dep't 1992).

23. (a) **Yes.**

    (b) **No.** "The imputation of residency based upon the presumption . . . that a married woman's residency is that of her husband is based on the anachronistic fiction that a married woman is merely an appendage of her husband. . . . Societal mores and the law recognize the full equality of women, married or unmarried." *Ledwith v. Sears, Roebuck & Co., Inc.*, 231 A.D.2d 17, 660 N.Y.S.2d 402 (1st Dep't 1997).

Occupancy

Another much-litigated issue, this one in the context of automobile policies—especially uninsured/underinsured motorist and No-Fault—is the issue of "occupancy," i.e., whether the claimant was the occupant of a particular vehicle or a pedestrian at the time of an accident. Here, too, the meaning ascribed to the term may depend upon the context in which it is used. In the context of uninsured/underinsured motorist insurance, and its unambiguous legislative purpose of protecting innocent persons against loss and damage resulting from the acts of negligent, financially irresponsible motorists, the term "occupying" is expansively defined so as to afford a broad sweep of coverage. On the other hand, in the context of No-Fault coverage, where the term "occupant" appears in an exclusionary provision (coverage is excluded for the occupant of another motor vehicle), a more restricted definition is applied.

Questions

A. The claimant's decedent was a passenger in a vehicle operated by Mr. G, which was proceeding eastbound on the Cross-Bronx Expressway. Mr. G believed that his vehicle was struck by a vehicle driven by Mr. C and both vehicles pulled to the side of the road. Mr. C maintained that his car did not touch Mr. G's car and pointed to the fact that there were no marks at the point of alleged contact. Mr. G and Mr. C went to the rear of Mr. G's car to verify this claim and the claimant's decedent got out of Mr. G's vehicle to join them. While they were all standing in the roadway, a stolen vehicle (uninsured) struck Mr. C and the claimant's decedent, killing the latter instantly.

Was the claimant's decedent an occupant of Mr. G's vehicle at the time of the accident and, therefore, entitled to coverage under Mr. G's policy?

Yes ____ No ____

B. The claimant was a passenger in a panel truck that stalled. The driver got out, raised the hood and looked at the motor. The claimant, in order to aid the driver, then got out of the truck and proceeded to the front of the truck. Approximately 4-5 seconds after he got out of the truck, the claimant was struck and injured by a hit-and-run vehicle.

Was the claimant an occupant of the panel truck at the time of the accident entitled to coverage under the truck's policy?

Yes ____ No ____

C. The claimant, a passenger in a taxicab, was alighting from the cab when the operator of the cab, without warning and without affording the claimant the opportunity to fully disembark, drove off while the claimant's clothes were still in the cab door. As a result, the claimant was dragged along the street and injured. The cab then left the scene and was, therefore, unidentified.

Was the claimant an occupant of the taxicab at the time of the accident?

Yes ____ No ____

D. The claimant was a passenger in a taxicab. The cab reached its destination and the claimant stepped out to pay the fare. While he was paying the driver, an unknown vehicle struck the cab, causing the opened door of the cab to strike the claimant, injuring him.

Was the claimant an occupant of the taxicab entitled to UM coverage under a policy of insurance issued to the wife of the taxicab driver?

Yes ____ No ____

E. The claimant's vehicle skidded off the road and into a high snow bank. After he alighted from the vehicle to release it from the snow he was struck by a hit-and-run vehicle. He was actually in contact with his own vehicle when he was struck.

Was the claimant an occupant of his vehicle at the time of the accident?

Yes ____ No ____

F. The claimant was operating a vehicle owned by a corporation of which he was a shareholder, director, officer and employee. As he approached a certain intersection, he saw a man lying in the center of the roadway. He drove his vehicle through the intersection, parked it in an adjacent lot, removed the ignition key, and walked approximately 25 feet back to the injured man. While two others watched for oncoming traffic, the claimant administered first-aid to the man. As he started to walk to a nearby "firebox" to summon further assistance, and after he had taken one-step in that direction (further away from his vehicle), the claimant was struck by a hit-and-run vehicle, and injured.

Was the claimant an occupant of his vehicle at the time of the accident?

Yes ____ No ____

G. The claimant was operating Vehicle #1, proceeding to a common destination with another vehicle, Vehicle #2. Both vehicles stopped for a red light, Vehicle #2 stopping 5-10 feet behind Vehicle #1. The claimant, at the request of the operator of Vehicle #2, who wished to complete the journey by driving

Vehicle #2, got out of her vehicle and proceeded to walk back to Vehicle #2. Before she reached Vehicle #2, The claimant realized that she had not given the registration for Vehicle #1 to the operator of Vehicle #2 and, as she stepped between the two cars to deliver it, Vehicle #2 was struck by a third car, which propelled it into Vehicle #1, striking and injuring the claimant, who was standing midway between the two cars.

(a) Was the claimant an occupant of Vehicle #1?

Yes ____ No ____

(b) Was the claimant an occupant of Vehicle #2?

Yes ____ No ____

(c) Was the claimant a pedestrian?

Yes ____ No ____

H. The claimant, who had borrowed a car from his cousin, parked the car, turned off the headlights, shut the motor and removed the ignition key. He then exited from the car, closed the door and walked to the right, close to the car, about 2-3 feet toward the front of the car, where, he was struck from the rear by an unidentified car and injured.

Was the claimant an occupant or user of the car at the time of the accident?

Yes ____ No ____

I. The claimant, who had just finished a repair job, deposited his tools in the back of a van owned by his employer and was walking around the van to the driver's door when he was struck by an under-insured vehicle and injured.

Was the claimant an occupant of the van at the time of the accident?

Yes ____ No ____

J. The claimant's car broke down on the highway and, with assistance, she moved the car out of traffic and parked it. She then went to a nearby restaurant to telephone for help. When she was unable to reach anyone, she returned to the car, gathered her belongings and left the car to go home. While crossing the highway, she was struck by another car and injured.

Was the claimant an occupant of the car at the time of the accident?

Yes ____ No ____

K. The claimant was operating his vehicle on the Grand Central Parkway when the hood of the vehicle flew up, smashing the windshield and blocking his view. After stopping the vehicle and trying, unsuccessfully, to close the hood, he, together with his two passengers, positioned the vehicle partially on the center median. They then stood on the roadway some distance from the car flagging oncoming traffic to warn of the disabled vehicle. After about fifteen minutes, a passing motorist volunteered to phone for a tow truck. The claimant and his passengers continued to flag traffic from a position behind the disabled vehicle, varying their locations, until, when the claimant was walking in the road 6-7 feet from the vehicle, he was struck by a car.

Was the claimant an occupant of his vehicle at the time of the accident such that he would not be entitled to no-fault benefits under the policy of the vehicle that struck him (and instead, entitled to no-fault benefits under his own policy)?

Yes ____ No ____

"Final Answers"

A. **Yes.** "Not every physical departure from the vehicle results in termination of status as a passenger. . . . Where the departure is incident to some temporary interruption in the journey of the vehicle, as when there is a mechanical failure and the passenger gets out to help or even to observe the work of the driver, he does not cease to be a passenger. . . . Where the passenger alights following some temporary interruption at a place other than his destination, remains in the immediate vicinity of the vehicle and there is every reason to believe that, had it not been for the accident, he would shortly have resumed his place in the vehicle, his status as a passenger has not changed." *Cepeda's Estate v. USF&G*, 37 A.D.2d 454, 326 N.Y.S.2d 864 (1st Dep't 1971).

B. **Yes.** *State-Wide Ins. Co. v. Murdock*, 25 N.Y.2d 674, 306 N.Y.S.2d 678 (1969).

C. **Yes.** Occupying includes "in or upon or entering into or alighting from." Here, the claimant was caused to fall by the negligent acts of the driver. *Shindler v. MVAIC*, 41 Misc. 2d 590, 245 N.Y.S.2d 90 (Sup. Ct., Bronx Co. 1963).

D. **Yes.** First of all, the injuries sustained by the claimant were caused by the door's contact with him, either immediately by the door itself, or proximately by being thrown by or from the door to the pavement at the time of his contact with the door. Thus, the claimant was "upon" the cab and, therefore, "occupying" it.

Secondly, the claimant did not cease to occupy the vehicle because he did not sever his connection with it—he was still "vehicle-oriented" at the time

of the accident. *Allstate Ins. Co. v. Flaumenbaum*, 62 Misc. 2d 32, 308 N.Y.S.2d 447 (Sup. Ct., N.Y. Co. 1970).

E. **Yes.** The claimant's "short, temporary, enforced break in the occupancy of his vehicle for the express purpose of continuing his occupancy" did not remove him from the category of an "occupant." Moreover, while he may not have been "in" the vehicle, he was "upon" it and was, therefore, an "occupant" for that reason as well. *MVAIC v. Oppedisano*, 41 Misc. 2d 1029, 246 N.Y.S.2d 879 (Sup. Ct., Nassau Co. 1964).

F. **No.** The claimant's activities when he was struck were in no way related to the vehicle. "The only relation between [his] vehicle and the accident was the fortuitous circumstances that he was riding in it when he observed the situation that prompted him to respond as a good Samaritan." *Fischer v. Aetna Ins. Co.*, 65 Misc. 2d 191, 317 N.Y.S.2d 669 (Sup. Ct., Nassau Co. 1971).

G. (a) **No.** The claimant was not an occupant or passenger of Vehicle #1, from which she had alighted because she had ceased any connection with that vehicle. "Where a departure from a vehicle is occasioned by or is incident to some temporary interruption in the journey and the occupant remains in the immediate vicinity of the vehicle and, upon completion of the objective occasioned by the brief interruption, he intends to resume his place in the vehicle, he does not cease to be a passenger." Here, however, the claimant's intent was not to return to the vehicle, and she had for all intents and purposes severed her connection with Vehicle #1. "Had the accident not occurred, the claimant would have completed her journey with no further connection with the car from which she had alighted."

(b) **No.** The claimant was not an occupant or passenger of Vehicle #2, either. One is not considered to be occupying a car if he or she is merely approaching it with intent to enter; nor may such a status be created if the claimant is not yet "vehicle-oriented" with that vehicle. "More than a mere intent to occupy a vehicle is required to alter the status of pedestrian to one of 'occupying' it; and this is particularly so where there has been no previous passenger-oriented status."

(c) **Yes.** The claimant was a pedestrian. Since she was not an "insured" under the policies of either vehicle, she was deemed a "qualified person" entitled to make claim against MVAIC. *Rice v. Allstate Ins. Co.*, 32 N.Y.2d 6, 342 N.Y.S.2d 845 (1973).

H. **No.** "The mere fact that the claimant was in close proximity to the vehicle is not sufficient to make him a user, nor is his intention to return to the car after his non-vehicle related leaving the car sufficient. The mere fact that his intention was to return to use the automobile to continue his travels after the visit is not sufficient to come within the scope of the Rice case. If we adopt the claimant's view, then no person can ever cease to be a user if his intent is to at some future time, use the auto again. We would then have to determine what time element is to be the cut off point on the time of the intent to return. Is four or five minutes (as were claimed) sufficient? It is my opinion that the 'intent' to leave the auto must have some connection with the continued driving of the vehicle as distinguished from a parking of the auto to go elsewhere." *Aetna Ins. Co. v. Espinosa*, 92 Misc. 2d 200, 399 N.Y.S.2d 975 (Sup. Ct., Kings Co. 1977).

I. **No.** The claimant cannot be deemed to have been entering the van merely because he was walking towards the door on the driver's side with the intent to enter the vehicle. "More than a mere intent to occupy a vehicle is required to alter the status of a pedestrian to one of 'occupying' it." Notably, the claimant had not yet reached the locked driver's side door and his departure from the vehicle was not "incident to some temporary interruption in the journey of the vehicle" such that his original occupancy of the van could be deemed continuing in nature. *State Farm Auto Ins. Co. v. Antunovich*, 160 A.D.2d 1009, 555 N.Y.S.2d 231 (2d Dep't 1990).

J. **No.** The claimant cannot be deemed an occupant merely because she was on her way home with the intent to return and enter the vehicle. "More than a mere intent to occupy a vehicle is required to alter the status of pedestrian to one 'occupying' it." Notably, the claimant was walking away from the car when she was struck. Her departure from the car was not "incident to some temporary interruption in the journey of the vehicle" such that her original occupancy of the car could be deemed continuing in nature. *Travelers Ins. Co. v. Wright*, 202 A.D.2d 680, 609 N.Y.S.2d 642 (2d Dep't 1994).

K. **No.** In the context of no-fault insurance, the word "occupant" should be ascribed its normal, dictionary meaning and not the "very much expanded" interpretation it has been given in the context of uninsured motorist and MVAIC law. Thus, the "vehicle-oriented" standard is not applicable. The claimant was not "occupying" his vehicle within the ordinary and customary meaning of that term. *Colon v. Aetna Cas. & Sur. Co.*, 48 N.Y.2d 570, 423 N.Y.S.2d 908 (1980).

Hit-and-Run—Physical Contact

Our final category involves the complex and oft-litigated issue of "physical contact" in the context of a "hit-and-run" claim under an uninsured motorist policy. Sections 3420(f)(3) and 5217 of the Insurance Law provide that uninsured motorist coverage shall not apply to any cause of action arising out of a motor vehicle accident occurring in New York against a person whose identity is unascertainable, *unless* the bodily injury to the claimant *arose out of physical contact* of the motor vehicle causing the injury with the claimant or with the motor vehicle the claimant was occupying at the time of the accident. The "physical contact" requirement has as its purpose the deterrence of fictitious claims, which are thought to be too easily contrived in the absence of physical contact. The "physical contact" requirement is not limited to direct contact with an unidentified vehicle, but may also be met, under certain circumstances, by indirect contact.

Questions

I. The claimant was operating an automobile in the westbound lane of an expressway and was struck by an eastbound vehicle that had been pushed across the center divider by a hit-and-run vehicle.

Was there the requisite physical contact to establish a hit-and-run claim?

Yes ____ No ____

II. The claimant, an infant, was riding as a passenger in his father's car when an unidentified car struck a metal object on the roadway, believed to be a piece of divider rail, causing the object to be precipitated through the air and to strike the claimant.

Was there the requisite physical contact to establish a hit-and-run claim?

Yes ____ No ____

III. The claimant was driving a taxicab. While stopped at a traffic light, the cab was struck in the rear by another vehicle, which was apparently pushed into the cab by a truck that turned out to be unidentified.

Was there the requisite physical contact to establish a hit-and-run claim?

Yes ____ No ____

IV. An unidentified tractor-trailer combination approached the claimant's vehicle from the opposite direction. Snow and ice were dislodged from the tractor-trailer, striking and shattering the claimant's windshield and causing injuries.

Was there the requisite physical contact to establish a hit-and-run claim?

Yes ____ No ____

V. The claimant was a highway equipment operator with the Department of Transportation. While operating an asphalt-heating machine on the Long Island Expressway, he bent down to light a propane burner on the machine when a car swerved, hit a cone that was marking off the lane where he was working, and then hit a wooden two-by-four that was serving as a windbreaker to keep the propane flame from going out. The two-by-four then struck the claimant in the eye.

Was there the requisite physical contact to establish a hit-and-run claim?

Yes ____ No ____

VI. The claimant was asleep in bed on the first floor of her house. The head of the bed was against a wall. Suddenly, an uninsured automobile (whose operator was unidentified) crashed against the wall, causing the claimant's head to jerk and hit the wall.

Was there the requisite physical contact to establish a hit-and-run claim?

Yes ____ No ____

VII. The claimant was a passenger in an ambulance that was involved together with the vehicle it front of it in a collision with an unidentified vehicle proceeding in the same lane directly ahead of them. It was alleged that the unidentified vehicle made a sudden stop which contributed to the accident. The car ahead of the ambulance hit that vehicle. The ambulance then hit the car ahead of it.

Was there the requisite physical contact to establish a hit-and-run claim?

Yes ____ No ____

VIII. The claimant's decedent was killed when, while riding in an automobile owned and operated by her husband, a tire and rim from an unidentified vehicle struck the windshield of her car and caused it to crash.

Was there the requisite physical contact to establish a hit-and-run claim?

Yes ____ No ____

IX. The claimant's vehicle collided with a metal gear box that was somehow propelled into it.

Was there the requisite physical contact to establish a hit-and-run claim?

Yes ____ No ____

X. An unidentified vehicle cut off a police car, causing the police car to strike the claimant's car, propelling it into an unoccupied, parked car.

Was there the requisite physical contact to establish a hit-and-run claim?

Yes ____ No ____

XI. The claimant was traveling on Route 55 in Poughkeepsie when her car struck an automobile muffler in the road which caused her to lose control and swerve into a guardrail.

Was there the requisite physical contact to establish a hit-and-run claim?

Yes ____ No ____

XII. The claimant, a bicycle commuter, was riding his bicycle on the paved shoulder of a highway entrance ramp when an overtaking tractor-trailer passed so close as to graze his portfolio, which was strapped to the bicycle's rear carrier. As a result, the claimant was caused to lose control of the bicycle, hit a pothole and fall to the ground.

Was there the requisite physical contact to establish a hit-and-run claim?

Yes ____ No ____

"Final Answers"

I. **Yes.** The vehicle that made actual contact with the claimant's vehicle was a mere involuntary intermediary of the hit-and-run vehicle. *MVAIC v. Eisenberg*, 18 N.Y.2d 1, 271 A.D.2d 641 (1966).

NOTE: According to this Court, the requisite physical contact would also be involved where the offending vehicle strikes a telephone pole, which, in turn, is propelled into the claimant's vehicle; or, where the offending vehicle strikes a motorcycle whose rider is propelled through the air and strikes a pedestrian.

II. **Yes.** "There is no distinction in principle between 'physical contact' made through the intermediacy of an offending automobile involuntarily propelled by the hit-and-run' vehicle into the automobile occupied by the injured person (*MVAIC v. Eisenberg*, 18 N.Y.2d 1, 271 N.Y.S.2d 641) . . . and 'physical contact' through the intermediacy of a metal object in the roadway propelled by the 'hit-and-run' vehicle into the plaintiff's body. . . ." *Gavin v. MVAIC*, 57 Misc. 2d 335, 292 N.Y.S.2d 745 (Sup. Ct., Kings Co. 1968).

III. **Yes.** If a hit-and-run vehicle struck the second vehicle and propelled him into the claimant's vehicle, this would constitute physical contact. *Shamrock Cas. Co. v. Mack*, 61 Misc. 2d 240, 305 N.Y.S.2d 525 (Sup. Ct., Kings Co. 1969). *See also, Powers v. Continental Ins. Co.*, 29 A.D.2d 1041, 289 N.Y.S.2d 467 (3d Dep't 1968).

IV. **No.** The kind of contact required by the statute, even if not direct, must at least originate in collision. "[P]hysical contact as contemplated by the statute may involve the continued transmission of force indirectly and simultaneously through an intermediate agency, but the initial impact must, nevertheless, be that of a collision between he unidentified vehicle with the claimant, the vehicle occupied by him, an obstruction or other object causing the bodily injury. Excluded, therefore, are objects cast off or cast up by the hit-and-run vehicle, whether it be ice accumulated on the vehicle or pebbles or rocks or other debris on the roadway surface. Every transmission of force by a moving vehicle is not collision, and the statute is concerned only with an initial collision by the unidentified vehicle with someone or something, and then a continued transmission of the colliding force with the injured person." *Smith v. Great American Ins. Co.*, 29 N.Y.2d 116, 324 N.Y.S.2d 15 (1971).

V. **Yes.** Physical contact occurred when the inert two-by-four was propelled into [the claimant] as a result of being struck either by the unidentified vehicle or the cone into which the vehicle had initially swerved. The force of the collision was transmitted through either or both of these objects to [the claimant]. *Aetna Cas. & Sur. Co. v. Loy*, 108 A.D.2d 709, 485 N.Y.S.2d 1018 (1st Dep't 1985).

VI. **Yes.** Physical contact does not necessarily mean direct contact of the offending vehicle with the injured person. It may involve "the continued transmission of the force indirectly and simultaneously through an intermediate agency, but the initial impact must, nevertheless, be that of a collision between the unidentified vehicle with the claimant . . . or other object causing bodily injury [citing *Aetna Cas. & Sur. Co. v. Loy*, supra.]. Here, the automobile collided with the wall and there was a continued transmission of the colliding force with the injured person." *State Farm Mut. Auto. Ins. Co. v. Smith*, 129 Misc. 2d 828, 494 N.Y.S.2d 647 (Sup. Ct., Queens Co. 1985).

VII. **Yes.** The lack of an "actual" contact between the ambulance and the vehicle which fled the scene will not necessarily defeat the claim [citing *MVAIC v. Eisenberg*, supra.]. "There is no juridical distinction between a hit and run vehicle which strikes one vehicle which in turn collides with another and one which negligently stops short and thereby causes vehicles behind it which are unable to anticipate that action to strike it. In both examples, a hit and

run event is established. The contact between the offending vehicle and in 'involuntary intermediary' which occurs in either example is sufficient to satisfy the objective of the statute—the avoidance of fraud and collusion which could occur in an accident involving a 'phantom' vehicle." *New York City Health & Hospitals Corp. v. DeGorter*, 133 Misc. 2d 93, 506 N.Y.S.2d 644 (Sup. Ct., N.Y. Co. 1986).

VIII. **Yes.** Physical contact occurs when the accident originates in collision with an unidentified vehicle, or an integral part of an unidentified vehicle. *Allstate Ins. Co. v. Killakey*, 78 N.Y.2d 325, 574 N.Y.S.2d 927 (1991).

NOTE: This decision appears to overrule the following cases:

Diaz v. MVAIC, 82 A.D.2d 749, 440 N.Y.S.2d 13 (1st Dep't 1981) ("hurtling hubcap") dislodged from speeding, unidentified vehicle, strikes pedestrian—no physical contact); *Soto v. MVAIC*, 140 A.D.2d 223, 528 N.Y.S.2d 543 (1st Dep't 1988) (same); *GEICO v. Goldschlager*, 44 A.D.2d 115, 355 N.Y.S.2d 9 (2d Dep't 1974) (wheel detached from unidentified vehicle strikes pedestrian—no physical contact); *Utica Mutual Ins. Co. v. Spenningsby*, 133 A.D.2d 765, 520 N.Y.S.2d 163 (2d Dep't 1987) (rear relief spring on unidentified truck came loose, striking the claimant's windshield, causing him to lose control and strike another vehicle—no physical contact); *Eagle Ins. Co. v. Watanabe*, 171 A.D.2d 451, 567 N.Y.S.2d 34 (1st Dep't 1991) (unsecured metal plate run over by car, causing it to bounce and fall on the claimant's foot—no physical contact); and *Utica Mutual Ins. Co. v. Tucker*, 132 Misc. 2d 920, 505 N.Y.S.2d 992 (Sup. Ct., Onondaga Co. 1986) (rimless tire "thrown" from overpass, striking the windshield of the claimant's vehicle—no physical contact).

IX. **No.** The evidence did not establish a collision with an unidentified vehicle, or that the metal gear box was an integral part of an unidentified vehicle [citing *Allstate Ins. Co. v. Killakey*, supra.]. *Insurance Company of North America v. Carrozo*, 203 A.D.2d 210, 611 N.Y.S.2d 171 (1st Dep't 1994).

X. **No.** Although direct contact with the unidentified vehicle is not necessary to satisfy the term "physical contact," the accident in this case did not originate "in collision with an unidentified vehicle, or an integral part of an unidentified vehicle" [citing *Allstate Ins. Co. v. Killakey*, supra.]. *Federal Ins. Co. v. Luhmann*, 229 A.D.2d 438, 645 N.Y.S.2d 86 (2d Dep't 1996).

XI. **No.** The burden of proving a claim when only a part of a vehicle is involved is substantial. "[T]o establish that the claim originated in collision . . . the claimant must prove that the detached part, in an unbroken chain of events, caused the accident" [citing *Allstate Ins. Co. v. Killakey*, supra.]. Here, because no one witnessed the muffler actually fall off any vehicle and because there was no proof as to how long the muffler had been in the roadway, the claimant failed to meet her burden. *GEICO v. Yarmoluk*, A.D.2d, 692 N.Y.S.2d 433 (2d Dep't 1999).

XII. **No.** The tractor-trailer never came into contact with the claimant or his bicycle. Moreover, a bicycle is not included within the statutory definition of a "motor vehicle" (VTL § 125) and, therefore, even if contact was made with the bicycle, there was no contact with a "motor vehicle" that the claimant was riding. Finally, there was no "collision." *General Accident Ins. Co. v. Gladstone*, 260 A.D.2d 855, 687 N.Y.S.2d 830 (3d Dep't 1999). [Was this case correctly decided?]

Conclusion

If you have answered each and every one of the above questions correctly, CONGRATULATIONS! You have probably impressed yourself and your friends and family and you may consider yourself an insurance law scholar. Now go out there and try to earn a million dollars. (You might find that to be not quite as easy!)

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The Ethics of Legal Bill Auditors

By Kevin A. Lane, with the assistance of Wendy A. Scott

When an insurance company compensates a lawyer for defending its policyholder in civil litigation, pursuant to an insurance contract that requires the insurer to pay for the policyholder's defense, must the lawyer obtain the client's informed consent before submitting legal bills to an auditor employed by the insurance company? This question, which has impacted the relationship between defense counsel and the insurance industry in recent years, has now been addressed by the New York State Bar Association's Committee of Professional Ethics. The Committee concluded that a client's legal bills and related records are subject to the lawyer's duty of confidentiality. Consequently, these documents may be disclosed only with the client's informed consent. The client is to be *understood as the insured and only the insured*. The *carrier is not the client of defense counsel*. Further, in order for the client to make a voluntary, informed decision, counsel must provide advice that is "competent and that is designed exclusively to promote the client's interests, not those of the insurer or the lawyer." It is our opinion that a consideration of the impact of this decision, which affirms the concerns that we have been voicing on this issue, indicates that the insurer actually faces the most risk *if the informed consent of the insured is obtained* and outside auditors are utilized!

This Opinion, which was issued on March 3, 1999, begins by recognizing that not every item in a bill is privileged. However, whether a specific item is in fact confidential is a question that "ordinarily calls for a fact-specific determination (Citation omitted)." That means legal analysis and cost. "Thus, the extent to which billings records are protected by the attorney-client privilege would require carefully analyzing the records line-by-line." To the extent that billing records or other records sought by the insurance companies auditors contain "secrets" or "confidences," the attorney is precluded from disclosing them *without the consent of the client* after full disclosure.

Given that the billing records generally sought in these instances are likely to contain a significant amount of confidential information, a lawyer may not make a general practice of disclosing documentation to the auditor without obtaining the client's informed consent. Although there had been suggestions that mere language in a policy could do away with the need for such informed consent, the committee rejected this idea out of hand. The reasoning here is that even if there was such language in a policy, such a provision would not constitute "consent after full disclosure" within the meaning of DR4-101. This is because it would not have been preceded by the disinterested explanation that is necessary to make the client's decision fully informed. Moreover, even if the prior consent was fully informed, the client is still free to revoke the consent.

Thus, the consent must be obtained after *Full Disclosure*, which can only be obtained after the insured has been provided with *Disinterested Advice*. Here is a thorny issue. A lawyer must exercise independent judgment on behalf of the client, and must "avoid being influenced either by the interests of the insurance company, which may have selected the lawyer, or by the those of the lawyer, who may have an ongoing relationship with the insurance company." In other words, if the consent from the insured is to be obtained by defense counsel, defense counsel must obtain that consent without regard to the financial impact that full disclosure to the insured may have (loss of the insurance company referring future cases) to the attorney. How reasonable do you think that is?

In any event, if, after full disclosure, the client willingly authorizes disclosure to the outside auditor, defense counsel can still only respond in a way that safeguards the client's interests. This would include minimizing the extent to which client confidences and secrets are disclosed to the auditor and, especially, avoiding disclosures that could result in a waiver of the attorney-client privilege or otherwise prove embarrassing or detrimental to the client. . . . To the extent that the auditor insists on receiving such information, this may require . . . revisiting the question of client consent under DR4-101. Thus, there must be open and ongoing communication between the insured and defense counsel on the disclosure issue. Is this a productive use of the time of defense counsel a/k/a the money of the insurer?

It is for this reason, the probable communication of confidential information, that we believe that the danger of use of outside auditing companies is so high. This opinion makes it clear that the disclosure of invoices and supporting documentation to outside auditors calls into play the disclosure of what would be otherwise confidential or privileged material. Otherwise, there would be no need for such informed consent. This disclosure can very well be found to be a waiver of any ability the insured—carrier may have to prevent the adverse parties in the suit to obtain a copy of either the invoices or the underlying documents referenced in those invoices, including opinion and strategic letters

from defense counsel. The risks of such a waiver are, to be blunt, monumental.

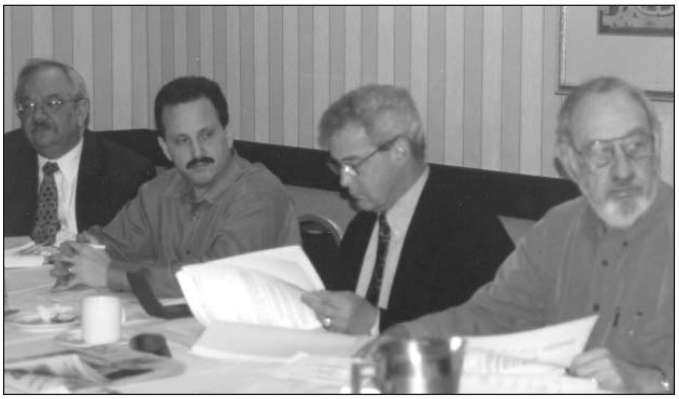
If the privilege is waived, then shouldn't the other parties to the action be able to obtain the information? What impact would providing plaintiff's counsel with a copy of the opinion letter of defense counsel be? What if that opinion was submitted to the Court? Obviously, such outcomes would have no impact upon the exposure of the insured, right? If you think so, you are in for a big, unpleasant surprise. We therefore believe that, while defense counsel can obtain the consent of the client (the insured in a liability matter, the insurer in a coverage matter) to enable defense counsel to cooperate with the requirements of outside auditing companies, the peril to insurance companies of such services is very significant indeed.

This publication is for informational purposes only. It is meant to encourage thought and reflection upon the subject area discussed. It reflects a possible way that the relevant issues will be decided and does not necessarily reflect the status of the law. It should not be relied upon at all. Any person or company seeking guidance on any or all of the issues addressed herein should obtain the advice and guidance of counsel.

TICL Executive Board Meeting
April 7, 2000 • LaGuardia Airport

(l-r) Richard Cairns; Paul Edelman, *TICL Journal* Co-Editor; Dennis Glascott; Paul Jones; Paul Suozzi; Louis (Bucky) Cristo, TICL Chair; Saul Wilensky (hidden); Eric Dranoff; William Cloonan, former TICL Chair; Joseph Baum; and Robert Glick.

(l-r) Kenneth Bobrow, *TICL Journal* Co-Editor; and Lawrence R. Bailey, Jr., former TICL Chair.



(l-r) Saul Wilensky, TICL Vice Chair; Eric Dranoff; William Cloonan, former TICL Chair; and Joseph Baum.

High-Tech Evidence Presentation

By Marjorie L. Cohen

I. Introduction

The use of computer technology in the courtroom results in a lively, interesting and fast-paced presentation of evidence. Instead of flipping through a document and then projecting a portion of it on an overhead projector or using a board on an easel, the lawyer can instantaneously enlarge the relevant passage and highlight it in color on the computer screen. Clips of videotaped depositions as well as animations can also be shown on the screen.

II. The Courtroom

A. Courtroom 2000 (Room 228) at 60 Centre Street is a high-tech courtroom that preserves its traditional character while being equipped for the electronic presentation of evidence.

1. Computer equipment and cables are installed under an elevated platform behind the rail.

2. There are six computer screens in the jury box, one for every two jurors.

3. On the counsel table, there are computer screens and laptops with real-time transcription of the testimony.

4. The lawyer's podium is equipped with a monitor, a communicator, which allows the image of any physical exhibit to be displayed on the monitor, and an illustrator, which allows the lawyer to draw in color on the image of the document, like a sportscaster diagramming a play.

5. On the witness stand, there is a monitor and a touch pad that allows a witness to circle or annotate over any image displayed on the screen.

6. Counsel or the witness can also write in color on a large "white board" with the image projected on the monitors. A printer in the courtroom provides copies of the projections within seconds to be marked as exhibits.

7. At the bench, the judge has a screen and real-time transcription as well as an override switch to cut off any objectionable projections.

8. The court reporter in Courtroom 2000 operates a control panel which permits the reporter to switch between the parties' computer systems or to the communicator on the podium. Attorneys may operate their own computer systems or use a computer consultant in the courtroom.

B. If the particular courtroom is not already equipped with monitors, screens or projection equipment, attorneys may bring their own equipment to the courtroom. An attorney would use a laptop, projector, screen and, possibly, a communicator to display the evidence.

III. Trial Preparation

A. Documents are scanned in advance so that they can be retrieved in seconds with a bar code scanner. Alternatively, lawyers can use hard copies of documents on a communicator.

B. Thus, rather than bringing boxes of documents to the courtroom, lawyers can use a few CDs containing imaged documents to present their cases.

IV. Opening Statement

Counsel can use the opening statements to present the main themes, highlight the key documents and focus on the relevant issues for the jury. During the opening, the attorney can electronically show documents, project graphics, display photos of witnesses or videoclips and use power point presentations on the computer screens.

V. Direct Testimony

A. Counsel can script direct testimony by creating a CD file of scanned documents with significant passages highlighted. Counsel can use the documents in the order on the CD or can call up documents by their bar codes with a bar code scanner. In addition, the attorney can use the communicator to show the documents to the jury.

B. Attorneys should select the most legible copies of the documents, especially where documents have been photocopied many times and/or have handwritten notes.

C. Counsel may also wish to mix media, i.e., counsel can have available traditional poster boards of key documents with the important passages highlighted and "called out" in addition to the electronic version of the documents. Counsel can point to portions of the document on the boards for emphasis while showing the electronic version to the jury on the computer screens.

D. The technology also enhances the presentation of expert testimony, since power point technol-

ogy can be used to emphasize key points and the expert can refer to graphics on the screen. As described above, experts may also use the "white board" for diagrams and calculations, and the witnesses' writings on the "white board" can be printed and preserved as exhibits.

VI. Cross-Examination

A. While cross-examination is necessarily more spontaneous than direct, counsel can prepare files of scanned documents or deposition excerpts which would be the likely subjects of cross. In addition, the documents can be retrieved instantaneously by their bar codes.

B. Using such technology, it is particularly effective to confront a witness on cross-examination by showing the document or the conflicting deposition testimony on the screen.

C. Hard copies of the documents may be useful on cross where the attorney feels it is more dramatic to hand the witness the document. Especially where a multi-page document is being discussed, it may sometimes be easier to use the tangible document, and some witnesses may insist upon it. Thus, counsel may also have to maintain hard copies of relevant documents and depositions in the courtroom for cross-examination.

VII. Presentation of Deposition Testimony through Technology

A. If available, videotaped depositions may enliven the trial since the visual image of the actual witness may provide a stronger impact than reading the deposition.

B. Videotaped depositions can be digitized and put into electronic form which provides easier access to particular parts of the deposition rather than fast forwarding through a videotape to the relevant passage.

C. Use of videotape depends upon quality of the videotapes, i.e., whether they are clearly audible and whether the witnesses' demeanor may be easily observed. At times, inexperienced technical personnel do not provide microphones for all the lawyers asking or objecting to questions, resulting in inaudible comments being heard on the videotape. Thus, lawyers have to weigh the advantages of using the videotape of the witness showing his or her demeanor against the possibly inferior quality of certain videotapes.

D. Where the deponent is a strong witness or the witness' demeanor on the videotape is especially significant to his or her testimony, it may be very helpful to show such videotape.

E. Even where the depositions are not videotaped, technology can enhance the reading of the questions and answers from the deposition. To make the deposition more interesting and to use the documents referred to in the testimony, those documents can be flashed on the screen and highlighted as they come up in the deposition. The lawyers can pause to let the jurors read the key passages from the documents and then continue the readings.

F. Split screen technology is also available to show the document and the videotaped deposition testimony simultaneously on the screen. Such technology can also be used to present the testimony and the referenced document at the same time.

G. The display of video clips requires advance preparation time. Lawyers will usually edit the videotapes to include the most relevant clips and they will have the pauses deleted to shorten the running time of the depositions. As part of the editing process, it is easier to have the original videotaped depositions time-coded so that the lawyers can use the time codes for editing purposes; otherwise, it is a lengthy process for a technician to edit the videotape using the page and line designations. Once edited, the computer consultant digitizes the tapes for use in the courtroom.

H. If a number of depositions are to be shown, it may be most effective to vary the presentations, using videotapes as well as reading the depositions and showing the documents simultaneously on the computer screens.

VIII. Evidentiary Considerations

It is preferable for counsel to stipulate in advance as to admissibility of documents or to exchange the exhibits with the adversary before the trial or at the beginning of the trial day so that objections can be resolved by the Court prior to the presentation of evidence.

IX. Conclusion

A. Jurors have strongly endorsed the use of such technology.

B. Even computer resistant lawyers have become conversant with this system and have embraced the technology.

C. Lawyers will undoubtedly adapt this system for their own cases resulting in a further development of techniques for the effective presentation of computerized evidence at trial.

Sources for Technology

Trial Consultants

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Animation

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MEDIVISUALS
9211 Forest Hill Avenue
Suite 103
Richmond, VA 23235
Telephone: (804) 323-6124
(800) 899-2153
Facsimile: (804) 323-9632
E-mail: bshepherd@medivisuals.com
Website: www.medivisuals.com

INSIDE OUT MEDICAL ILLUSTRATIONS
33 Great Neck Road, Suite 11
Great Neck, New York 11021
Telephone: (516) 944-5409
Susan Brenman
Medical Illustrator

Scanning and Production of Exhibits

GRAPHIC LAB
228 East 45th Street
New York, New York 10017
Telephone: (212) 682-1815
Facsimile: (212) 682-5067
Website: www.graphiclabinc.com

Legal Photography

JOHN AFRIDES PHOTOGRAPHY, INC.
3232 Steinway Street
Long Island City, New York 11103
Telephone: (718) 204-2645
Facsimile: (718) 204-9301

Videoconferencing

See ALT/1/ideoTelecon above

Using Technology in the Courtroom

By Andrew L. Weitz and Harvey Weitz

Introduction

Computers are now a staple of every law practice. We use them to do our research, track our cases, generate letters, send e-mail, keep our calendars, and even dial our phones. Where we used to ask legal secretaries, now legal assistants, whether they took stenography and how many words per minute they typed, we now ask them if they are familiar with WordPerfect or Word, and fluency in LEXIS or Westlaw and SAGA, TrialWorks, or other case management systems are certainly pluses. Nobody can deny that we depend on computers for our every day practice of law.

Similarly, more and more attorneys are bringing their computers to court with them. The advent of powerful laptop computers and fast, easy to use, programs removes from the lawyer's litany the most common excuses for not using technology. No longer may we complain that the machines are too bulky to carry around, or that we are too busy to learn how to use the programs that may help us win a case. Further, now that many court reporters have computerized their stenographic process, attorneys who have always ordered daily transcripts may get "real time" transcripts for a small additional cost.

Why Technology?

Today it is very likely that the people sitting on a jury are members of a generation raised on television and video games; these people are conditioned to respond to visual stimuli. The members of "Generation X" are more likely to get information from television or radio than from newspapers. Visual and aural stimulation are the key to communication with GenXers. An attorney who ignores this reality is at a distinct disadvantage to the lawyer who employs technology in the courtroom.

Conventional wisdom tells us that a jury understands what it can see. Toward this end, most trial lawyers have used blow-ups of photographs, charts, signs, and other aids when examining witnesses; some have even used "day in the life" videotapes to illustrate loss of enjoyment of life. With today's trial oriented computer programs, we can now organize photos without the inconvenience of having to shuffle through dozens of poster boards, and we can immediately project a photo onto a screen for all in the courtroom to see. Further, with a program such as TrialDirector, a witness can make or direct the placement of markings, and these markings can be produced on the projection, magnifying the effect for the jury. The marked up projection may be printed out as an 8 ½" by 11" exhibit for the jury to take into deliberations. This has two advantages—the jury will recall the testimony that produced the printout and the jury will have seen the exhibit created, almost taking part in the process and lending the exhibit more credence.

While there are so many good products available to aid attorneys in running a practice, the range of products for courtroom work is still narrow and developing. In spite of the narrow range, the products that do exist may be used quite effectively in presenting one's case. Study after study has proven that demonstrative evidence is an important persuasive tool, and there can be no denying that how such evidence is presented influences how it is perceived and used by a jury.

What It Takes

Of course, using computer programs effectively to create exhibits in the courtroom requires an investment of time and money, but you will find that these resources are well spent. To use courtroom presentation programs, one should have a Pentium PC with at least 32 MB of RAM, though 128 MB is recommended—the more RAM available, the faster the graphics will load. The computer should operate in Windows 95/98 or NT, and must have at least one serial port available. A bar code scanner is helpful if you are using TrialDirector. You will also need a projector and screen, or a TV monitor, and a Super VHS VCR if you plan to use animation videos. A laser pointer is helpful, but not necessary.

Before one can use TrialDirector or other like programs, the images needed for a particular case must be compiled, sorted, labeled, and then scanned onto a disk. We have had a great deal of success using the computer to store and project photos and hospital records. Where formerly in a medical malpractice case we might have blown up a portion of the hospital record, only to find at trial that there was another, more damaging, portion of the record that was not blown up, now that record is easily accessed, projected, and marked up by a witness. The cost of scanning the complete record is nominal compared to the cost of not having the appropriate exhibit at trial.

X-rays, CAT scans, photographs, and other images may take some time to load on your computer, so it pays to plan ahead. There are many services that can scan documents onto CD-ROM, but it takes special equipment to scan medical films. Once all of the images and films are scanned, the next task is organizing them. A typical program will allow a user to create different folders into which images may be grouped. Organizing

by witness is a good idea, and the folders may be ordered on your computer desktop to coincide with your order of proof. Images that will be used for more than one witness may be placed in multiple folders. A separate folder should also be maintained for any images that are marked as evidence. A copy of each image in evidence should be placed in this folder for easy access.

If you are using TrialDirector, you will be able to bar code each of your exhibits. You may then print out the exhibits with those bar codes and place them in a notebook. There are still some advantages to using old fashioned methods in conjunction with the new technology. It may be easier to flip through the pages of a notebook and then scan the code of the exhibit you need, than to flip through the images on the computer before finding the one you want to project. Scanning the bar code in TrialDirector will instantly place the image on the screen.

Setting Up

Every courtroom is different, and sight lines are not always good. When you are assigned to a room, check to see where the outlets are, where the counsel tables are, and where you might place a screen and projector. Always consult with the court clerk before plugging anything in, and always let the judge make the decision to allow you to use "electronic blow-ups" rather than poster boards. If the technology is explained in terms that ring of traditional exhibits and demonstrative evidence, it is unlikely that any resistance will be met. In fact, we have yet to encounter a judge who was not anxious to see what the equipment could do. Make sure that you bring a surge protector and long enough extension cords to cover large distances to outlets. Also bring duct tape to tape any loose wires to the floor.

You should run through your exhibits on the computer just as you would run through any other exhibits, before you enter the courtroom. Know where things are, and label them clearly. Have more than one set of hard copy of your notebook with bar codes.

Presenting the Evidence– Some Do's and Don't's

Since it is so easy to create exhibits using technology, you may be tempted to do too much. Remember, the point is to make your presentation more effective, not to make it longer. Edit your content down to the bare essence—present images that buttress your main theme, and avoid showing off technology for technology's sake. For instance, if you want a witness to show where he claims he applied his brakes, don't use a narrative mark-up tool saying "W claims he applied brakes here ———->," simply because the tool is available. Rather, do what you would do with a blow-up: use a simple "B" for "brake," or an "X" instead. The jury will remember what it stands for.

Also avoid taking items from a report or hospital chart out of context. It looks dishonest. Instead, take advantage of zoom functions by showing the entire page, and then focusing in on the part you are interested in highlighting. Mark-up tools will allow you to "explode," highlight, or underline whatever you deem important. Always present the evidence in context.

If you plan to use animations or other video presentations, exchange them with your adversary and review them with the Court at a break shortly in advance of the time you plan to offer the evidence or demonstrative aid. This will avoid the appearance that you are springing a surprise on your adversary. It will also give you a chance to make some last minute changes to your presentation. You may find that your animator, following your pre-trial instructions, put things in an order different than the one that makes sense in light of developments at trial. Previewing the tape will allow you to make last minute adjustments.

When showing videotapes, do not allow your witness, even an expert, to run the display. You will want to control what is happening at all times, and rather than having to tell the witness "stop the tape there," you can stop, rewind, fast forward, or freeze the tape wherever you want, whenever you want. Finally, always check and re-check sight lines and glare. Make sure all in the jury box can see what you are displaying. Ask the judge to inquire of the jury whether they can see clearly.

Conclusion

Technology is a powerful asset for trial work. Like any asset, though, it must be carefully allocated. Just as you would not attempt to present one hundred blow-ups to a jury in a four-day trial, don't attempt to present too much evidence electronically simply because you have become enamored of the possibilities. Remember: while the medium may be the message, your message must be clear and concise.

High Technology in Courtroom 2000

By Hon. Stephen G. Crane

Courtroom 2000 was opened at the New York County Courthouse in December 1997. Initially, it was assigned to Justice Lewis R. Friedman, who had received his undergraduate degree at the Massachusetts Institute of Technology, and who understood and championed the technological changes that could be used to good effect in courtrooms, not only presently, but in the future. The courtroom is Room 228 at 60 Centre Street, in New York City.

Unfortunately, my colleague, Justice Friedman, died of a heart attack in February 1998. In June 1998, the courtroom was dedicated to the Justice's memory. He was, after all, not only the first justice to preside there, but one whose efforts helped to plan the courtroom and the advanced equipment in it.

After Lew's untimely death, I took the courtroom as my own, but because I do not preside over trials on a regular basis, it has been possible to give at least three other justices access to the wonderful technology it contains.

In the matters I have tried, the array of special equipment has shortened the trials by as much as 40 percent. The proceedings have been livelier. The jurors have been utterly captivated and much more involved than they would have been with traditional methods of trial.

Wide Array of Innovative Resources

A wide array of innovative resources, tied together by a computer that manages all the equipment, has made this possible.

A Digital Evidence Presentation system allows the instant retrieval and quick display of digitized documents, together with deposition transcripts and the accompanying videotape. For one trial, more than 5,000 documents were digitized for the plaintiff and 18 video depositions were edited to three and a half hours. The defense team said it had transferred more than 1,000 hours of video depositions from 50 witnesses to CD and digitized more than 20,000 documents. Particularly, when dealing with documents that are old or of poor quality, the digitizing process is an asset because it can enlarge them and highlight key portions in yellow.

Material can be instantly displayed to all the participants in a trial on the flat-panel video monitors. The jury box has one monitor for every two jurors. Other monitors are in place for the bench, on the counsel tables, at the podium and at the court reporter's station. A monitor at the witness stand is attached to an electronic pad and pen.

The podium has an exhibitor called the Communicator for projecting electronic images of documents, photographs and similar material.

The traditional blackboard and chalk have been replaced by an electronic whiteboard that can be written on with dry-erase marking pens in black, blue, green and red. A color printer attached to the system can provide printouts. A personal computer records what is written on the whiteboard, so the information can be saved for later redistribution.

Computer docking stations at key locations permit access to the system for presentations and analysis of evidence. They can also be used to receive real-time transcripts or to communicate with remote data bases at the law office or at the electronic research provider.

Real-time court reporting, a technology developed to give the hearing impaired access to court proceedings, allows participants to view the transcript of the trial as it is being created. They can also search the transcript, make notes about it and highlight important passages. This reporting has also evolved into a sophisticated tool for the advocate. No longer do the litigants need to rely on notes to cross-examine. Witnesses gain new respect for the truth when asked, "Didn't you testify on direct examination to such and so?" A negative response is swiftly eviscerated by the Live Note software by which the precise passage of direct testimony can be instantly retrieved and displayed for the witness and all others to see.

Reduction in Time-Consuming Procedures

The result is trials that greatly reduce the time-consuming aspects of evidence presentation, examination of witnesses and creation of demonstrative evidence.

An attorney at the podium can project a proposed exhibit to the courtroom monitors simply by placing it on the Communicator. The court reporter can prevent the jury monitors from revealing the exhibit until it is admitted. The witness can lay a foundation simply by authenticating the exhibit as it appears on the witness's screen.

Once an exhibit is admitted, it is published to the jury—not the old-fashioned way by passing from one juror to the next—but by projection on their flat-screen monitors all at once.

The witness can draw on the exhibit with a light pen that creates an electronic mark. The attorney can ask questions about the exhibit by marks, lines, arrows or circles affixed with the light pen on the podium. All these markings will be projected on everyone's monitor screens. The court reporter can preserve the electronically marked-up exhibit with a command that prints out a counterpart. When the exhibit is ultimately retrieved from the Communicator, it remains pristine, without any of the electronic marks that were used to clarify the testimony.

The whiteboard, too, can be a tremendous aid in understanding testimony. The witness may step down from the stand and draw with various colored erasable markers. In the old days, extra time was spent positioning the easel or blackboard and asking the witness not to block the line of sight while drawing. Now, as the image is being created, the whiteboard simultaneously transmits it directly to all the courtroom monitors. When completed, the drawing need not be preserved with a distorting Polaroid shot; it can be printed out on the color laser printer.

Animation is also possible as a form of demonstrative evidence. Although the litigants who have tried cases in Courtroom 2000 have not yet availed themselves of this feature, it can be a formidable factor in persuading the fact finder. This technology, driven by customized software, can re-create a motor vehicle accident and the trajectories of the vehicles and people after impact. In a products liability case, it can view the product front various angles and perspectives. It can transect the image of the human body to yield a view of a heart valve replacement. It can expose the interior of buildings and present cross-sections from various vantage points.

Development of the Courtroom

The Association of Surrogate's and Supreme Court Reporters in New York City developed the concept for the courtroom and guided its installation.

The equipment was loaned for two years by the vendors, including DOAR Communications Inc., Stenograph Corp. Live Note, ASAP Computer, Engineering Animation, Ibid Co., Philips Corp., Ergotron Inc. and Xerox Corp.

Plans to develop additional advance-technology courtrooms are still in the early formative stages. Issues include funding and the rapid pace of technology that can make even apparently farsighted efforts seem outdated in a comparatively short time.

I think that Lew Friedman would embrace these challenges, and he would be very pleased with the outcome of Courtroom 2000. This is why it was so appropriate to dedicate it to his memory.

Hon. Stephen G. Crane is an Administrative Judge, Supreme Court, New York County.

Innovative Trial Procedures for the Twenty-First Century

By Harold Lee Schwab

Between November 23, 1999 and January 19, 2000, the case of *John Paul Scally, et al. v. Christopher Carillo, et al.* and a companion action was tried in Long Island in the Supreme Court of the State of New York, County of Nassau (Index No. 16579/93) before Hon. F. Dana Winslow, Trial Term Part 21. Harvey Weitz of the New York City law firm of Schneider Kleinick Weitz Damashek & Shoot represented the primary plaintiffs. This writer had the privilege of defending the target defendant, Gerry Baby Products Company, manufacturer of the allegedly defective child restraint, a shield booster seat, from which the co-plaintiff infant William Scally was ejected. The trial was made memorable because it uniquely spanned two centuries. More importantly, during the course of the trial, Justice Winslow made various trial practice rulings and authored various trial procedures, many of which were innovative in nature and all of which were of such value as to warrant them being shared with the judicial and legal community at large.

Factual Background

Certain basic facts are needed for the reader to fully understand and appreciate the value of the rulings and procedures. On January 20, 1993, a clear, dry morning, defendant Azalea Scally was operating her 1986 two-door Cavalier hatchback in a southerly direction in the middle of three southbound lanes on the Meadowbrook Parkway in Hempstead, Long Island. Seated in the right rear on a Gerry Voyager shield booster seat was the five (5) year old infant plaintiff, William Scally. Seated in the left rear in a child infant seat with integrated harness was two (2) year old co-plaintiff, John Paul Scally. An adult passenger, Anna Cecelia Flores, co-plaintiff in the companion case, was in the right front passenger seat. Azalea Scally, either because she had been cut off by an unidentified white Jaguar or because she was lost and attempting a U-turn across a median divider, turned into the left-hand lane. While the Cavalier was still on an angle of approximately thirty-three degrees, it was struck in the left rear quarter panel by a 1988 Mustang operated by co-defendant Christopher Carillo, who himself was proceeding in a southerly direction in the left-hand lane. Due to the severity of the collision and its angulation, the Scally vehicle traveled approximately 90 feet from the point of impact and did one and one-half full revolutions, coming to rest on the median facing back in a generally northerly direction. The Carillo Mustang left 44 feet of brake tire marks before the point of impact and approximately 80 feet of tire marks afterwards.

Plaintiff and defense experts both agreed that William Scally was ejected from his booster seat, that he sustained his lower left leg tibia and fibula fractures during the ejection from the child restraint, and he sustained his comminuted depressed parietal skull fracture from impact with the rear hatchback window header. Although he was thereafter ejected out of the vehicle, his principal injuries were sustained in the interior of the automobile. John Paul remained in his infant seat and received injury far less serious than his brother.

Walter Scally, on behalf of his sons William and John Paul, commenced suit against the two drivers alleging driver negligence including statutory violations. Suit was also commenced on behalf of William against Gerry Baby Products Company alleging causes of action for strict products liability, failure to warn and breach of implied warranty, as well as a claim for punitive damages.

Plaintiff maintained, inter alia, that the product was defective in that it did not have either its own seat back or an integrated seat belt system, the frontal shield would slide forward on impact, the seat violated certain federally mandated requirements, and that the manufacturer did not recall the model notwithstanding an internal corporate memorandum which identified various problems with the Voyager seat. The defendant denied all of these claims.

The case was tried on the issue of liability only. Five expert witnesses testified at trial (two for the plaintiff, three for the defendant) on accident reconstruction, occupant kinematics, biomechanics and child seat design. Nine lay witnesses also testified at trial or through deposition.

It was in the context of this lengthy, complex and multi-party trial that the Court made rulings and inaugurated procedures which serve as the basis for this article.

Reorganization of the Order of the Parties

In the typical case the order of openings, summations, and the participation by trial counsel is based upon the order in which plaintiff's counsel has named the defendants in the pleadings. That order, having been decided neither by the agreement with defense counsel or by the court, is either the result of happenstance or the belief by plaintiff's counsel that a certain naming of the order of the parties will be of benefit to plaintiff's case. In *Scally*, if the order in which the par-

ties were named was to be followed, the order for opening statements and cross-examination of plaintiff's witnesses would have been counsel as follows: plaintiffs Scally, co-plaintiff Flores, co-defendant Carillo, co-defendant Azalea Scally and finally defendant Gerry Baby Products Company. For purposes of summations the first closing argument would have been on behalf of Gerry and the last summation would have been by counsel for plaintiffs Scally with three other parties in between. This order did not make any practical sense since the majority of testimony at trial was going to relate to the product liability action brought on behalf of William Scally against Gerry Baby Products Company.

Accordingly, Justice Winslow with the concurrence of some of the parties, but not all, exercised his discretion and reorganized the order of the trial for purposes of opening statement and cross-examination as follows: plaintiff Scally, defendant Gerry Baby Products Company, plaintiff Flores, co-defendant Carillo and finally co-defendant Scally.

Reorganization of the parties for purposes of counsels' participation at trial made eminently good sense as was best demonstrated by what took place on summations. Obviously, all closing arguments could not be presented on the same day. On January 13, 2000, with the reorganization of the parties, the summations that related solely to the motor vehicle accident were given by co-defendant Scally, co-defendant Carillo and co-plaintiff Flores. On the following day summations in the product liability case were presented on behalf of defendant Gerry and plaintiff William Scally.

Reorganization of the parties for trial purposes should be seriously considered in cases involving multiple parties and differing theories of liability, and certainly where the thrust of the case will be primarily against one particular defendant.

Bifurcation

Bifurcation of liability from damages is of course not a novel procedure although its utilization is the exception rather than the rule nationwide.

Justice Winslow ordered that the case be bifurcated, notwithstanding the application by plaintiffs' counsel for a unified trial of both liability and damages. Bifurcation has always been the general rule in the Second Department in New York, except for cases involving malpractice, wrongful death, or where the issues of liability and damages are "inextricably intertwined." This procedure, which guarantees a significant conservation of time and monies for all concerned in those cases which result in defense verdicts, does not even appear to be followed by the majority of judges throughout the State of New York notwithstanding § 202.42(a) of the Uniform Rules for the New York State Trial Courts which provides:

> Judges are encouraged to order a bifurcated trial of the issues of liability and damages in any action for personal injury where it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action.

It is almost quixotic, and most certainly inconsistent, that judges in Brooklyn and Staten Island (two of the courts in the Second Department) will automatically bifurcate and their brethren across the river in Manhattan and the Bronx (the First Department) will refuse to do so.

To be sure, it may be argued that the claims of liability and injury were inextricably intertwined in *Scally*. Plaintiff, in order to make out a products case, had to prove that the injuries sustained were caused by the child seat and would not have otherwise occurred. This, therefore, required proof of injuries during the case which supports argument for a unified trial. However, the defense response is that even in an enhanced injury case some limited medical testimony can be presented during the liability phase, but the nature and extent of the injury sequellae (blood and guts) and damages (dollars and cents) can properly be reserved for the second stage of the trial were there to be one. Although bifurcation was the exception rather than the rule, in Onondaga County (Syracuse, New York), the Appellate Division, Fourth Department in *Martell v. Chrysler Corporation*,[1] an automobile crashworthiness case, concluded that the trial court did not abuse its discretion by ordering a bifurcated trial of the issues of liability and damages since plaintiff was afforded considerable latitude to develop the nature and extent of his injuries as they related to the liability aspect of the case and plaintiff's expert, a biomedical and mechanical engineer was permitted to testify at length about plaintiff's injuries.

The legal standard governing bifurcation in federal courts and those states which follow the federal rules is found in Fed. R. Civ. P. 42(b) which provides:

> Separate trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claims, cross-claim, counter claim or third-party claim, or of any separate issue or any number of claims, cross-claims, counter claims, third-party claims, or issues . . .

Note that three separate criteria are presented, any one of which will suffice: (1) furtherance of convenience, (2) avoidance of prejudice, and (3) conduciveness to expedition and economy.

In *Zofcin v. Dean*,[2] District Judge Robert Patterson, who advised counsel that he had never previously granted a motion for bifurcation, ordered bifurcation of liability from damages in a crashworthiness case involving a claim of defective design of a fuel system. The Court stated:

> Plaintiff in this case seeks damages for physical injuries, death and pain and suffering on behalf of himself and his deceased wife and children. In support of such damages, he will offer detailed evidence of extreme pain and suffering, including burning flesh and screams of pain. Court's in this Circuit have recognized that 'evidence of harm to a plaintiff, regardless of the cause, may result in sympathetic jurors more concerned with compensating plaintiff for his injury than whether or not defendant is at fault.' *Buscemi v. Pepsico, Inc.*, 736 F. Supp. 1267, 1272 (S.D.N.Y. 1990). . . . This Court finds that introduction of evidence offered only to prove damages poses a substantial risk of impairing the jury's objectivity on the liability issue in this case.[3]

As regards the relationship of injury to liability in the crashworthiness case, Judge Patterson initially noted that Chrysler had stipulated to the admissibility of evidence during the liability phase of the case of physical injuries relating to events occurring within the vehicle prior to removal of the passengers to the extent that it is relevant to determining liability or apportion liability among the parties. Accordingly, the Court granted bifurcation subject to four specific limitations as follows:

(1) it is stipulated by the parties that the burn injuries sustained by Plaintiff and Plaintiff's decedents resulted from fire in the Dodge van, and that Plaintiff's wife and two children died of those burn injuries;

(2) evidence relating to the physical injuries of Plaintiff and his decedents and evidence relating to events occurring within the Dodge van prior to the removal of all passengers may be admitted during the liability phase of the trial to the extent that such evidence is relevant to a determination of liability or apportionment of liability among the parties;

(3) further evidence of damages sustained by the plaintiff and his decedents may be admitted during the liability phase of the trial if the defendants' line of proof either renders such evidence relevant to the determination or apportionment of liability or necessitates the introduction of such evidence for purposes of rebuttal of evidence offered by the plaintiff; and

(4) issues of liability will be tried first, and trial of damages issues will follow immediately thereafter. The same jury will try the issues of both liability and damages.[4]

An additional argument in support of a unified trial might appear to be that in *Scally* there was a claim for punitive damages. However, Justice Winslow agreed with the defense that the punitive damage claim actually mandated bifurcation since a fair trial as to fault or responsibility could not take place if the jury was apprised of the wealth of the corporate defendant and its parent corporation, something which plaintiff undoubtedly would prove in order to justify the extent of the punitive award. Accordingly, the Court ordered bifurcation and ruled that the issue of entitlement to punitive damages, if any, would be presented during the liability phase of the case. The quantum of punitive damages, were the jury to reach that stage, would be reserved until the second phase of the trial.

Although there are attorneys and judges who will disagree, bifurcation would appear to be an ideal procedure to be utilized in the overwhelming majority of litigated cases, and in particular those which are protracted or involve any degree of complexity or major injury. It may be argued that bifurcation would result in extra time being expended was there to be a plaintiff's verdict on liability. Under the New York Uniform Rules, in the event of a plaintiff's verdict, the damage phase of the trial shall be conducted immediately thereafter before the same judge and jury, unless the judge presiding the trial, for reasons stated in the record, finds such procedures to be impracticable. Further, a plaintiff's verdict on liability often results in a settlement without the need for a damage trial. Another mistaken objection to bifurcation is that in a catastrophic injury case, the jury will see the condition of the plaintiff during the liability phase. However, every trial attorney recognizes the world of difference between a jury merely viewing the plaintiff and a jury learning all about the nature and extent of medical treatment and disability on a day by day basis, including a viewing of a day in the life film as a supplement to medical, vocational rehabilitation and economic damage testimony. Without doubt, bifurcation best guarantees fulfillment of the objectives of eliminating sympathy and ensuring to the maximum extent possible an impartial jury decision-making process.

Although the value of bifurcation cannot be quantified, it undoubtedly assisted Gerry Baby Products in

achieving a defense verdict in *Scally*. Certainly bifurcation permitted the jury to focus on the technical issues. Not surprisingly, after the verdict the primary plaintiffs settled with the two motor vehicle defendants without the need for a second stage injury/damage trial. Bifurcation thus eliminated an additional two weeks of trial and the extra time and expenses which would have otherwise been incurred by the court, counsel and the parties.

Note-Taking

Jurors were permitted to take notes throughout the trial. Each juror was given a yellow pad on which to take notes if the juror desired to do so. The pads were collected at the end of each trial day and retained the following morning. No one was permitted to review the jurors' notes. The notes were made available to the juror during deliberations. Following the verdict all jurors notes were collected and destroyed.

Note-taking is most certainly the exception rather than the rule everywhere and the universal attitude of the Bar and Bench is opposed to permitting jurors to take notes. Hence, the jurors are generally not even told in the first instance that they can take notes. Nevertheless, whether to allow jurors to take notes during a trial in New York State rests in the sound discretion of the trial judge. New York Pattern Jury Instruction 1:103 addresses this very issue and states:

> The question has been asked whether the jurors may take notes. The law does not prohibit your taking notes, but there generally is no need for note-taking. Because the court reporter records everything stated in the courtroom, any portion of the transcript, at your request, will be read back to you during your deliberations. Taking notes may create a problem in that it may divert your attention from important testimony.
>
> If any of you do take notes during the trial, those notes are simply an aid to your memory. Because the notes may be inaccurate or incomplete, they may not be given any greater weight or influence than the recollection of other jurors about the facts and/or conclusions to be drawn from the facts in determining the outcome of this case. Any difference between a juror's recollection and a juror's notes should always be settled by asking to have the court reporter's transcript on that point read back to you. You must base your determination of the facts and, ultimately, your verdict on the court record rather than on any juror's notes.

This charge initially presupposes that a juror has asked whether he/she can take notes. Rather than leaving the issue of note-taking to a juror's inquiry, something which in real life will almost never take place, Justice Winslow addressed the issue head on and advised the jury at the outset of the trial that each juror had the right to take notes if he/she was so inclined. The court gave specific limiting instructions regarding the use of notes. His Honor stated, among other things:

> Jurors are not required to take notes, and those who take notes are not required to take notes extensively. Note taking should not divert jurors from paying full attention to the evidence and evaluating witness credibility. Notes are merely memory aides and are not evidence or the official record. Jurors who take few or no notes should not permit their independent recollection of the evidence to be influenced solely by the fact that other jurors have taken notes. Notes are confidential and will not be reviewed by the Court or anyone else.

In substance, the court advised the jury that the determination of the facts was to be based upon each juror's recollection and not what was contained in the notes. Further, a note by one juror could not be utilized by any other juror. These limiting instructions were repeated during the final charge to the jury.

In *People v. Hues*,[5] one of the grounds for appeal was that the trial court permitted note-taking. The New York Court of Appeals affirmed the conviction and concluded that it is within the sound discretion of trial courts to allow note-taking by jurors during trial. Some of the statements by Judge Wesley speaking for a unanimous court are informative and interesting.

> The common-law rule prohibiting jurors from taking notes during trial was a consequence of the high illiteracy rate during the earliest days of our republic. Judges did not allow note-taking because of the perceived danger that jurors capable of taking notes would dominate deliberations. To guard against this risk and to ensure a fair trial, early common-law Judges forbade juror note-taking.

* * *

The American Bar Association has also endorsed juror note-taking, indicating that note-taking results in greater juror attention during the trial itself (Am. Bar Assn. Standards for Criminal Justice, Standard 15-35: Note Taking by Jurors [3rd ed. 1996]).

* * *

In New York, the practice of allowing jurors to take notes was authorized under the Code of Criminal Procedure. Today, the practice is common and has been approved by all four Departments of the Appellate Division.

* * *

Indeed, there are numerous benefits to juror note-taking. Note-taking can serve as a legitimate aide in absorbing and synthesizing information, as well as refreshing memory. Jurors today are often involved in longer trials, dealing with difficult issues. As cases have become increasingly complex, courts should have the option to allow jurors to take notes to aid their memories and to enable them to consider the evidence in a more informed fashion. In addition, note-taking may help focus a juror's attention on the proceedings and prevent the juror's attention from wandering.

* * *

Judges, lawyers and court clerks typically take notes during the trial. In light of the pervasive use of note-taking by others at trial to manage information, we are of a view that allowing jurors to take notes is long overdue. In fact, in a recent survey, 98% of jurors polled nationally and Statewide indicated that they would welcome the opportunity to take notes during trial.

Based upon the foregoing, we hold that a trial court—while not obligated to do so—has the discretion to permit note-taking by jurors during a trial. If a trial court determines that a particular case warrants note-taking, the court can, *sua sponte*, instruct jurors that they are permitted to take notes during the trial. (681 N.Y.S.2d at 781, 782, citations omitted).

The Court of Appeals went on to spell out the instructions to be given to a jury on this subject:

> This discretion, however, must be tempered in light of the potential perils that note-taking can present during trial. Preliminary cautionary instruction should be given with respect to note-taking and the use of notes. The instructions should also be repeated at the conclusion of the case as part of the court's charge prior to the commencement of jury deliberation.
>
> The instructions should explain to the jury that they should not allow their note-taking to become a distraction from the proceedings; that notes are only to aid a juror's memory and are not superior to their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are only for the juror's personal use in refreshing recollection of the evidence. The Court should also inform the jury that if there is a discrepancy between a juror's recollection of the evidence and the juror's notes, the jury should request a read back of the record and that the court's transcript prevails a juror's notes. Finally, the jury should be reminded that notes are not a substitute for the official record or for the governing principles of law as enunciated by the trial court. (681 N.Y.S.2d at 782, 783, citations omitted).

Although note-taking may be frowned upon in a relatively simple case, it would clearly seem to serve a useful purpose in a multi-party complex case and/or one of extended length. Both of these requirements were met in *Scally*. Not every juror took notes and some may have taken more notes than others. It appeared that the jury followed the court's instructions. Rather than relying upon either notes or mere recollection, the jury asked for the read back of all testimony by Walter Scally regarding the manner in which he installed the booster seat in the automobile. This included a re-reading of the testimony both from deposition and at trial. Further, it would appear that the notes assisted the jury in identifying specific evidence which it wanted to see in the jury room rather than asking for all exhibits which numbered more than 225. Although plaintiffs'

counsel initially objected to note-taking, I believe that it is fair to say that there is no indication that the note-taking did anything other than act as an aid to a particular juror's memory, particularly with regard to expert witness testimony which constituted the product liability case and took 18 trial days. However, even in a relatively simple case note-taking can at the very least heighten a juror's interest.

Juror Questions

After the conclusion of the testimony of a witness, be that person lay or expert, Justice Winslow afforded each juror the opportunity to write out his/her own questions for that witness. His Honor instructed the jurors that appropriate questions are those that provide information necessary to reach a conclusion, namely those that help determine the facts at issue, explain the evidence or clarify the testimony. The jurors were given five minutes to write out the questions. The number of questions presented depending upon the witness ranged from none to a maximum of approximately ten. Jurors were not required to sign off on the questions and, since the jurors utilized the same note-taking pads for these purposes, the author of a particular question was not identified (except by happenstance when only one note was submitted).

These notes were collected and with the witness remaining on the witness stand, Justice Winslow and counsel caucused outside the courtroom, reviewing each question in terms of relevancy and any other evidentiary objection. Still outside the presence of the jury, the Court sustained objections to certain questions, and re-phrased other questions which were objectionable as to form but otherwise appropriate. Approximately 50 percent of the questions presented were deemed appropriate.

Once the rulings were made, the Court read the written questions to the witness who then answered them. All counsel were then afforded the opportunity of asking any follow-up questions, but no attorney took advantage of this opportunity.

This procedure was initially adopted by Justice Winslow as the consequence of a question presented by a juror in August 1999 during a medical malpractice trial before his Honor. Following the precedent-setting move, a teacher serving as a juror for the first time was interviewed by the *New York Law Journal* and is reported to have said "By allowing us to ask to ask questions during the trial, Judge Winslow told us we were thinking human beings and allowed us to participate more."

Although little known, New York Pattern Jury Instruction 1:104 addresses the issue of questions by jurors.

> If any of you has a question to ask a witness or the court, please write the question on a paper, and the court officer will deliver the question to me. For legal reasons, I must decide whether and how the question may be asked, and what procedure to follow.

The Comment to this instruction contains the additional statement "Caveat: This charge should only be given if a juror seeks to ask a question." There is no good reason for such a caveat. This writer strongly disagrees with such an archaic limitation, particularly in cases where jurors are being forced to sit through increasingly long and complex trials and where even skilled attorneys may either mistakenly or intentionally fail to ask a relevant question.

The issue of jury questioning was raised in *United States v. Bush*.[6] There, a juror initially presented a question in writing but subsequently other jurors directly questioned the accused. In affirming a judgment of conviction, the Court of Appeals concluded that direct questioning by jurors is a "matter within the judge's discretion, like witness-questioning by the judge himself."[7] However, the Court went on to detail the numerous risks that existed with such direct questioning and stated ". . . we strongly discourage its use."[8] On the other hand, the Court indicated that in the event of extraordinary or compelling circumstances, juror questioning would be appropriate when utilizing the following procedures:

> (1) Jurors should be instructed to submit their questions in writing to the judge;
>
> (2) Outside of the presence of the jury, the judge should review the questions with counsel, who may then object; and
>
> (3) The court itself should put the approved questions to the witnesses.[9]

This is the procedure, although with greater detail, that Justice Winslow utilized in *Scally*. During the course of this trial, spectators had been present at the conclusion of the testimony of one of plaintiffs' experts. His Honor addressed the jury "O.K. Good, it's your turn, ladies and gentlemen. Thank you very much." While the jurors were writing out questions on their notepads, Justice Winslow explained to the spectators the procedure which was then taking place:

> For those of you in the courtroom who have evidenced some surprise, this is a procedure that this Court has adopted which permits jurors to ask questions of the witness. The jury is now, as they

are well aware, writing out questions. They have five minutes to do so. They may not confer with each other, they recognize that, and the questions are then examined by the attorneys and the Court and those that withstand that scrutiny are then presented to the witness.

Although this writer does not see any valid reason why juror questioning in writing should be limited to only cases where there are "extraordinary or compelling circumstances," certainly that test is met in a complex product liability case which extends over a period of three months. Lesser complexity and shortness of trial should not be a deterrent to active participation by jurors in any case. The right to ask questions coupled with the right to take notes surely serves to heighten the interest at trial of factual testimony to the maximum extent possible.

Although initially uncertain, the general consensus of counsel at the *Scally* trial appeared to be that questions by jurors served a useful purpose. As an example the following questions by jurors were submitted by Justice Winslow to one of plaintiffs' experts.

The Court: First, did the twisting of the seat back allow William a path of ejection in your opinion?

The Witness: O.K., in my opinion, yes. . . .

* * *

The Court: O.K. Next question. If the Cavalier seat did not deform, would William have stayed in his seat? Can you answer that question?

The Witness: Yes, I can. Yes, he would have.

* * *

The Court: O.K. Does sled testing take into account seat back deformation?

The Witness: No, it does not. . . .

* * *

The Court: In the Exhibit M, the CALSPAN test report, is there any reference to a passing or failing for the shield?

The Witness: No. There is not. . . .

* * *

The Court: When the tests were run for frontal impact, is there any reason why there were no tests run for oblique crashes?

The Witness: No reason whatsoever. They could have been run.

These were questions posed by various members of a jury consisting of an attorney, salesperson, graphic artist, receptionist, switch repairer, and court officer. Without a doubt, the right to ask questions gave the jury a proactive feeling of participation which certainly increased their interest. Without a doubt, the questions by these jurors were right on target. The foreperson interviewed afterwards stated that "I really liked the jury questions. They helped the jurors focus on the issues." Finally, this writer found that certain of the questions were an aid to understanding the jurors' thinking, something which was of benefit at the time of summation.

Jury Instructions

Uniquely, Justice Winslow gave his jury charge on three separate occasions. The first time was immediately prior to opening statements. Superficially this would not seem to be unusual since standard procedure in New York in all civil cases is to give a basic procedural charge. It typically covers such matters as a general introduction, identification of the parties, openings and evidence, objections, motions and exceptions, function of court and jury, weighing testimony, do not visit the scene, discussion with others, etc. Justice Winslow went further, however, and included in his preliminary remarks various substantive portions of the law pertaining to driver negligence and products liability.

The court's second charge to the jury was given immediately prior to summations. By that time, and as a result of multiple pre-charge conferences, the final charge had been drafted including the contentions of the parties with regard to strict products liability, failure to warn, breach of implied warranty and driver negligence. Also, the special verdict sheet with its various ramifications, given the multiple parties and theories of liability, had by then been decided upon. This second charge did not include some of the procedural boilerplate instructions such as falsus in uno and interested witnesses but it did contain all of the substantive law charges.

However, this second charge was itself delivered in two discreet segments, which followed the revised order of summations based upon the reorganization of the parties. On January 13th His Honor gave the complete substantive law charge regarding negligence, substantial factor (proximate cause), duty of drivers, the emergency doctrine, the effect of a statutory violation, together with a reading of all relevant Vehicle and Traffic Law statutes, and those portions of the special verdict sheet which pertained to driver negligence, causation, and apportionment of fault of drivers. The summations by the co-defendants, Scally and Carillo, and co-plaintiff Flores followed this charge. By this means, in a complex three month trial, the jury was able to be focused on the particular driver negligence case and the law applicable thereto. On the following day, immediately prior to summations by counsel for Gerry Baby Products and plaintiffs Scally, the Court gave its product liability charge as regards strict products, failure to warn, breach of implied warranty, punitive damages, and those parts of the special verdict sheet relating to the product liability issues. Once again, this procedure inaugurated by Justice Winslow permitted the jury to focus on those particular products liability claims.

Finally, after all summations and the passage of a three-day holiday weekend, the Court gave its third jury instruction, this being the complete charge which included a repeat of those segmented charges give immediately prior to the summations as well as the classic procedural instructions and review of the special verdict sheet as a whole.

Courts and attorneys have often expressed concern, if not doubt, that jurors, especially in complex cases, will not remember the details of a lengthy charge and thus will be unable to fully follow the law. Indeed, in products cases the jury instructions, where every word is critical, can well prove to be too difficult even for some attorneys to comprehend and follow. The utilization of a special verdict sheet, although intended to obtain specific answers to specific questions, serves as a means of correlating and organizing the jury's fact finding determinations along the lines of and in the context of the court's charge. However, in cases such as *Scally* clearly more is required.

This writer had the privilege of appearing before Judge John H. Dooling, in the United States District Court for the Eastern District of New York many years ago. In a complex products case, His Honor not only read the charge to the jury but gave each juror a written copy of the complete charge. He also delivered the charge orally to the jury following summations. To be sure submission of six to twelve copies of a written charge requires some extra effort but fortunately that is minimal in this 21st century of automation. One would expect that a court in the exercise of its sound discretion has the absolute right to submit in writing its jury charge after it has been verbally given.

Concededly, *People v. Owens*,[10] and *Rivers v. Garden Way Inc.*,[11] stand for the proposition that submission in writing of only a *portion* of the court's charge constitutes error. Their reasoning, however, is that selection of certain portions of the charge may convey the message to the jury that these are of particular importance, the repetition of parts of the charge may serve to emphasize them and subordinate the others, and finally that the written instructions may be reinforced by their physical presence in the jury room as the oral instructions fade from memory. Submission of the complete charge to the jury obviates these objections. Submission of the complete charge in writing to the jury empowers the jury to best apply its factual findings to the specifics of the law.

However, if such a procedure is either not authorized or aggressively adopted, the multiple charge procedure utilized by Justice Winslow is an outstanding means for assisting the jury to arrive at a proper result by applying the facts that it finds to the law as it actually exists and is charged and understood. Further, Justice Winslow did not submit only selected portions of the charge prior to summations. He gave the entire substantive law charge (albeit in two segments because of the multiplicity of parties and theories of liability) immediately prior to the respective summations and the same charge following summations with the addition of procedural boilerplate instructions. Although it may be argued that a jury can always ask for a repeat of the charge as a whole or any part of it for clarification purposes, this is a right which appears to be rarely exercised notwithstanding the complexity of many types of cases. Why not proactively assist the jury to the maximum extent possible in understanding and remembering the law?

The Special Verdict Sheet

The special verdict sheet contained what are now essentially standard product liability questions regarding design defect, failure to warn, breach of warranty and of course proximate cause. It also contained questions regarding negligence of each motor vehicle defendant and proximate cause. Additionally, it included an apportionment question in the event the two motor vehicle defendants were found liable. Also included was an Article 16 question which required the jury, in the event that it found Gerry Baby Products and one or more of the motor vehicle defendants liable, to apportion fault between the defendants. It was as a consequence of issues that arose regarding the applicability of Article 16 to the father, Walter Scally, that a proce-

dure was implemented on the special verdict sheet which should be considered by counsel and the courts in various other cases unrelated to apportionment.

Some further background in this regard may be helpful. Article 16 of the Civil Practice Law and Rules (§§ 1600, *et seq*.) provides in substance that in lawsuits not specially excluded, the liability of a defendant "found to be 50% or less of the total liability assigned to all persons liable . . ." shall be several (as opposed to joint and several) for non-economic loss. In other words, if a manufacturer is found to be only 50% or less at fault it will be liable as regards matters such as pain and suffering and cosmetic disfigurement only for its percentage share of responsibility. Further, the total liability to be considered in this context can include non-parties to the lawsuit as well as parties.

The defendant maintained that the Gerry Voyager booster seat was improperly installed in the automobile by the father, Walter Scally. Mr. Scally had discontinued, with prejudice, his own action for loss of services and therefore he was a non-party suing only on behalf of the children. A significant part of the defense case demonstrated the improper installation by the father and proved that the improper installation caused the seat to violently rotate as a consequence of the automobile accident which in turn permitted the ejection of William from the seat and out of the rear hatch of the automobile.

As one might expect, a major legal battle ensued regarding whether or not Walter Scally should be included in the Article 16 verdict question as one of the persons who comprised the total liability. Since it appeared certain that, in the event of a finding of liability against Gerry Baby Products, the liability of the motor vehicle defendants alone would be more than 50% in causing the accident, the provisions of Article 16 would be triggered, and any percentage of fault assigned to Walter Scally would reduce the exposure of Gerry Baby Products for non-economic loss by that same percentage. Plaintiffs argued that the father could not be considered for purposes of Article 16 since this would have the potential effect of reducing the recovery by his son which was prohibited by the General Obligations Law and case law. The defendant on the other hand argued that the situation was distinguishable, that this was not a case of lack of supervision and that there was no case which held that Article 16 did not apply in a parent/child scenario. Justice Winslow agreed with the plaintiff and Walter Scally was excluded from the apportionment question.

Query, what if there is an appeal? Why not present all of the issues to the jury for resolution so that in the event of an adverse verdict and a determination by the Appellate Division that Walter Scally properly belonged on the apportionment sheet, there would already be a jury determination so as to obviate the need for a retrial? Plaintiff opposed this application, arguing that the inclusion of the father would prejudice the infant. Justice Winslow sustained plaintiffs' objection to the defense application.

By way of compromise the defense requested that a separate question be included in the special verdict sheet concerning the conduct of Walter Scally. The question did not assign or suggest fault or responsibility, by way of percentage or otherwise. It asked: "Did Walter Scally install the Gerry child car seat using the center latch plate and the right rear buckle." An affirmative answer to that question would mean that the installation was improper. A negative answer would establish that the defense contention was not proven to the satisfaction of a jury. The jury answered "Yes."

This question was obviously not part of the boilerplate special verdict questions found in the New York Pattern Jury Instructions. It was tailored for purposes of the case. It had a meaning not for purposes of the trial verdict but rather for appellate purposes. A negative answer to the question would mean that the failure to include Walter Scally in the Article 16 apportionment question, even if erroneous, was moot since there was no fault on his part. Accordingly, any appeal on that issue was rendered academic. Besides having an appellate quotient, an additional dividend to such questions may be the impact which they can have on post-verdict negotiations.

In sum, this writer submits that counsel and the courts when preparing the special verdict sheet, should consider not only the case at hand but those issues which may be presented to an appellate court and which can be resolved by the jury factually so as to obviate a retrial. To be sure, in many instances the factual predicate for resolution of legal issues, if presented in the special verdict sheet, may prove prejudicial and must await an appellate determination. There are other situations, however, where opportunities for inclusion of additional questions in the special verdict sheet have been ignored with the net result being a retrial which could have been avoided in the first instance. Compromises are often times possible and indeed what took place in *Scally v. Gerry Baby Products* is a good example. The lesson learned: always consider what can be done to have the present jury establish facts which may aide the appellate court and eliminate the need for a retrial.

Summations

Unlike what appears to be the practice in many criminal cases, counsel in New York are severely restricted in civil cases from referring to the law during summation. The law is sacred ground reserved for

judges, and counsel in summation best not tread on that ground. Counsel may be permitted in closing argument to make some oblique reference to burden of proof, negligence and product defect, but never in the context of stating what the law is or what it means to a particular party. Whether or not counsel can refer verbatim to the special verdict sheet appears to be subject to the discretion of a particular trial judge. A different situation was created, however, and an additional dividend resulted, when Justice Winslow gave his products liability charge immediately prior to summations. Having stated what the law was in advance, it appeared that counsel could properly quote certain aspects of the charge verbatim and argue how those legal requirements were either established or not proven by the facts.

One good example is what took place regarding New York Pattern Jury Instruction 2:141 on strict liability. The definition as given there of defect is as follows:

> A product is defective if it is not reasonably safe—that is, if the product is so likely to be harmful to (persons, property) that a reasonable person who had knowledge of its potential for producing injury would conclude that it should not have been marketed in that condition.

Following the Court's second jury instruction, this writer argued to the jury that the test was not that the product was merely "likely to be harmful" but that it had to be "*so likely* to be harmful." This is, of course, a significant distinction which, if not specifically referenced and explained by counsel, can most easily be overlooked when presented as part of a lengthy charge. Plaintiff's counsel, Harvey Weitz, in turn, also referenced portions of the Court's charge.

Obviously, trial counsel will not devote their closing arguments to a substantial reading of the court's charge. Further, limiting instructions can be given in this connection. However, the ability of counsel to apply the facts proven to the specific law in *haec verba* makes the summation far more meaningful and indeed the charge far more meaningful. The correlation of the facts to the law is an appropriate province for summation.

Conclusion

The risk factors of a jury verdict based upon emotion, a failure to follow the case as its being presented, or of not comprehending the details of a jury charge are ever present. In this 21st century the time has come for a more proactive approach towards assisting the jury in arriving at a proper result by means of applying the facts to the law on an impartial decision making basis. In the main, judges and attorneys are a conservative breed resistant to change. Advances in courtroom technology will not suffice. Established procedures may in fact be archaic and hence should be re-evaluated. Any procedure which will assist the jury in its rendition of justice should be implemented to the fullest extent possible. The rulings by Justice Winslow in *Scally v. Carillo* should serve as a model for the judicial and legal community at large in this regard.

Endnotes

1. 186 A.D.2d 1059, 588 N.Y.S.2d 682.
2. 144 FRD 203 (S.D.N.Y. 1992).
3. 144 FRD 203, 205, additional citations omitted.
4. 144 FRD 203, 206. *See also Emerick v. U.S. Suzuki Motor Corp*., 750 F.2d 19 (3d Cir. 1984); *Helminski v. Averst Lab., A Div. of A.H.P.C.*, 766 F.2d 208 (6th Cir. 1985), *cert. denied* 474 U.S. 981, 106 S. Ct. 386, 88 L.Ed.2d 399 (1985); *Angelo v. Armstrong World Industries, Inc*., 11 F.3d 957 (10th Cir. 1993).
5. 92 N.Y.2d 413, 681 N.Y.S.2d 779, 704 N.E.2d 546 (1998).
6. 47 F.3d 511 (2d Cir. 1995).
7. 47 F.3d 511, 514 citing earlier cases.
8. 47 F.3d 511, 515.
9. 47 F.3d 511, 516.
10. 69 N.Y.2d 585, 509 N.E.2d 314, 516 N.Y.S.2d 619 (Ct. App. 1987).
11. 231 A.D.2d 50, 660 N.Y.S.2d 893 (3d Dep't 1997).

Jury Innovations and Suggestions for Effecting Change

By James C. Gacioch, Michael J. Holland, Harry F. Mooney and James Q. Auricchio

In June 1992 the Section of Litigation of the American Bar Association and the Brookings Institute cosponsored a symposium entitled "The Future of the Civil Jury System in the United States." During that three-day conference in Charlottesville, Virginia judges, litigators, researchers, trial consultants and representatives from both insurance and consumer groups developed recommendations to improve civil jury trials. One general conclusion of those in attendance: Jury trials fail to account for how people process information.

Five years later the ABA, in coordination with the National Center for State Courts and the State Justice Institute, published the *Jury Trial Innovations Manual*.[1] That same year, the International Association of Defense Counsel Foundation initiated the National Jury Trial Innovations Project.

The goal of the Project is to take the ideas proffered in the Innovations Manual and discuss them, with the thought of initiating positive change in the civil justice system as it pertains to juries. Specifically, the Project aims to bring to light the ways jurors make decisions, and to find ways to enhance a juror's decision-making process.

This article addresses the findings of the National Jury Trial Innovations Project and jury trial innovations in the State of New York.

How Jurors Make Decisions

Regardless of one's orientation as a legal practitioner—whether a judge, a plaintiff attorney or a defense attorney—most would agree that one way to improve the civil justice system is to make it more friendly. By making it easier for jurors to understand the information presented to them at trial, we can make it easier for them to make informed decisions.

However, the civil justice system was not designed to accommodate how people process information, but rather how to conform evidence to the criteria of admissibility. For the most part, jurors are unfamiliar with the law, with trial procedure, and most importantly, with what they expect to hear and learn and decide. With advances in psychology and social sciences, we now have a better understanding of how jurors make decisions. The courts and the legal system must work to improve this decision-making process.

Like most people, jurors make decisions based upon information and peer pressure. They process information by creating a framework for it. Essentially, they create a story that makes sense and fits in with their attitudes and beliefs to help them understand the evidence and fill in the gaps in the information provided. In the courtroom, it is the evidence, witness testimony, credibility and demeanor, and the persuasive ability of the attorneys that help each juror create his or her own story. How that evidence is framed will influence a juror's decision; evidence fills in the gaps between a person's beliefs and his or her knowledge of the world.

Interactive communication helps each juror understand the evidence. Together, judges and lawyers can work to structure a trial that assists jurors in getting the information they need, when they need it, to make decisions based on information.

We know from studies that jurors do not wait until the end of a trial to process information. In fact, they do it throughout the course of a trial; they decide what to commit to memory and what to discard as irrelevant as they see and hear it. We also know that information that is most consistent with a juror's belief and expectations is more readily processed and remembered.[2]

Studies show that jurors change their opinions during a trial, which means they are more open-minded than perhaps many trial experts believe. Studies have also shown that the more actively involved jurors are in a trial—such as being allowed to take notes or ask questions—the better a juror's evaluation of the evidence has been.[3]

Being actively involved in the trial offers several benefits: it provides a focused approach for evaluation of the evidence; it avoids relying on the aura of a particular witness; it fills in information gaps if jurors are allowed to participate; and it provides the ability for jurors to pool information during trial, correct errors and increase recall.

Ultimately, jurors make their decisions on the clarity and timing of the information presented to them. Obviously, lawyers and judges need to be clear when presenting information. Instructions need to be clear, comprehensible, and user friendly. Jurors do not understand the law well unless instructions are clear and simple.

Jurors are people who are being asked to take on an unfamiliar role with dire consequences to the parties involved. They need an environment that is friendly, stimulating and conducive to decision making. They need to understand the process simply and quickly, with their likely questions anticipated and answered. At the same time, they need to be assured that jury service is an important function of society, something to respect and take seriously, not something to loathe and seek ways to avoid.

Examples of Innovations

We turn now to the innovations that are either taking place or being considered in parts of the country. The hope is not only to open a dialogue but to begin a process of change to improve the jury trial process. Ultimately, this dialogue will bring about a better, more informed, and more responsive civil justice system in America.

Jury Tutorials

For cases involving highly technical or complicated issues that require understanding of unfamiliar terminology or concepts, the attorneys or experts in a case could offer a "tutorial" during or in addition to opening statements, to help jurors better understand the evidence. The substance of this lesson would be limited to topics not in controversy and agreed to by the parties and the judge. These tutorials would be held like a classroom lecture, allowing jurors to ask clarifying questions, and made a part of the record. The jury would be instructed that these tutorials are not evidence, but may be used as background information only. In the 9th Circuit the Hon. Pamela Ann Rymer allowed a tutorial to be presented to the jury after the parties delivered one to her and she found it helpful.

Speak Plain English

We know from studies that there is a strong correlation between juror satisfaction with jury service and how well jurors understood the proceedings. It seems obvious, but the first step in helping jurors understand the proceedings is to avoid using "legalese" vocabulary and jargon, that is, "speak English." For example, the judge may use simple terms during his communications, and explain such terms as "plaintiff," "cause of action," or "indictment."

Rulings on evidentiary objections, and other exchanges between judge and attorneys, should be conducted in plain English so the jury can understand them. Even admonitions to the jury to disregard certain evidence should be made in plain English.

On the other hand, it is important to observe appropriate limits for encouraging plain English, since trial attorneys should be able to retain their style of communication for their particular strategies. Additionally, it may seem difficult to use plain English without being too casual, diminishing the dignity of the court.

Mini-Openings and Interim Commentary

At the beginning of a trial, each party would have a set amount of time (a budget) to present opening statements and interim commentary. After a brief opening statement to the jury outlining the major theory of the case, attorneys could subsequently use reserved or budgeted time at periodic intervals during the trial. At these intervals the attorneys would explain to the jury the significance of the evidence or testimony about to be presented and how it supports the theory of the case. Opposing counsel would have the opportunity to respond to this commentary. The purpose would be to allow counsel to frame their cases in manageable segments which jurors could easily assimilate.

Discussion of Evidence During the Trial by Jurors

Since the end of 1995, jurors in civil trials in Arizona have been allowed to discuss the evidence in the jury room as the trial proceeds, with certain limitations.[4] Several other states are currently considering this innovation as well. The idea is to allow the jury to discuss the evidence among themselves during the course of the of the trial only. Discussions would take place in the jury room and only when all jurors are present. In pretrial instructions, the judge would instruct the jurors to keep an open mind throughout the trial and these discussions.

This innovation is based upon the theory that discussion can improve comprehension, helping jurors sift through information, organize it, and create a coherent, cohesive picture during the course of a trial.

Juror's Questions to a Witness

Since people make more informed decisions after asking questions and getting answers, it only makes sense that a jury should be permitted to submit questions to witnesses. At the beginning of a trial, the judge would tell the jurors that, if a witness' testimony is confusing or complicated, they may submit clarifying questions to the judge. Following direct and cross examinations of a witness, a judge could send the jurors into the jury room for a limited time with instructions to draft any questions.

In the absence of the jury, the judge and attorneys could review any questions submitted and the attorneys could voice objections on the record to the scope or content of any question. The judge could then rule on these objections, or instruct the witness to confine his or her answer in light of any objection.

If necessary, the judge may tell jurors that evidentiary rules may prohibit asking certain questions, and there is no significance to the fact that certain questions were not asked After reading these questions from the jury, counsel may have an opportunity to cross or redirect based upon the answers provided.

Judges and attorneys using this technique have reported that most questions are serious, concise, and relevant to the matter at hand.[5] There is no evidence that permitting jurors to pose questions to the witnesses has any significant effect on the deliberative role of the jury.[6]

Jury Instructions Before Closing Arguments

Traditionally, judges issue final instructions after closing arguments by the attorneys. While this was mandated in various statutes and the Federal Rules of Civil Procedure, today many of those rules and many state codes have become more flexible; judges are permitted to instruct the jury either before or after argument or both. A judge may instruct the jury on the law before closing arguments, leaving administrative matters until after the arguments.

Written or Recorded Instructions

Written jury instructions may help increase a juror's comprehension about the charge and reduce questions by the jury about instructions during deliberations. While written instructions could mean more work for the court and lawyers, as well as higher costs, they may help prevent a jury from forgetting about a critical element of a claim or defense.[7]

New York State Jury Reforms

In 1996, the New York State Legislature repealed Judiciary Law § 512, which, in part, exempted from jury duty all clergy, attorneys, police, all manner of medical, chiropractic and psychiatric healthcare providers, embalmers, sole proprietors of small businesses, all persons seventy five or older, and guardians of children under the age of sixteen. The Legislature's goal was to spread the burden of jury service equally among all citizens. As a result, lawyers and judges routinely serve on petit and grand juries, and while this has created occasional problems, the percentage of first time jurors has increased.[8] In Broome County, for example, first time jurors are up from 20 to 70 percent. In addition, the master source list for jury call has been improved to include voter registration, driver's license, and state income tax filers, thereby cultivating a more diverse and deeper jury pool.

The Unified Court System has also tried to find ways to better use and treat jurors, with goals for less frequent service and a statewide, four-year disqualification period. As a result, of all counties, only Bronx and New York Counties have a two-year repeat schedule.[9] In Supreme and County Courts a juror's per diem has been increased to $40 a day and those courts have made sequestration available only in the most serious of cases.

The number one complaint of those called for jury duty is wasted time. The Unified system has initiated a Pilot Project with 55 judges in four locations with heightened supervision, alternative jury selection methods, and time limits on selection. Additionally the Office of Court Administration has instituted new voir dire rules which have reduced the average length of voir dire by 30 percent.[10]

Additionally, Courts have instituted a "1-1-1" policy, meaning no court should have more than one jury on trial; one in voir dire; and one awaiting voir dire for each sitting judge.[11]

In 1998, the Court of Appeals held that "a trial court—while not obligated to do so—has the discretion to permit note-taking by jurors during a trial. If a trial court determines that a particular case warrants note-taking, the court can, sua sponte, instruct jurors that they are permitted to take notes during the trial."[12]

In 1999 the State Senate introduced bills to implement the following innovations: (1) interim jury instructions (S.4336); (2) interim Summations (S.4336); (3) preliminary jury instructions (S.4336); (4) remodeled the pretrial conference rules to mirror FRCP 16(c)(3) (S.4364). However the assembly took no action on them.

Included in the Judiciary's 2000 Legislative Agenda is a reintroduction of those initiatives mentioned above, as well as bills to: (1) reduce the number of preemptory challenges in criminal cases; (2) assign Judicial Hearing Officers to supervise voir dire in all civil cases; and (3) prohibit post verdict jury gratuities.[13]

Who knows what may happen in the Legislature. Regardless, most of the rules governing the jury's role are discretionary; when a trial judge is encouraged to experiment, many changes may be implemented without legislation.[14] Conversely, legislation or rule changes are ineffective if the judiciary is not encouraged to use their discretion to incorporate innovations in the court room.

Conclusion

We ask jurors to step out of their normal lives—and normal context for processing information—to sit in judgment of their fellow citizens. We ask them to do so with little knowledge of the judicial system and little understanding of the laws and rules governing the process of law. It is important that we, as members of the legal profession, become more sensitive to how jurors—indeed how all of us—process information and make decisions. By implementing positive changes that improve the decision-making process, we are in effect improving the civil justice system as a whole.

Endnotes

1. *Jury Trial Innovations Manual*, G. Thomas Munsterman, et. al., National Center for State Courts (1997).
2. *Id.* at 11.
3. *Id.* at 15.
4. Ariz. Rule of Civil Procedure 39(f) (1996).
5. *See* Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. Rev. 423 (1985); Larry Heur & Steven Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 Nw. U. L. Rev. 226 (1990).
6. American Judicature Society, Toward More Active Juries: Taking Notes and Asking Questions (1991) (finding no prejudicial effect from permitting jurors to ask questions. *See also Juror Note Taking and Question Asking During Trials*, 18 Law & Hum. Behav. 121 (1994) (study finding supports hypotheses that jury question promotes juror understanding of facts and issues and that potential disadvantages of questions do not occur).
7. *See* Sand & Reiss, *supra* note 6 at 443.
8. *See 23 Jones Street Associates v. Beretta*, 177 Misc. 2d. 600, 676 N.Y.S.2d 80 (Civ. Ct., CNY 1998), *rev'd* 182 Misc. 2d 177 (1st Dep't App. Term 1999) (Where a lawyer/judge-juror was held to have undue influence on the panel).
9. Second Progress Report on a Continuing Initiative for Jury Reform in New York State, (NYS Unified Court System, March 1998).
10. 22 N.Y.C.R.R. 202.33.
11. Rules of Chief Admin. § 128.8 and 22 N.Y.C.R.R. 202.336.
12. *People v. Hues*, 92 N.Y.2d 413, 681 N.Y.S.2d 779 (1998).
13. Second Progress, note 10.
14. We wish to acknowledge the assistance and cooperation of the Unified court system and its staff, especially Antonio E. Galvao, Esq., executive assistant to Chief Administrative Judge, The Honorable Jonathan Lippman, for their contribution throughout the reform process and for compiling the data for this article.

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Travel Law: The Internet and Its Impact Upon Personal Jurisdiction

By Judge Thomas A. Dickerson

Consumer use of the Internet to make travel arrangements has risen dramatically every year.[1] The marketing of travel services on the Internet through interactive Web sites may have dramatically changed the basis upon which personal jurisdiction may be asserted over foreign hotels and other travel suppliers in tort cases involving travelers injured abroad.

Personal Jurisdiction

In adjudicating an injured traveler's claim against a foreign supplier or tour operator the court must have jurisdiction over the subject matter as well as personal jurisdiction over the parties. Traditionally, personal jurisdiction has depended upon physical presence in the forum. For example, if a foreign hotel[2] or air carrier[3] conducted business through a wholly owned subsidiary[4] or joint venturer[5] or maintained an office with a staff, a bank account and a local telephone number then jurisdiction would, generally, be appropriate. The rationale being that in return for the privilege of doing business in the forum a foreign travel supplier or tour operator should be available to answer claims brought by injured travelers.

In the absence of physical presence, however, the assertion of personal jurisdiction is more problematical. For example, instead of maintaining an office in the forum a foreign travel supplier may conduct business through an agent,[6] independent contractor,[7] travel agent[8] or tour operator.[9] Under these circumstances personal jurisdiction has been found if there was active solicitation of business plus contract formation in the forum. This concept, known as the "solicitation plus" doctrine, is still followed by most U.S. courts.[10]

Long Arm Jurisdiction

Most states have enacted statutes providing for personal jurisdiction based upon certain minimal contacts.[11] For example, New York's long arm statute[12] provides for personal jurisdiction over a non-resident if "in *person or through an agent"* he "transacts *any business within the state" or "commits a tortuous act within the state"* as long as the particular cause of action asserted is one "arising *from" any* of such acts. While many courts[13] still follow the solicitation plus doctrine other courts[14] have found solicitation alone to be sufficient to exercise long arm jurisdiction over foreign travel suppliers.

A modern jurisdictional analysis should consider the extent to which a defendant purposefully avails itself of the privilege of conducting business in the forum, that the claim must arise out of defendant's forum related activities and the exercise of jurisdiction must be reasonable.[15] What is reasonable may depend upon 1) the extent of purposeful interjection, 2) the burden on defendant to defend in the chosen forum, 3) the extent of the conflict with the sovereignty of the defendant's state, 4) the forum state's interest in the dispute, 5) the most efficient forum for judicial resolution of the dispute, 6) the importance of the chosen forum to the plaintiff's interest in convenient and effective relief, and 7) the existence of an alternate forum.[16]

Jurisdiction and the Internet

The extent to which an Internet Web site confers personal jurisdiction in a forum in which the Web site is accessible to the general public and/or to customers has recently been addressed by several courts. A useful jurisdictional analysis appears in *Zippo Manufacturing Co. v. Zippo Dot Com Inc.*,[17] a trademark infringement action brought by the manufacturer of "Zippo" lighters against a computer news service using the Internet domain name of "zippo.com." In *Zippo*, the defendant was a California-based news service with an interactive Web site " through which it exchanges information with Pennsylvania residents in hopes of using that information for commercial gain later."[18] The defendant had entered into news service contracts[19] with 3,000 Pennsylvania residents and seven "contracts with Internet access providers to furnish services to their customers in Pennsylvania."[20] Since it was defendant's "conscious choice to conduct business (in Pennsylvania)"[21] the court asserted personal jurisdiction based upon the following analysis:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. . . . At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign

jurisdictions. A passive web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. . . . The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[22]

Passive Web Sites

If a foreign travel supplier or tour operator maintains an informational Web site accessible to the general public but which can not be used for making reservations then most,[23] but not all,[24] courts would find it unreasonable to assert personal jurisdiction. For example, in *Weber v. Jolly Hotels*[25] a New Jersey resident purchased a tour packaged by a Massachusetts travel agent, not an exclusive selling agent,[26] which featured accommodations at a Sicilian hotel owned by an Italian corporation, Itajolly Compagnia Italiana Dei Jolly Hotels ["Jolly Hotels"]. Jolly Hotels conducted no business in New Jersey but had a subsidiary which owned a hotel in New York City which could make reservations at all of its hotels. The plaintiff sustained injuries at defendant's Sicilian hotel and brought suit against Jolly Hotels in New Jersey. Jolly Hotels maintained a Web site accessible in New Jersey which provided *"photographs of hotel rooms, descriptions of hotel facilities, information about numbers of rooms and telephone numbers."* The Web site could not be used to make reservations at any of the Jolly Hotels. Finding the Web site to be passive in nature the court dismissed for a lack of personal jurisdiction but transferred the case to New York because defendant's subsidiary's New York City hotel could make reservations at all Jolly Hotels.[27]

Passive Web Sites Plus

However, passive Web sites combined with other business activity, e.g., providing trainees to a company doing business in the forum,[28] entering into a licensing agreement with a company in the forum and selling to three companies in the forum,[29] entering into a contract with a company in the forum which contained a forum selection clause and multiple e-mail communications to the forum,[30] sale of 3,000 passwords to residents in the forum and contracts with seven service providers with customers in the forum,[31] e-mail, fax and telephone communications,[32] e-mail, fax, telephone and regular mail communications[33] and 12 sales in the forum and plans to sell more,[34] may provide a reasonable basis for the assertion of personal jurisdiction over foreign travel suppliers.

Interactive Web Sites

If the Web site provides information, e-mail communication, describes the goods or services offered, downloads a printed order form or allows on-line sales with the use of a credit card and sales are, in fact, made in this manner in the forum then most courts[35] would find the assertion of personal jurisdiction reasonable. However, at least one court has held that the combination of an interactive Web site with a forum selection clause negates any intent of being hauled into a local court.[36]

The Internet has Expanded Jurisdiction

The Internet has dramatically changed the way in which the courts decide what types of business contacts justify the assertion of personal jurisdiction. To establish personal jurisdiction over foreign travel suppliers and tour operators under the traditional solicitation plus doctrine it was necessary to find both solicitation of business and the entering into of reservations' contracts in the forum. Because foreign travel suppliers or their reservations' services entered into contracts at distant locations, the courts, invariably, found local solicitation of business through travel agents but no contract formation in the forum. This meant that injured travelers were denied a local forum in which to bring a lawsuit against a foreign travel supplier.

The Internet may have changed all that. The courts that have addressed the issue seem to agree that when an interactive Web site is used to take orders and make reservations that contract formation takes place in the consumer's forum and not at the location of the foreign travel supplier's home computer. Although the courts have applied the solicitation plus doctrine to Internet marketing they have done so in a manner which has dramatically increased the reach of personal jurisdiction over foreign travel suppliers and tour operators.

Endnotes

1. *See* Travel Weekly, August 12, 1999, p. 23.

> Survey reveals user satisfaction with Internet sites is on the rise . . . NPD Online Research . . . said 31% of Web users who visited airline sites this year made a booking, up from 21% in 1998. NPD said 28% of visitors to hotel sites booked on line in 1999, compared with 21% last year, and 28% of visitors to car rental sites booked on line, compared with 19% in 1998.

2. *See, e.g.*, **Second Circuit**: *Darby v. Compagnie National Air France*, 735 F. Supp. 555 (S.D.N.Y. 1990) (Brazilian hotel where guest drowned subject to New York jurisdiction because of actions of subsidiary in the forum). **State Courts**: **New York**: *Frummer v. Hilton Hotels International, Inc.*, 19 N.Y.2d 933, 281 N.Y.S.2d 41, 227 N.E.2d 851 (1967) (subsidiary's reservations' service in the forum).

3. *See, e.g., Bryant v. Finnish National Airline*, 15 N.Y.2d 426, 260 N.Y.S.2d 625, 208 N.E.2d 439 (1965).

4. *See, e.g., Taca Intl. Airlines v. Rolls-Royce of England*, 15 N.Y.2d 97, 256 N.Y.S.2d 129, 204 N.E.2d 329 (1965). *Compare: Schenck v. Walt Disney Co.*, 742 F. Supp. 838 (S.D.N.Y. 1990) (Walt Disney World not doing business in New York because of activities of parent company in forum).

5. *See, e.g., Rait v. Jacobs Brothers*, 49 Misc. 2d 903, 268 N.Y.S.2d 750 (1966).

6. *See, e.g.*, **Kentucky**: *Mohler v. Dorado Wings, Inc.*, 675 S.W.2d 404 (Ky. Ct. App. 1984). **New York**: *Berner v. United Airlines, Inc.*, 3 N.Y.2d 1003, 170 N.Y.S.2d 340, 147 N.E.2d 732 (1957).

7. *See, e.g., Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1987); *Guile v. Sea Island Co., Inc.*, 11 Misc. 2d 496, 66 N.Y.S.2d 467 (1946), *aff'd* 272 App. Div. 881, 71 N.Y.S.2d 911 (1947).

8. *See, e.g.*, **Third Circuit**: *Romero v. Argentinas*, 1993 WL 416547 (D.N.J. 1993). **Tenth Circuit**: *Afflerbach v. Cunard Line, Ltd.*, 11 F. Supp. 2d 1260 (D. Wyo. 1998). **State Courts**: **New York**: *Savoleo v. Couples Hotel*, 136 A.D. 2d 692, 524 N.Y.S.2d 52 (1988).

9. *See, e.g.*, **Sixth Circuit**: *Hughes v. Cabanas del Caribe Hotel*, 744 F. Supp. 788 (E.D. Mich. 1990). **Seventh Circuit**: *Wilson v. Humphreys*, 916 F.2d 1239 (7th Cir. 1990).

10. *See, e.g.*, **First Circuit**: *Rosich v. Circus & Circus Enterprises, Inc.*, 1998 WL 234582 (D.P.R. 1998) (advertising through travel guide and brochures insufficient contact); *Clark v. City of St. Augustine, Florida*, 977 F. Supp. 541 (D. Mass. 1997) (advertising in forum insufficient contact); *Bennett v. Jack Dennis Whitewater Trips*, 1996 WL 277384 (D. Mass. 1996) (brochures insufficient contact with forum). **Second Circuit**: *Lane v. Vacations Charters, Ltd.*, 750 F. Supp. 120 (S.D.N.Y. 1990) (ads and toll free number insufficient contact with forum). **Third Circuit**: *Fields v. Ramada Inn*, 816 F. Supp. 1033 (E.D. Pa. 1993) (800 reservations number and brochures insufficient contact with forum). **Fifth Circuit**: *Luna v. Compagnie Paramena de Aviacion*, 1994 WL 173369 (S.D. Tex. 1994) (800 reservations number and solicitation insufficient contact with forum). **Sixth Circuit**: *Denham v. Sampson Investments*, 1998 WL 129958 (E.D. Mich. 1998) (sending brochures to forum and reserving rooms at hotels insufficient contact with forum). **Tenth Circuit**: *Afflerbach v. Cunard Line, Ltd.*, 14 F. Supp. 2d 1260 (D. Wyo. 1998) (national advertising and selling tours through travel agents insufficient contact with forum).

    State Courts: **New York**: *Sedig v. Okem Mountain*, 204 A.D. 2d 709, 612 N.Y.S.2d 643 (1994) (mere solicitation insufficient contact with forum).

11. *See, e.g., Burger King Corp. v. Rudewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

12. New York C.P.L.R. § 302(a).

13. *See* N. 10, *supra*.

14. *See, e.g.*, **First Circuit**: *Nowak v. Tak How Inc. Ltd.*, 1995 WL 521874 (D. Mass. 1995). **Sixth Circuit**: *Raferty v. Blake's Wilderness Outpost Camps*, 1997 WL 14795 (E.D. Mich. 1997).

15. *See, e.g., Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1440-1441 (9th Cir. 1988), *superseded* 897 F.2d 377 (9th Cir. 1990), *rev'd* 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991) (forum selection clause enforced).

16. *Id. See also Federal Deposit Ins. Corp. v. British American Insurance Co., Ltd.*, 838 F.2d 1439, 1442 (9th Cir. 1987).

17. *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). *Compare Millenium Enterprises v. Millenium Music*, 49 USPQ2d 1878, 1885 (Ore. Jan. 4, 1998) ("the trend has shifted away from finding jurisdiction based solely on the existence of Web site advertising. Instead, 'something more' is required to show that the defendant purposefully directed its activities at the forum").

18. *Id.* at 952 F. Supp. 1125.

19. *Id.* at 952 F. Supp. 1121 ("Dot Com's Web Site contains information about the company, advertisements and an application for its Internet news service. . . . A customer who wants to subscribe-fills out an on-line application. . . . Payment is made by credit card over the Internet or the telephone. The application is then processed and the subscriber is assigned a password which permits the subscriber to view and/or download Internet news group messages that are stored on the defendant's server in California").

20. *Id.* at 952 F. Supp. 1126.

21. *Id.*

22. *Id.* at 952 F. Supp. 1123.

23. *See, e.g.*, **Second Circuit**: *American Homecare Federation, Inc. v. Paragon Scientific Corp.*, 1998 WL 790590 (D. Conn. 1998) ("The Website does not list . . . products which are sold nor does it provide any process for ordering. . . . No sales . . . occur through the Website and an individual accessing the site cannot order. . . . It does not provide anyone with files to download nor does it link to anyone else's Website"); *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104 (D. Conn. 1998) ("there is no evidence that any user in Connecticut accessed Neogen's Web site or purchased products based upon the Web site advertisement . . . Internet users could not order products directly from the Web site . . . it required them to call an ' 800 ' number in Michigan or write Neogen in Michigan or Kentucky"); *Hearst Corp. v. Goldberger*, 1997 WL 97097 (S.D.N.Y. 1997) (Web site with e-mail contact); *Benusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997) (Missouri nightclub's passive Web site). **Third Circuit**: *Remich v. Manfredy*, 1999 WL 257754 (E.D. Pa. 1999) (passive Web site offering general information and advertising insufficient contact with forum); *Molnlycke Health Care AB v. Dumex Medical Surgical Products Ltd.*, 1999 WL 695579 (E.D. Pa. 1999) (passive Web site does not confer jurisdiction). **Fourth Circuit**: *Esab Group, Inc. v. Centricut, LLC*, 1999 WL 27514 (D.S.C. 1999) (Web page which provides information but requires customer to place an order through an 800 telephone number is insufficient for assertion of personal jurisdiction). **Fifth Circuit**: *Mink v. AAAA Development, L.L.C.*, 190 F.3d 333 (5th Cir. 1999) (no long arm jurisdiction based upon printable mail-in order form and toll free number and e-mail address); *Broussard v. Deauville Hotel Resorts, Inc.*, 1999 WL 62152 (E.D. La.. 1999) (slip and fall in Florida hotel; no long arm jurisdiction based upon passive Web site); *Mid-City Howling Lanes & Sports Palace, Inc. v. Ivercrest, Inc.*, 35 F. Supp. 507 (E.D. La. 1999) (no personal jurisdiction based upon passive Web site). **Ninth Circuit**: *Cybersell, Inc. v. Cyberseell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997) ("conducted no commercial activity over the Internet in Arizona. All that it did was post an essentially passive home page on the web"); *McDonough v: Fallon McElligott, Inc.*, 1996 WL 753991 (S.D. Cal. 1996) ("fact that (defendant) has a Web site used by (forum state residents) cannot establish jurisdiction by itself"). **Tenth Circuit**: *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292 (10th Cir. 1999) (no jurisdiction based on Web site that only provided information); *SF Hotel Company, L.P. v. Energy Investments, Inc.*, 985 F. Supp. 1032, 1035 (D. Kan. 1997) (Boto's advertisement in a trade publication appears on the Internet. Boto did not contract to sell, any goods or services . . . over the Internet site"). **Eleventh Circuit**: *JB Oxford Holdings, Inc.*, 1999 WL 1068444 (S.D. Fla. 1999) (Web site providing connections to Internet, listing of national toll free telephone num-

ber and a pending application to do business in Florida provided insufficient contacts with Florida to permit exercise of personal jurisdiction). **District of Columbia Circuit**: *GTE New Media Serv. Inc. v. Bellsouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000) (Yellow Pages accessibility insufficient for long arm jurisdiction); *Mallinckrodt Medical, Inc. v. Sonus Pharmaceuticals, Inc.*, 989 F. Supp. 265, 272 (D.C. D.C. 1998) (The act of posting a message on an AOL electronic bulletin board-which certain AOL subscribers may or may not choose to access (is not sufficient for personal jurisdiction.)).

State Courts: **California**: *Jewish Defense Organization, Inc. v. Superior Court*, 85 Cal. Rptr. 2d 611 (Cal. App. 1999) (defamation action; a passive Web site delivering only information insufficient contact with forum for assertion of personal jurisdiction). **New York**: *Nationwide Insurance Co. v. Holiday Inn*, N.Y.L.J., Jan. 27, 2000 (N.Y. Sup.); *Messelia v. Costa*, N.Y.L.J., Feb. 14, 2000 (N.Y. Civ.) (passive Web site providing information insufficient for assertion of personal jurisdiction). **Oregon**: *Millenium Enterprises v. Millenium Music*, 49 USPQ2d 1878 (Oregon Jan. 4, 1999).

24. *See, e.g.*, **Second Circuit**: *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164 (D. Conn. 1996) (Web site and toll free number; " advertising via the Internet is solicitation of a sufficient repetitive nature"). **Fourth Circuit**: *Bochan v. La Fontaine*, 1999 WL 343780 (E.D. Va. 1999) (posting of libelous messages on the Internet by Texas and New Mexico residents sufficient grounds for the assertion of personal jurisdiction in Virginia where Web site was accessed). **Ninth Circuit**: *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996) (fraud claims; jurisdiction based on Web site contact alone). **District of Columbia Circuit**: *Heroes, Inc. v. Heroes Found*, 958 F. Supp. 1 (D.C.D.C. 1996) (Web site, toll free number and local newspaper ad).

25. *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997).

26. *See, e.g.*, **Third Circuit**: *Rutherford v. Sherburne Corp.*, 616 F. Supp. 1456 (D.N.J. 1985).

    State Courts: **New Jersey**: *Van Eeuwen v. Heidelberg Eastern, Inc.*, 124 N.J. Super. 251, 306 A.2d 79 (1973).

27. *See* N. 2, *supra*.

28. In *Hasbro, Inc. v. Clue Computing, Inc.*, 994 F. Supp. 34, 38 (D. Mass. 1997) the defendant, a Colorado corporation, maintained a passive Web site. " The company uses the Web site to advertise its business, including Internet consulting, training, system administration and network design and implementation. On its Web site, Clue states "Clue will go to any customers site . . . those Internet users who view the site can instantly email the company by clicking on the page." However, the defendant was found to be conducting business in Massachusetts by providing trainees for a company that had a contract with a Massachusetts company).

29. *See Digital Equipment Corp. v. Altavista Tech*, 960 F. Supp. 456 (D. Mass. 1997).

30. *See Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

31. *See Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

32. *See EDIAS Software Int'l v. BASIS Int'l Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996).

33. *See Resuscitation Tech., Inc. v. Continental Health Care Corp.*, 1997 WL 148567 (S.D. Ind. 1997).

34. *See Gary Scott International, Inc. v. Baroudi*, 981 F. Supp. 714 (D. Mass. 1997).

35. *See, e.g.*, **Second Circuit**: *American Network, Inc. v. Access America/Connect Atlanta, Inc.*, 975 F. Supp. 494 (S.D.N.Y. 1997) (subscriptions for Internet services sold to customers in the forum through contracts entered into on Web site). **Third Circuit**: *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). **Fourth Circuit**: *Easb Group, Inc. v. Centricut, LLC*, 1999 WL 27514 (D.S.C. 1999) (Web page which provides information but requires customer to place an order using an 800 telephone number is insufficient to confer jurisdiction). **Fifth Circuit**: *Origin Instruments v. Adaptive Computer Systems*, 1999 U.S. Dist. LEXIS 1451 (N.D. Texas 1999) (no jurisdiction; failure to show sales in forum through interactive Web site); *Thompson v. Handa-Lopez, Inc.*, 1998 WL 142300 (W.D. Tex. 1998) (California corporation subject to personal jurisdiction in Texas based upon entering into contracts to play casino games with Texas citizens); *Mieczkowski v. Masco Corp.*, 997 F. Supp. 782, 785 (E.D. Texas 1998) ("Web site lists various categories . . . individuals can view various furniture selections-individual pieces of furniture can be viewed-as well as price information-an order form can be printed . . . (customers may) check the status of their purchases . . . information is available regarding freight costs-communicate directly with on-line sales representatives"). **Ninth Circuit**: *Park Inns International v. Pacific Plaza Hotels*, Inc., 5 F. Supp. 2d 762, 764-65 (D. Ariz. 1998) (interactive Web site accepted seven hotel reservations from customers in the forum). **District of Columbia Circuit**: *Blumenthal v. Drudge*, 992 F. Supp. 44, 56 (D.C.D.C. 1998) ("The Drudge Report's Web site allows browsers . . . to directly e-mail defendant . . . thus allowing an exchange of information . . . browsers who access the Web site may request subscriptions to the Drudge Report, again by directly emailing their requests to Drudge's host computer-the Drudge Report is . . . sent . . . to every e-mail address on his subscription list . . . constant exchange of information and direct communication"). **State Courts**: **Oregon**: *Millunium Enterprises v. Millenium Music*, 49 USPQ2d 1878 (Ore., Jan. 4, 1999).

36. **Third Circuit**: *Decker v. Circus Circus Hotel*, 1999 WL 319056 (D.N.J. 1999) (New Jersey consumers sue Nevada hotel; hotel Web site allowed guests to make reservations but Web site also contained a forum selection clause whereby guests agreed to sue hotel only in Nevada; forum selection clause enforced).

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Travel Law Articles on the Web

By Judge Thomas A. Dickerson

SHOULD COUPONS OR CREDITS BE USED TO SETTLE TRAVEL CLASS ACTIONS?
http://courts.state.ny.us/tandv/coupons.html

TAKE YOUR TRAVEL AGENT ON A TRIP TO THE COURTHOUSE
http://courts.state.ny.us/tandv/travelagent.html

THE CRUISE PASSENGER'S RIGHTS & REMEDIES
http://courts.state.ny.us/tandv/cruiserights.html

FLIGHT DELAYS, RIGHTS, REMEDIES, DAMAGES & CLASS ACTIONS
http://courts.state.ny.us/tandv/flightdelays.html

WHAT TORT LAWYERS SHOULD KNOW ABOUT TRAVEL LAW
http://courts.state.ny.us/tandv/travellaw.htm

THE LICENSING AND REGULATION OF TRAVEL SELLERS IN THE UNITED STATES
http://courts.state.ny.us/tandv/Aqtaed1.htm

NEW YORK STATE NEEDS A MODERN TRAVEL SELLER STATUTE
http://www.tay.ac.uk/iftta/newyork.html

THE INTERNET, THE "SOLICITATION PLUS" DOCTRINE AND JURISDICTION OVER FOREIGN TRAVEL SUPPLIERS
http://courts.state.ny.us/tandv/TLJInternetArticle99.htm

SPONSORING GROUP TRAVEL: A DISCUSSION OF LIABILITY ISSUES–1999
http://courts.state.ny.us/tandv/sgt.html

TRAVEL ABROAD, SUE AT HOME
http://courts.state.ny.us/tandv/tasah.html

INSTANT TRAVEL AGENTS
http://courts.state.ny.us/tandv/ita.html

TOUR OPERATORS AND AIR CARRIERS: MODERN THEORIES OF LIABILITY
http://courts.state.ny.us/tandv/toac.html

HOW SAFE ARE STUDENT TOURS
http://courts.state.ny.us/tandv/studtour.html

HOTEL RESTAURANT LIABILITY FOR LOST OVERCOATS
http://courts.state.ny.us/tandv/overcoat.html

Judge Dickerson's Additional Web Sites

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http://members.aol.com/judgetad/index.html

TRAVEL LAW
http://members.aol.com/travellaw/index.html

CLASS ACTIONS
http://members.aol.com/class50/index.html

Cyberlaw Issues: Paying Attention to Proposed Legislation

By Catherine Habermehl

Introduction

The Y2K bug. It did not turn out to be the problem that was anticipated. For some, this lack of massive turmoil despoiling the unprepared, may be a source of irritation. All that stress and time and financial expenditure to safeguard data. And for what? For nothing.

Not for nothing. If you think about it, there may not be one other single event, or potential for event, that woke us up to our degree of dependence on computers; no other moment when our sophistication level on this machine so collectively spiked; and no greater opportunity for an entire industry to obtain legislatively ordained shields from liability. Not a bad day's work for a simple January 1st.

Legislation

Legislative analysis, in this situation, is a critical, albeit dry, starting point. It is critical because of timing. Currently up for assessment is the Uniform Commercial Code's Uniform Computer Information Act, UCITA. Each state is currently looking at the proposal to see if it should be adopted, and with what, if any, modifications. New York is no exception. I am not suggesting that this process be slowed down to the alacrity of a Senate judiciary confirmation hearing, but a pause may be in order.

In anticipation of problems with the Y2K bug, Congress quickly passed *The Year 2000 Readiness and Responsibility Act*. Under this legislation, a company's remedies were extremely limited, leaving businesses able to look, practically speaking, only to their insurers as the means of recovering any loss. With this, which follows, as an example of legislation already come to pass, how should we approach the current proposal for UCITA?

On the one hand, Silicon Alley is a vital economic sphere in New York that should be protected. On the other, businesses and consumers are extremely vulnerable to the actions, to say nothing of omissions, of an industry that, to those businesses and consumers, is extremely novel, complicated, and absolutely and completely necessary. "Let the buyer beware" may be an acceptable doctrine if what you are talking about is the appropriate remedy for one staring at an open and obvious water-logged basement. Computer technology, however, remains a mystery, or as my own system's vendor quite candidly expressed to me, "Well, what are computers if not one big experiment? Heh, heh." Heh heh, indeed!

The Year 2000 Readiness and Responsibility Act

On July 16, 1999, Congress e-mailed a bill to the President for his signature. It marked the very first cyberspace transmission of proposed legislation, and the subsequently delivered hard copy of the bill was signed by President Clinton on July 20, 1999. We had not gotten through the first two pages of the Act without wondering who had sponsored it. So back to the introduction we went.

106th CONGRESS
1st Session
H. R. 775
IN THE HOUSE OF REPRESENTATIVES
February 23, 1999

> Mr. DAVIS of Virginia (for himself, Mr. DREIER, Mr. COX, Mr. MORAN of Virginia, Mr. CRAMER, and Mr. DOOLEY of California) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Small Business, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

Mr. Davis, the bill's chief sponsor, represents the 11th District of Virginia, which includes the city of Dulles, where America Online, Inc., is located. Co-sponsors in the House included several representatives from California, a state famous for its software developers in Silicon Valley. The Senate version of the Bill (which was not the version ultimately accepted, but was similar in its approach) was introduced by Orin Hatch of Utah, the situs, where software giant Corel takes up residence, as well as Diane Feinstein from California.

The Act is called the "Year 2000 Readiness and Responsibility Act," and was based upon a number of findings, including that

- the Year 2000 problem "will affect practically all business enterprises to some degree, giving rise to a large number of disputes";
- Resorting to the legal system for resolution of Year 2000 problems is not feasible for many businesses, particularly small businesses, because of its complexity and expense";
- there will be many frivolous lawsuits; and
- that there "will be delays, expense, uncertainties, loss of control, adverse publicity and animosities . . . that can only exacerbate the difficulties associated with the Year 2000 date change."

Accordingly, Congress expressed an interest in "minimizing possible business disruptions associated with the Year 2000 issues: avoiding "unnecessary case loads in Federal courts" and "provid[ing] initiatives to help businesses prepare and be in a position to withstand the potentially devastating economic impact" of Y2K problems. Congress, therefore, through this legislation, strove to insure that the industry-choking litigation which arose out of the strict product liability theory of recovery would never appear again, as it is apparently the lawyers who have the greatest potential to bring national and international commerce to its knees. This time, it is the small to medium-sized businesses that stand to suffer the greatest consequences of computer malfunction. Yet, as the following demonstrate, for these entities (which, ironically, have never seemed anxious to litigate in the first place) any right of recovery is extremely limited.

What Is Included

A Year 2000 claim is defined under the Act as

> any claim or cause of action of any kind, other than a claim based on personal injury, whether asserted by way of claim . . . or otherwise, in which the plaintiffs alleged loss or harm resulted, directly or indirectly, from an actual or potential year 2000 failure.

An action based upon such a claim is one where there is asserted either a Year 2000 claim, or "any claim or defense, other than a claim or defense based on personal injury, . . . related, directly or indirectly, to an actual or potential year 2000 failure."

The Condition Precedent

No action, whether in state or federal court can be commenced without first placing each prospective defendant on notice. This notice must be written, and provide

(1) a sufficient degree of particularity concerning the claimed material defect,

(2) the symptoms of that defect,

(3) the injury suffered by the prospective plaintiff,

(4) why the prospective plaintiff believes the prospective defendant is responsible for the defect and the injury, and

(5) the relief sought. Ninety (90) days must pass before any lawsuit can be commenced.

The prospective defendant is to respond within thirty (30) days of the receipt of this notice, offering its position with respect to the claim, and commenting on what, if anything, has, will, or can be done about the situation. If the prospective defendant fails to respond or fully address the information contained with the notice, then the prospective plaintiff can commence the lawsuit without waiting for the remaining 90 days to pass.

A complaint filed without such notice requirements having been fulfilled, shall itself be treated as the notice. The named defendant must advise the court and plaintiff of its election to treat the complaint as notice only, whereupon the court must stay all discovery for an additional 90 days, and toll all time for answers and other pleadings during this period.

If any contract requires notice of nonperformance and a waiting period before initiating suit, the contract terms concerning notice and delay control over this Act.

Alternative Dispute Resolution

Consistent with what one might anticipate after having read such concerned congressional findings, an entire section of the Act is devoted to ADR. Less than consistent, however, is the fact that it can be summed up simply: If the parties wish to submit to alternative dispute resolution, they may.

Pleadings

If your approach to complaint drafting is "plead thin and win," you would be well advised to expand your methodology, as nothing short of knowing—and pleading all you would ever hope to know post-discovery—seems appropriate here. The Act requires that

- "the complaint shall state with particularity the nature and amount of each element of damages, and the factual basis for the damages calculation";
- "the complaint shall identify with particularity the symptoms of the material defects and shall

state with particularity the facts supporting the conclusion that the defects were material"; and

- that "in any year 2000 action in which a claim is asserted as to which the plaintiff may prevail only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each element of the claim, state with particularity the facts giving rise to a strong inference that the defendant acted with the required state of mind."

Preservation of Evidence

In a legislative overview such as this, a simple reminder not to destroy evidence may not survive the mouse click on the block and delete icons on the word processor. But the very fact that this text exists, and seems only to apply once the action has been commenced, brings to mind the axiom in legislative construction that a court should not create a situation where words or phrases would be rendered useless or superfluous; that each word, term, or section is to be interpreted to serve a useful purpose. Accordingly, does this section add to or take away from provisions of state law concerning spoliation of evidence, and does the condition precedent notice period provide to all who have been put on notice a brief, but opportune time to search and destroy?

> During the pendency of any stay of discovery entered pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically stored or recorded data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were a subject of a continuing request for production of documents from an opposing party under applicable Federal or State rules of civil procedure.

Mitigation

This short section provides much ammunition for defense counsel, and is the justification for tremendous discovery with respect to due diligence:

> There shall be no recovery in any year 2000 action on account of injury that the plaintiff could reasonably have avoided in light of any disclosure or other information of which the plaintiff was, or reasonably could have been, aware, and the damages awarded in any such action shall exclude any amount that the plaintiff reasonably could have avoided in light of any such disclosure or information.

Conversely, it is the area where plaintiffs' counsel will have to be most creative in explaining why the client took the "wait and see" strategy towards Y2K compliance. Because of the import of this section, we are providing an overview of certain compliance checklists. It is too late for most clients to do anything about the problem now, but in the event that a claim will be brought, counsel should be prepared to perform the same overview.

Contract Terms

If the action is one in contract, then a specific Title under the Act adds certain additional requirements. As a practitioner, contracts must be carefully reviewed because unless you can convince the court that the entire contract is invalid, all terms will control notwithstanding any provision in the Act. As has been earlier referenced, certain pockets of this industry have contracts that afford the purchaser or licensee nothing more than the right to "return and refund." In addition, regardless of how expansive, there are in addition available defenses for

- **reasonable effort** ("the party against whom the claim of breach is asserted shall be allowed to offer evidence that its implementation of the contract, or its efforts to implement the contract, were reasonable in light of the circumstances for the purpose of limiting or eliminating the defendant's liability"); and
- **impossibility or commercial impracticability** ("applicability of the doctrines of impossibility and commercial impracticability shall be determined by applicable law in existence on January 1, 1999, and nothing in this Act shall be construed as limiting or impairing a party's right to assert defenses based upon such doctrines");

as well as limitations on damages:

- "the court shall not award any damages unless such damages are provided for by the express terms of the contract, or, if the contract is silent on such damages, then by operation of the applicable Federal or State law that governed interpretation of the contract at the time the contract was entered into."

Tort and Other Non-Contract Claims

If contract claims seem difficult to prosecute because of their almost ordained "adhesion +" quality, equally daunting requirements exist in a negligence claim.

First, there is no joint and several liability. Sec 301.

Second, the standard is "clear and convincing":

> With respect to any year 2000 claim for money damages in which the defendant's actual or constructive awareness of an actual or potential year 2000 failure is an element of the claim under applicable law, except for a claim based upon personal injury, the defendant shall not be liable unless the plaintiff, in addition to establishing all other requisite elements of the claim, proves by clear and convincing evidence that the defendant actually knew, or recklessly disregarded a substantial risk, that such failure would occur in the specific facts and circumstances of such claim. (Emphasis added.)[1]

and,

> With respect to any year 2000 claim for money damages in which the defendant's actual or constructive awareness of actual or potential harm to the plaintiff is an element of the claim under applicable law, except for a claim based upon personal injury, the defendant shall not be liable unless the plaintiff, in addition to establishing all other requisite elements of the claim, proves by clear and convincing evidence that the defendant actually knew, or recklessly disregarded a known and substantial risk, that the plaintiff would suffer such harm.[2]

Third, there is no res ipsa loquitur.

Fourth, it is a complete defense to a claim if a defendant can establish that it took measures that were reasonable under the circumstances. It appears there may be two separate burdens here; the plaintiff with an obligation to establish its prima facie case with clear and convincing proof of constructive awareness; the defendant able to walk away from the claim if, upon a showing of only a preponderance of evidence ("more likely than not") their actions were reasonable.

Fifth, the legislation limits damages:

> Punitive damages: Punitive damages are capped, the standard is "clear and convincing" proof that the defendant specifically sought to harm the plaintiff, and the entire amount goes into a Year 2000 recovery fund, to aid all non-compliant small businesses, as well as state and local governments. This reduces the incentive to bring charges, and also reduces incentive to become compliant.
>
> Economic Damages[3]: To get economic losses, the claimant must prove that the losses are authorized by contact to which the claimant is a party (in other words, there must be privity and proof of the anticipation of such an award), the loss is incidental to a personal injury claim, or such losses are incidental to damage to tangible property (other than damage to property that is the subject of the contract).

Sixth, there is a cap on officers and director's liability. $100,000 or one year's salary, whichever is greater.

The Attorney's Obligations

Claimants are free to elect between contingency fees and hourly arrangements; but any resulting contingency award cannot exceed (1) one-third of the award; or (2) the amount the attorney would have earned had he or she received hourly compensation. So clearly, hours must be tracked.

The Uniform Commercial Information Transactions Act—UCITA

The Uniform Commercial Code was a project begun in 1942 by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and enacted in 1952. Its purpose was to clarify and modernize the law governing commercial practice, with an eye towards recognition of custom and usage in commercial transactions. Article 2 governs the sale of goods.

Computer software was not to be included within the ambit of the sale of goods. Software was treated from the beginning not as "goods," but a license. Accordingly, to cover certain computer-related transactions, the drafters proposed a separate section of the Code, referenced as Article 213, Software Contracts and

Licenses of Information. The draft Code met with such criticism from consumer and non-computer industry business groups, that it was withdrawn. It is now packaged and presented to us as UCITA. The Act is to apply to all "computer information transactions," which includes

> an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information.

If the point of any commercial code is to try to establish a pattern of behavior upon which merchants and customers, vendors and clients, producers and consumers can rely, then the Act is halfway there. The terms are relatively familiar. They echo from Article 2. A practitioner can read through the lengthy text and actually recognize turns of phrases.

The difficulty with UCITA is applying it to the circumstances of the subject matter. Software and its application and impact on our lives and businesses, this phenomenon, is something less than certain and it is constantly changing. It is like trying to corral phantom horses.

But that does not mean that we do not attempt to lay down rules of conduct. In fact, perhaps it is all the more reason we work to uniform expectations and knowledge of consequences. The burden rests, then, ultimately, on reviewing the proposed statute, considering your own clients' potential problems with the text, and offering comment to the legislature.

Some areas to consider include restrictions on reverse engineering, transfer restrictions, and information rights and use; or the impact on libraries, the effectiveness of copyright protection, and software companies' use of self-help. It is not clear from the text whether the introduction of mass marketing protection protects small businesses. This raises the question of whether small business are more closely aligned with consumers or with large companies, or neither, and how much bargaining power that smaller companies will ever have in order to modify computer industry-generated contract provisions.

We direct the readers attention to the most recent version, updated February 2000. It raises many questions. For example, parties can opt out of UCITA, but are still subject to standards of good faith, unconscionability, and public policy invalidation. Interestingly, the way this particular provision is headed: "SECTION 104. MIXED TRANSACTIONS: AGREEMENT TO OPT-IN OR OPT-OUT," it is not clear if the option to opt out applies only where there is a mixed transaction, one where there is some transaction in computer goods, but also another portion of the transaction which is governed by another area of the law.

Section 105 acknowledges that the Code is subject to federal preemption, public policy limitations, and consumer protection law oversight. Where existing state law may seem to overlap in some areas, certain portions of the Code, such as sufficiency in writing, authentication, and conspicuousness of information, will be governed by the Code. Under the Rules of Construction, the Act is to be construed liberally to "facilitate the realization of the full potential of computer information transactions," (S. 106(a)), whatever that means.

Parties are free to agree about choice of law, although the agreement cannot vary a consumer protection rule that, under the laws of the state where the consumer resides, is mandatory. If there is no choice of law provision, then the Act's own choice of law rules apply. Essentially, if you are downloading software from a home page, the licensor's jurisdiction controls. If software is delivered to the consumer's home or business, and that home or business is in the United States, then the consumer's jurisdiction (principal place of business) controls. (Foreign jurisdiction issues look at the law of the foreign place and contacts.) For everything else, one looks to the jurisdiction having the most significant relationship to the transaction. Sec. 109. Choice of forum is limited only where the choice is "unreasonable and unjust." Sec. 110. Almost all mass market licenses insist on ADR and that the vendor's home state laws control.

The section on manifesting assent attempts to comport with the Restatement (Second) of Contracts. It looks to whether there was (1) an opportunity to review, (2) either an express agreement or conduct engaging in operations that in the circumstances indicate acceptance of the record or term, and (3) an assent given by the person or entity to be bound. There are times when the terms of the contract cannot be reviewed until after a party has broken a seal, or engaged in some conduct that might in other circumstances manifest assent (the "you open it, you bought it, terms and all" clause). Under those circumstances the proposed Act provides: "If a record or term is available for review only after a person becomes obligated to pay or begins its performance, the person has an opportunity to review only if it has a right to a return if it rejects the record." This may not apply to a transaction that is not mass-marketed. Sec. 112.

Parties may agree to terms that are at variance with the act, but obligations of good faith, diligence, reasonableness, and care imposed by the Act may not be disclaimed. Neither can there be any changes regarding

prohibitions against unconscionability or fundamental public policy. Having declared thisceptance, then one must look to whether there is a reasonable manner of acceptance. The language such as "any medium reasonable under the circumstances", or nonconforming copy" brings to mind the Article 2 provisions and exchanging and responding to purchase orders. A good example is:

(4) If an offer in an electronic message evokes an electronic message accepting the offer, a contract is formed:

(A) when an electronic acceptance is received; or

(B) if the response consists of beginning performance, full performance, or giving access to information, when the performance is received or the access is enabled and necessary access materials are received.

Whether this works conceptually in electronic commerce remains a question.

Section 209 addresses the mass-market license. It addresses the applicability of terms where the purchaser does not have an opportunity to review until after opening the packaging or installing on the computer. It also provides for compensation for costs to return or correct any system problems that occurred as a result of the software installation, but only if the installation must take place before the purchaser can review the license. Section 211 deals with pre-transaction disclosures in internet transactions, and essentially instructs that the licensing terms are readily observable.

Things look a little skewed against the consumer in Section 214, Electronic Errors and Consumer Defenses. Here, if a consumer received a message or delivery in error, then the consumer will not be bound thereby, but it requires affirmative steps by the consumer to rectify the situation, such as putting the sender on notice, returning the information, and proving that it did not benefit thereby.

Section 300 of the Act deals with construction of the contract terms, and offers that express terms rule over course of performance, course of performance trumps course of dealing, and course of dealing beats usage of trade. The use of any of these items of proof during a legal proceeding must be on notice to the other party in time and scope so that a court will find there is no "unfair surprise." Sec. 302. Modifications need no consideration to be binding.

A license grants "a contractual right to use any informational rights within the licensor's control at the time of contracting which are necessary in the ordinary course to exercise the expressly described rights." Uncertainty may surface in the restriction of information rights: "If a license expressly limits use of the information or informational rights, use in any other manner is a breach of contract." "Information" is defined as "data, text, images, sounds, mask works, or computer programs, including collections and compilations of them." "Informational rights" include "all rights in information created under laws governing patents, copyrights, mask works, trade secrets, trademarks, publicity rights, or any other law that gives a person, independently of contract, a right to control or preclude another person's use of or access to the information on the basis of the rights holder's interest in the information." One might understand that he cannot copy and reproduce for sale the program that he has just licensed for use from the creator; but is he also similarly restricted by the work he produced as a result of implementing the program? The text or image or program is, one could argue, information that he would be incorporating into his work product.

Section 308 deals with the duration of contract. If the agreement is silent, then it will be deemed "enforceable for a time reasonable in light of the licensed subject matter and commercial circumstances". Given the speed of light by which computer programs and applications evolve, it may be more prudent to not include a date. But that is disconcerting for most lawyers. Again, it invites uncertainty.

Warranties are addressed in Section 4, and the entire topic is deserving of its own article. If the licensor is a merchant, then it delivers the product free from interference, a species of quiet title. If, however, the licensee has provided all the specs, then there is no protection. In fact, the licensee holds the licensor harmless. The warranty of non-infringement may be, disclaimed by express language, such as "There is no warranty against interference with your enjoyment of the information or against infringement", or words of similar consequence. This disclaimer option exists with respect to implied warranties, as well.

Absent a disclaimer, the licensor promises that the computer program is fit for the ordinary purposes for which such computer programs are used; the program is adequately packaged, the number and quality are as ordered and labeled. Sec. 403. There is also an implied warranty for informational content, which can be disclaimed and requires a showing of reliance, by the licensee, on this information content expertise. Disclaimer can be express, or by course of performance or usage of trade. There is no warranty on information content if that content is published, or the licensor is merely a conduit for distribution. The "if published" provision is intimidating to a potential purchaser. It makes sense in theory, but whether the "information" is already published may not be readily discernible. Sec. 404 Remedies are limited. Sec. 405.

Performance is addressed at Section 601, et seq. This section also contains the controversial self-help provisions, labeled as "automatic restraint": This allows the licensors to program an application to stop working at a given date or event. The licensee is not responsible for any damages caused by applying the self-help provisions. Breach implications are set forth at Section 701 et seq, with remedies at Part 8. The extensive provisions within each section mentioned in this paragraph deserve detailed treatment, and will be address in the next issue, along with insurance coverage for hardware, software, and data loss claims.

Endnotes

1. Compare this with the negligence and burden of proof charges under New York's Pattern Jury Instruction (PJI 1:60, 1:64, 2:10). "Clear and convincing evidence" means evidence that satisfies you that there is a high degree of probability that, for example, the defendant acted recklessly.
2. The issue of foreseeability also bears the clear and convincing burden.
3. The term "economic loss" means "any damages other than damages arising out of personal injury or damage to tangible property"; and "includes, but is not limited to, damages for lost profits or sales, for business interruption, for losses indirectly suffered as a result of the defendant's wrongful act or omission, for losses that arise because of the claims of third parties, for losses that must be pleaded as special damages, or for items defined as consequential damages in the Uniform Commercial Code or analogous State commercial law."

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This is an excerpt from Catherine Habermehl and Daniel Gerber, *The New Y2KAct and Y2K Act Insurance Implications*. Reprinted with permission from the Winter 2000 issue of the *Journal of Insurance Coverage.*

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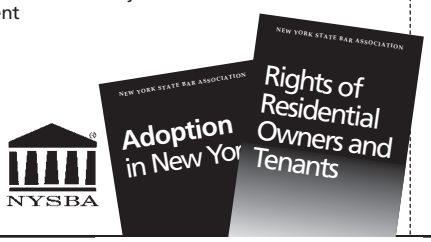

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MK019

Important Recent Cases

The following Important Recent Cases, a regular feature of the *TICL Journal*, was prepared by Martin M. McGlynn of Klein, DiSomma & McGlynn, New York City. It was edited by Co-Editor of the *Journal*, Kenneth L. Bobrow of Felt, Evans, Panzone, Bobrow & Hallak, LLP, Utica, New York.

APPEAL—FAILURE TO PERFECT FIRST APPEAL

In ***Rubeo v. National Grange Mutual Insurance Co.***, 93 N.Y.2d 750, 697 N.Y.S.2d 866 (1999), the Court of Appeals held that plaintiff's abandonment of an appeal, which he took before the trial court granted re-argument of the order appealed from, warranted dismissal of a second appeal which he took after the trial court granted re-argument and adhered to the order, where both appeals raised the same issue. The court said that CPLR 5517, which ensures that an appeal remains viable when the trial court grants re-argument of the order appealed from and then adheres to the order, was not intended to permit the litigants to engage in the dilatory practice of allowing an appeal to be dismissed for want of prosecution and then later pursuing a second appeal on the same issue.

DISCLOSURE—EXPERT WITNESS INFORMATION

In ***Cutsogeorge v. Hertz Corp.***, 264 A.D.2d 752, 695 N.Y.S.2d 375 (1999), the Second Department held that CPLR 3101(d)(i), which governs disclosure of expert witness information, does not require a party to respond to a demand for expert witness information at any specific time, nor does it mandate that a party be precluded from offering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful nondisclosure and a showing of prejudice by the opposing party.

INDEMNITY—ATTORNEY FEES

In ***Milani v. Broadway Mall Properties, Inc.***, 261 A.D.2d 370, 689 N.Y.S.2d 203 (1999), the Second Department held that a broad indemnification provision of a contract entered into between a crane service and a steel corporation included attorney fees, even though the provision did not expressly mention attorney fees, and the crane service was entitled to contractual indemnification for its expenses in defending a personal injury action.

In ***Reynolds v. Ciminelli-Walbridge***, 261 A.D.2d 839, 689 N.Y.S.2d 592 (1999), the Fourth Department held that a third-party defendant was responsible for attorneys fees, costs, and disbursements of third-party plaintiffs, even though there was no money judgment because the third-party defendant had entered into a settlement agreement that absolved third-party plaintiffs from all liability, where the cross-motions of the third-party plaintiffs for summary judgment seeking common-law indemnification from the third-party defendant were granted.

INDEMNITY—CONDITIONAL JUDGMENT

1. Contractual

2. Common Law

In ***Dinino v. D.A.T. Const. Corp.***, 700 N.Y.S.2d 24 (1999), the First Department held that primary defendants in an action arising from a construction accident were entitled to a conditional judgment on their third-party claim against a subcontractor for contractual indemnification, where there was no evidence of negligence on the part of the primary defendants. However, the court also held that the primary defendants were not entitled to common law indemnification from the subcontractor, even though there was no evidence of negligence on the part of the primary defendants, since more than one party could have been responsible for the injury.

In ***Taddeo v. 15 West 72nd Street Owners Corp.***, 701 N.Y.S.2d 643 (2000), the Second Department held that although liability had not been determined in the case, the motion for summary judgment on the third-party complaint for common-law indemnification was not premature and could be granted conditionally.

INDEMNITY—LABOR LAW

In ***Perez v. Spring Creek Associates, L.P.***, 696 N.Y.S.2d 468 (1999), the Second Department held that the owners of a building where a worker fell from a stepladder while scraping an exterior were entitled to full indemnification from the worker's employer, after being found vicariously liable on a Labor Law § 240(1) claim, even though the owners periodically inspected the work to make sure it was proceeding on schedule, because the owners did not supervise the worker's efforts or the construction procedures employed by the workers.

INSURANCE—ADDITIONAL INSURED COVERAGE

In ***Consol. Edison v. U.S. Fidelity & Guar.***, 697 N.Y.S.2d 620 (1999), the First Department held that Con Edison's settlement liability to an employee of the utility's excavation contractor for injuries allegedly caused by the utility's negligent placement of a barricade arose out of the contractor's "work" for the utility, triggering

coverage for the utility under an additional insured endorsement to the contractor's liability policy, even if the dismissal of the utility's third-party claim against the contractor supported an implication that the utility was negligent in maintaining an unsafe workplace for the contractor's employees.

In ***Eagle Ins. Co. v. Rite-Way Auto School,*** 263 A.D.2d 526, 693 N.Y.S. 2d 213 (1999), the Second Department held that the insurer of a driving school was obligated to defend and indemnify the school and its driving instructor, an additional insured, in a lawsuit arising from an accident in which a student was involved while driving one of the school's automobiles, even though the schools alleged liability was based on a claim of negligent supervision. The court said that the policy applied to injuries "resulting from the ownership, maintenance or use" of a covered automobile, and while the theory of negligence was relevant to the school's liability, the operative fact giving rise to any recovery was the student's operation of the school's automobile.

In ***Maggio v. Frank Mercogliano, Inc.,*** 262 A.D.2d 612, 693 N.Y.S.2d 609 (1999), the Second Department held that a catering company's liability policy, under which the owner of catering facilities leased by the catering company was named as an additional insured with respect to liability arising out of the ownership, maintenance, or use of the leased premises, provided coverage to the owner on a guest's claim for injuries sustained on the driveway of the facility.

In ***Petracca & Sons, Inc. v. Capri Const.,*** 264 A.D.2d 829, 695 N.Y.S.2d 403 (1999), the Second Department held that a jury verdict establishing that a worker's injuries did not arise from a subcontractor's work for a contractor precluded coverage for the contractor against the personal injury action under an additional insured endorsement to the subcontractor's liability policy (*citing* ***N. Kruger, Inc v. CNA Ins. Co.,*** 242 A.D.2d 566). The court also held that the subcontractor was not liable to the contractor for breach of the insurance procurement provisions of the subcontract in connection with the contractor's lack of coverage for an injured worker's suit, where the suit did not arise out of activities covered by the subcontract.

INSURANCE—ADDITIONAL INSURANCE COVERAGE

1. **Primary-Excess**
2. **Coinsurance**
3. **Exclusion For Additional Insured's Actual Negligence**

In ***Maxwell v. Toys "R" Us, NY Ltd.,*** 702 N.Y.S.2d 651 (2000), the Second Department held that coverage provided under the insurer's policy with a subcontractor was primary as to the general contractor and the property owner, where the policy contained an additional insureds endorsement providing that any coverage provided thereunder would be excess over any other insurance available to the additional insured unless the contract specifically called for it to be primary and the subcontract required the subcontractor to procure primary insurance covering the general contractor and the owner. The court also held that the insurer which issued the policy to the general contractor was a coinsurer along with the subcontractor's insurer for damages arising out of an accident involving the subcontractor's employee, where the employee's accident arose from the contractor's work for the property owner and the contractor's policy contained a blanket additional insured endorsement covering liability arising out of the work for the property owner.

In ***Pavarini Construction Co., Inc. v. Liberty Mutual Insurance Company,*** (2000 WL 280628), the First Department held that the underlying complaint which alleged bodily injury sustained by the primary insured's employee when he fell down a stairway, clearly fell within the general scope of the policy's coverage for bodily injury arising out of the primary insureds' work for the additional insureds. However, the court said that whether the underlying plaintiff's injuries came within the policy's exclusion for injuries caused by the additional insureds' negligence was a question that must await a determination of liability in the underlying action, since the complaint set forth claims pursuant to, for example, Labor Law § 240(1), under which each of the additional insureds could be held liable despite no showing of any negligence on their part contributing to the allegedly defective stairway.

INSURANCE—TIMELY NOTICE—ADDITIONAL INSURED

In ***American Manufacturers Mut. Ins. Co. v. CMA Enterprises, LTD,*** 246 A.D.2d 373, 667 N.Y.S.2d 724 (1998), the First Department held that the insureds' delay in giving its liability insurer notice of the underlying claim was unreasonable as a matter of law, relieving the insurer of any obligation to defend and indemnify them, where notice was first given in the summons and complaint served in the insureds' declaratory judgment action against the insurer nine months after commencement of the underlying action and two years after the insureds first learned of the property damage asserted in the underlying action. The court said that where the additional insureds under a liability policy had an independent obligation to give the insurer timely written notice of the underlying claim against them, it was irrelevant whether the insured acquired actual knowledge of the occurrence from the primary insured or from another source.

In ***Rosen v. City of New York*****,** 245 A.D.2d 202, 666 N.Y.S.2d 594 (1997), the First Department held that notice given by the primary insured to the liability insurer was applicable to the additional insureds. The insurer disclaimed coverage of the additional insureds before they had asserted any claims against the primary insured. The court noted that the insured failed to demonstrate any prejudice attributable to the additional insureds' late notice or other sound reason for excusing performance.

ANTI-SUBROGATION RULE—INSURED CONTRACT

In ***Antonitti v. City of Glen Cove*****,** 698 N.Y.S.2d 722 (1999), the Second Department held that the anti-subrogation rule barred a city from filing a third-party complaint for indemnification against its construction contractor in an action in which an employee of the contractor was seeking to recover for work-site injuries, where the city and the contractor were both insured under the same liability policy and the contractor was potentially covered for the indemnity claim insofar as the contract between the city and the contractor satisfied the "insured contract" exception to the policy's employee injury exclusion. The court said however, to preserve the city's rights to recover losses for which it was not actually compensated by the insurer, the indemnification claims would be dismissed pro tanto to the extent of payments actually made by the insurer.

INSURANCE—COVERAGE—AMBIGUITY IN POLICY

In ***Allstate Ins. Co. v. Young*****,** 265 A.D.2d 278, 696 N.Y.S.2d 189 (1999), the Second Department held that while the failure to issue a timely disclaimer does not create coverage where none otherwise exists, the terms of a personal liability umbrella policy containing an alleged chauffeur exclusion were, at best, ambiguous as to whether they applied to a motor vehicle accident involving the insured, and, accordingly, the ambiguity had to be construed against the insurer and the policy deemed to provide coverage for the accident.

INSURANCE—BAD FAITH

In ***Ansonia Assoc. v. Public Serv. Mut. Ins.*****,** 257 A.D.2d 84, 692 N.Y.S.2d 5 (1999), the First Department held that the public policy prohibition against liability coverage for punitive damages (*see* ***Home Ins. Co. v. American Home Prods. Corp.*****,** 75 N.Y.2d 196), does not protect a liability insurer from being held in bad faith for exposing its insured to a potential award of punitive damages by refusing to settle a claim within coverage limits before trial, even if the potential exemplary award far exceeds the potential compensatory award. The court said that, in fact, a liability insurer's cavalier indifference to its insured's exposure to potentially ruinous punitive damages involved the insurer in a clear conflict of interest, and amounted to the application of economic duress. The court said that where an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured party's claim, and is then entitled to reimbursement from the insurer, even though the policy purports to avoid liability for settlements made without the insurer's consent.

In ***Home Ins. Co v. United Services Auto.*****,** 262 A.D.2d 452, 692 N.Y.S.2d 121 (1999), the Second Department held that fact issues existed as to whether a liability insurer acted with gross disregard for the insured's interest in rejecting a $100,000 settlement offer in a wrongful death action against the insured that ultimately resulted in a jury verdict of $600,000, precluding summary judgment on the insured's bad faith claim against the insurer.

INSURANCE—FILED RATE DOCTRINE

In ***City of New York v. Aetna Casualty & Surety Company*****,** 264 A.D.2d 304, 693 N.Y.S.2d 139 (1999), the First Department held that the filed rate doctrine barred an action by a city and city residents alleging that the failure of the residents' insurer to reduce their rates for automobile comprehensive insurance commensurately with a sharp drop in the city's rate of automobile theft meant that the rates being charged were excessive and unfairly discriminatory, where the rates had been filed with and approved by the Superintendent of Insurance. The court said that the legal and equitable remedies sought by the complaint were both barred because granting either kind of relief would enmesh the court in the rate making process, which the Legislature had committed to the Superintendent, and would have the potential to result in discrimination against ratepayers not included in the putative class.

INSURANCE

1. Insurer's Payment Into Court of Policy Limits

2. Insurer's Tender of Payment to Plaintiff

In ***Cohen v. Transcontinental Ins. Co.*****,** 262 A.D.2d 189, 693 N.Y.S.2d 529 (1999), the First Department held that tender of payment made by defendant's insurer to a personal injury plaintiff, in whose favor a judgment had been entered, while the appeal in which plaintiff hoped to increase the damage award was pending, was not unconditional, and thus did not stop accrual of interest on the judgment, where payment was conditioned on plaintiff's signing a satisfaction of judgment, which would have required him to abandon the appeal.

In ***Hiraldo v. Kahn*****,** 262 A.D.2d 607, 693 N.Y.S.2d 612 (1999), where a motorist against whom a judgment of

$1.3 million had been entered in an action arising from an automobile accident moved for leave pursuant to CPLR 2601(a) allowing his insurer to deposit the limit under the insurance policy into the court, the Second Department held that that the insurer was properly allowed to pay into court the policy limit of $300,000, thus discharging it from any further liability.

JUDGMENT—FEDERAL—DISMISSAL FOR WRONGFUL ADMISSION OF EXPERT TESTIMONY

In ***Weisgram v. Marley Co.***, No 99-161, a unanimous U.S. Supreme Court held that appellate courts have the authority to enter judgment as a matter of law for the trial loser in cases in which, after excising the erroneously admitted expert testimony, there is insufficient evidence to support the jury's verdict. The federal appeal circuits had split over whether the decision to enter judgment as a matter of law should be based on the record as it stood at the close of trial or shorn of the wrongly admitted testimony. This case involved a claim of a defect in a baseboard heater which resulted in a fire that killed the deceased plaintiff. The trial judge admitted expert testimony which was challenged by defendant and on appeal found unreliable and denied a new trial and directed judgment for defendant.

NEGLIGENCE—ABUTTING LANDOWNER—ICE AND SNOW

1. Sidewalk

2. City-Owned Parking Lot

3. Voluntary Removal of Snow

In ***Bautista v. City of New York*,** 700 N.Y.S.2d 56 (1999), the Second Department held that an adjacent landowner was not liable for injuries sustained by a pedestrian who slipped and fell on accumulated ice and snow on a public sidewalk, where there was no evidence that any action on the part of the landowner, including snow removal efforts, made the condition of the sidewalk more hazardous.

***Blum v. City of New York*,** 700 N.Y.S.2d 65 (1999). A property owner whose land abuts a public sidewalk does not owe a duty to the public to maintain the sidewalk in a safe condition by removing the natural accumulation of snow and ice. Although an abutting landowner will be responsible for injuries occurring on a sidewalk which he puts to a special use, such as a driveway, the plaintiff must prove that the special use caused a defective condition and that it was a proximate cause of his or her accident. In this case the Second Department held that an adjacent landowners' driveway, which traversed a public sidewalk, did not cause the allegedly hazardous condition created by accumulated ice and snow on the sidewalk, and thus neither the landowners nor their commercial tenant were liable for injuries sustained by a pedestrian who slipped and fell while walking on a public sidewalk.

In ***Oles v. City of Albany*,** 267 A.D.2d 571, 699 N.Y.S.2d 202 (3d Dep't 1999), the Third Department held that any benefit derived by an abutting landowner and his commercial tenant from a city-owned parking lot was insufficient to trigger a special purpose exception to the general rule of non-liability of abutting owners for accidents occurring on public property, and thus neither the landowner nor the tenant was liable for injuries sustained by a pedestrian who fell on accumulated ice in the parking lot. The court also held that the conduct of the abutting landowner and his commercial tenant in voluntarily undertaking to remove snow from the parking lot did not render them liable because the record contained no competent evidence that they created a dangerous condition.

NEGLIGENCE—ICE AND SNOW ON-GOING STORM

1. Shopping Center

2. Dripping Snow From Canopy

***Lyons v. Cold Brook Creek Realty Corp.*,** 700 N.Y.S.2d 603 (2000). Landowners have a reasonable period of time to correct storm-related dangerous conditions after the cessation of a storm, and liability will not be imposed upon a landowner for injuries caused by a hazardous condition on the property unless the landowner had actual or constructive notice of the hazard. In this case, the Third Department held that the owner of a shopping center was not liable under the "storm in progress" doctrine for injuries sustained by a pedestrian who slipped and fell on a sidewalk during a snowstorm, where there was no evidence, other than the pedestrian's unsupported speculation and conjecture, that her fall was caused by anything other than a half-inch of snow which had accumulated on the sidewalk during the storm. The court also held that the owner had no actual or constructive notice of the allegedly dangerous condition created by melted snow dripping from a canopy over the sidewalk, and thus the owner was not liable for injuries sustained by the pedestrian who claimed that she slipped and fell due to ice and water which had accumulated under the canopy.

PREMISES—OUT OF POSSESSION

Owner—Ice and Snow

***Hinds v. Consolidated Rail Corp.*,** 263 A.D.2d 590, 693 N.Y.S.2d 284 (1999). A lessor out-of-possession is not liable for injuries resulting from the condition of the premises, since liability is an incident of occupation and

control. In this case, the Third Department held that the landlord, under the terms of the lease, retained no meaningful control over the leased premises, and thus was not liable for injuries sustained by a worker when he slipped on a accumulation of snow, even though the lease permitted the landlord to enter the premises at any time to make inspections and repairs, and gave the landlord the right to control the placement of signs on the premises.

In ***Quiles v. 200 West 94th Street Corp.***, 262 A.D.2d 169, 692 N.Y.S.2d 59 (1999), the First Department held that a pedestrian did not establish in a slip and fall case that a snow-removal attempt by the landlords made the sidewalk more dangerous, where the landlords were out-of-possession landlords of a delicatessen premises and the lease agreement with the tenant delicatessen specifically provided that the tenant would be responsible for keeping the sidewalk and the curb in front of the delicatessen free from snow and ice. The court said that the landlord's admission that they had routinely undertaken snow removal efforts at the residential entrance to the building did not establish that the landlord made the separate entrance to the delicatessen more dangerous. The court also held that a lease provision giving the landlords a right to re-entry with respect to permanent structures did not create liability, where the lease expressly provided that the tenant would be responsible for snow removal.

NEGLIGENCE—FOLLOWING SPECIFICATIONS—REPAVING ROAD

In ***Sipourene v. County of Nassau***, 698 N.Y.S.2d 705 (1999), the Second Department held that a contractor which had followed county specifications and used 1A asphalt when it repaved a road was not liable to a motorist whose vehicle skidded off the road and collided with a tree about ten years later, allegedly because the proper coefficient of friction had not been maintained for those ten years, absent any evidence that the contractor's work or materials had been deficient or that any standard required the pavement to retain the proper coefficient of friction for ten years.

NEGLIGENT HIRING—ASSAULT BY SECURITY GUARD

Honohan v. Martin's Food, 255 A.D.2d 627, 679 N.Y.S.2d 478 (1998). A claim based on negligent hiring and supervision requires a showing that defendants knew of the employee's propensity to commit the alleged acts or that defendants should have known of such propensity had they conducted an adequate hiring procedure (***Ray v. County of Delaware***, 239 A.D.2d 757). In this case, the Third Department held that a retailer was not liable, under a negligent hiring theory, for a security guard's physical and sexual assault of a patron detained as a suspected shoplifter, where the employer had checked the security guard's references prior to hiring him, and the employer had not received any prior complaints concerning the security guard's conduct, and the security guard had received favorable employment reviews.

NEGLIGENCE—LABOR LAW

1. Activity

2. Directed Verdict on Liability

3. Recalcitrant Worker

In ***Holt v. Welding Services, Inc.***, 264 A.D.2d 562, 694 N.Y.S.2d 638 (1999), the First Department held that whether injuries sustained by an employee of a contractor, which was hired to preheat generators at a nuclear power plant in connection with the repair of welds, while the employee was working from a scaffolding erected around the generator constituted an elevation-related injury caused by a defect in the safety equipment required by § 240(1), was an issue for the jury. The court said that a directed verdict was only appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the non-moving party.

In ***Hernandez v. Board of Educ. of City of New York***, 264 A.D.2d 709, 694 N.Y.S.2d 752 (1999), the Second Department held that a field surveyor injured in a fall from a ladder while he was attempting to count and/or measure steam traps was not engaged in an enumerated activity protected under the Labor Law.

In ***Mills v. Niagara Mohawk Power Corp.***, 262 A.D.2d 901, 692 N.Y.S.2d 493 (1999), the Third Department held that a genuine issue of material fact as to whether a telephone linesman who fell from a utility pole was a recalcitrant worker, due to his failure to use safety equipment provided by his employer, precluded summary judgment in favor of the linesman on his § 240(1) claim against the owner of the pole. Plaintiff had readily admitted that his employer supplied him with materials and safety equipment, including a safety belt with a strap, to be utilized when working aloft. He was wearing his safety belt when he ascended the ladder to cut the wires but opted not to use it for several reasons, including the brief time he expected to be aloft and an insufficient amount of space between the old and new poles within which to belt off. The employer's head of safety testified that plaintiff could have tied off to a cable strand which crossed in front of him, or tie off to the ladder itself or placed his safety strap around the pole. He also established that plaintiff was required to attend mandatory monthly safety meetings at which safety topics were discussed and that the employer mandated that its employees utilize safety belts while working at a height.

NEGLIGENCE

1. Labor Law § 200-Conveyor Belt

2. Labor Law § 241(6)-Indus. Code § 23-1.13(b)(5)

In ***Zak v. United Parcel Service*****,** 262 A.D.2d 252, 692 N.Y.S.2d 374 (1999), the First Department held that a premises owner could not be held liable, on a theory of a breach of § 200 of the Labor Law, with respect to injuries a contractor's employee suffered when the electric power was accidentally restored to the conveyor belt, where the contractor had a long-standing contract for service and repair of conveyor belts and the owner exercised no supervisory control over the activity that brought about the injury. The court also held that the premises owner could not be held liable for a breach of Labor Law § 241(6) on the basis of § 23-1.13(b)(d) of the Industrial Code, which refers only to electrical shocks to a worker by the inadvertent closing of an open switch or circuit interrupting device.

NEGLIGENCE—LABOR LAW § 241(6)

Indus. Code Reg. 12 N.Y.C.R.R. 23-1.7(e)(1) and(2)

In ***Muscarella v. Herbert Construction, Inc.*****,** 265 A.D.2d 264, 697 N.Y.S.2d 35 (1999), the First Department held that a construction company was not liable, under Labor Law § 241(6), for injuries sustained by a worker when he tripped over a metal grate surrounding a tree as he walked from a job site to a construction trailer, since the open area in which the worker tripped and fell did not constitute a sort of passageway, floor, platform, or similar working surface contemplated by Industrial Code Regulations 12 N.Y.C.R.R. 23-1.7(e)(1) and (2).

NEGLIGENCE—LABOR LAW—COVERED PERSON

1. Labor Law § 241(6)

2. Labor Law § 200—Building Employee

In ***Paradise v. Lehrer, McGovern & Bovis, Inc.*****,** 700 N.Y.S.2d 25 (1999), the First Department held that a building manager was not hired by either the building owner or the general contractor to perform construction work on the building, and was not otherwise permitted or suffered to work on the renovation of the building, and thus the building manager was not entitled to recover under Labor Law § 241(6) for injuries he sustained when he collided with a pile of construction debris while attempting to move a pallet of 50-pound bags of de-icing material at the behest of a carpenter who wished to work on an area of the building where the de-icer was stored. However, the court also held that since the protections afforded a worker under Labor Law § 200 are not limited to construction work and apply to all work places, a genuine issue of material fact existed as to whether the general contractor was negligent in failing to remove the debris from the site of the building renovation, despite requests from the building manager that he do so, precluding summary judgment on the action brought by the building manager under Labor Law § 200.

NEGLIGENCE—LABOR LAW—FALL ON A DOLLY

1. § 240—Height

2. § 241(6)-Passageway—Ind. Code § 23-1-7(e)(1,2)

3. § 200—Stepping on Dolly

In ***Conway v. Beth Israel Medical Center*****,** 262 A.D.2d 345, 691 N.Y.S.2d 576 (1999), the Appellate Division, Second Department, held that the work of a construction worker injured in a fall when he stepped on a dolly in a building did not involve an elevation-related risk, thus precluding the imposition of liability on the building owner under § 240(1) of the Labor Law. The court also held that a storeroom in which the construction worker was injured in a fall when he stepped on a dolly was not a "passageway" or "working area," nor was the dolly a "scattered tool"within the meaning of Industrial Code § 23-1.7(e)(1,2). Finally, the court held that an owner's duty to provide a safe workplace pursuant to § 200 of the Labor Law did not include protecting workers from dangers which are readily apparent, such as a danger of injury of injury from a fall when stepping on a dolly.

NEGLIGENCE—LABOR LAW § 240(1)—HEIGHT

In ***Hatcher v. Ogden Martin Systems of Babylon, Inc.*****,** 264 A.D.2d 503, 694 N.Y.S.2d 474 (1999), where plaintiff was injured when hot ash fell on him while he was removing ash build-up from inside of a "hopper" at the defendant's recycling facility, the Second Department held that § 240(1) of the Labor Law did not apply to this case because plaintiff's injury was not the result of a gravity-related hazard.

In ***Grant v. Reconstruction Home Inc.*****,** 699 N.Y.S.2d 193 (1999), the Third Department held that injuries suffered by a roofer when he slipped as he stepped off a dormer roof onto the wet surface of an adjoining peak roof and fell backward onto the dormer roof, involved a fall on the same level as his work site, and thus did not result in an elevation-related hazard within § 240(1) of the Labor Law, even if the roofer ultimately ended up on the flat surface of the roof immediately below the dormer window, in the absence of any proof that any of his injuries were attributable to an elevation differential between the work site on the dormer roof and the lower level of the flat roof.

In ***Puckett v. County of Erie*****,** 262 A.D.2d 964, 693 N.Y.S.2d 780 (1999), the Fourth Department held that an accident in which the operator of a crane was injured when a 50-foot by 20-foot steel plate he was hoisting, which was standing in a vertical position on its edge, fell onto the cab of the crane, did not result from an elevation-related hazard, and thus did not provide the basis for recovery under § 240(1). The court said that while the force of gravity may have caused the plate to fall, it was never elevated at a level higher than the operator, and the work of maneuvering the plate was performed at approximately the same level where the operator was positioned. The court said that to the extent that its decision in ***Smith v. Benderson*****,** 639 N.Y.S.2d 600, was to the contrary, it was no longer to be followed. In the ***Smith*** case the Fourth Department held that § 240(1) applied to render defendants liable when a payloader's hydraulically operated bucket malfunctioned while it was positioning a mobile home unit over a work site, causing the unit to fall on the worker's thumb and index finger since the bucket was the functional equivalent of a hoist and the malfunctioning of the bucket resulted in the failure to protect the worker from injury.

In ***Webster v. Wetzel*****,** 262 A.D.2d 1038, 691 N.Y.S.2d 848 (1999), the Fourth Department held that an accident in which the rear gate of a dump truck gave way and released ten tons of stone onto a worker did not involve an elevation-related hazard covered by § 240(1) of the Labor Law.

NEGLIGENCE

1. Labor Law § 240(1)-Inadequate or Missing Safety Equipment

2. Reckless or Unforeseeable Conduct-Superceding Cause

In ***Egan v. A.J. Const. Corp.*****,** 262 A.D.2d 80, 691 N.Y.S.2d 495 (1999), the First Department held that § 240(1) of the Labor Law was inapplicable in a case involving a worker who injured his back when he jumped six feet from a stalled freight elevator since the section applied only to workers injured as a result of inadequate or missing safety equipment at elevated work sites. However, the court also held that the jump was not so reckless or unforeseeable as to constitute a superseding cause of his injury as a matter of law, where the worker's jump was preceded by uneventful jumps of 25 or 30 other passengers, there was another person standing below to assist in avoiding any danger, there was no evidence that the elevator operator did or said anything to stop anyone from jumping, and there was no evidence of any policy or practice establishing that any assistance would arrive shortly and that the workers should wait for help.

NEGLIGENCE—Labor Law § 240(1)

1. Ladder

In ***Anderson v. Schul/Mar Const. Corp.*****,** 258 A.D.2d 605, 685 N.Y.S.2d 753 (1999), the Second Department held that the evidence supported the jury's conclusion that the improper placement of a ladder was not a proximate cause of the injury sustained by a worker who fell while descending the ladder, as required to support imposition of liability on the site owner, since one of the employees at the work site testified that he observed the worker descend the ladder with coffee and a donut in hand, and that as the worker was going down the ladder he "misfooted" and fell backwards. [In this case tried in Supreme Suffolk, Judge Tanenbaum had set aside the jury's verdict on liability].

In ***Guzman v. L.M.P. Realty Corp.*****,** 262 A.D.2d 99, 691 N.Y.S.2d 483 (1999), where plaintiff testified at a deposition that after his fall, he noticed one of the ladder's legs was bent, but defendants challenged that allegation with photographic evidence that the legs of the ladder were still quite straight, with the swiveling rubber antiskid footpads still intact, and further offered the testimony of the subcontractor's president to the effect that plaintiff had been observed "skipping" the ladder, i.e., trying to move it by jerking his body, the First Department held that the hearsay observations of plaintiff's activities on the ladder, accompanied by the photographic evidence contradicting plaintiff's assertion of defective equipment, provided a plausible defense theory, supported by evidence, which thus placed plaintiff's credibility in issue, rendering the action inappropriate for summary disposition in his favor.

In ***Ross v. Threepees Realty Corp.*****,** 258 A.D.2d 575, 686 N.Y.S.2d 448 (1999), the Second Department held that injuries sustained by a worker when he fell from a ladder after being stung by a bee while caulking a leaking window were the sole result of his reaction to the bee sting, rather than any purported violation of § 240(1) of the Labor Law.

In ***Vouzianas v. Bonasera*** 282 A.D.2d 553, 693 N.Y.S.2d 59 (1999), the Second Department held that the lower court properly determined that there were triable issues of fact as to whether there was a violation of Labor Law § 240(1) and, if so, whether it proximately caused the accident, since a question of fact existed as to whether the injured plaintiff's conduct in disassembling the extension ladder at issue, and in using only the top half which lacked non-skid pads, constituted an unforeseeable, independent, intervening act which was a superseding cause of the accident.

In ***Adams v. Owens-Corning Fiberglass Corp.*****,** 260 A.D.2d 877, 688 N.Y.S.2d 788 (1999), where an electrician

fell from a ladder while working on the exterior of defendant's building, the Third Department denied plaintiff's motion for partial summary judgment as to the Labor Law § 240(1) cause of action, finding that plaintiff directed a co-worker to kick the ladder out from under him to prevent his electrocution.

In ***Briggs v. Halterman***, 699 N.Y.S.2d 795 (1999), the Third Department held that questions of fact existed as to whether a worker who was installing gutters on a commercial property simply fell from a ladder which did not slip or otherwise fail, whether the ladder did indeed slip and fall over, or whether the worker fell because he was hanging onto a light fixture affixed to the building which broke loose, precluding summary judgment for the worker on a Labor Law § 240(1) claim against the property owner. The court said that for purposes of a claim under Labor Law § 240(1) a mere fall from a ladder or other similar safety devise that did not collapse or otherwise fail is insufficient to establish that the ladder did not provide appropriate protection to the worker.

NEGLIGENCE—LABOR LAW § 200—MANHOLE COVER

In ***Cuartas v. Kourkoumelis*****,** 696 N.Y.S.2d 475 (1999), the Second Department held that a landowner was not liable under § 200 of the Labor Law, or under a common law negligence theory, to a construction worker who was injured when a manhole cover to a retention tank fell on his foot after he used a crowbar to loosen it, since there was no evidence the manhole cover was in a dangerous or defective condition, and the owner's direction to go to the tank, lift up the cover, and remove debris did not show control over the manner in which the worker performed that task.

NEGLIGENCE—LABOR LAW § 241(6)—PERSONS COVERED SECURITY GUARD OR MAINTENANCE WORKER

In ***Blandon v. Advance Contracting Co., Inc.*****,** 264 A.D.2d 550, 695 N.Y.S.2d 36 (1st Dep't), where there was a verdict of $3,236,653 reduced to $3,074,820 for 5% comparative negligence, the First Department reversed the verdict and dismissed the complaint, holding that a person employed in a building as a security guard or maintenance worker was not protected by Labor Law § 241(6), and thus, may not recover against a contractor performing renovations in the building under that statute. The court said that the statute affords protection for those actually employed to perform construction on the site (citing ***Agli v. Turner Construction Co.*****,** 246 A.D.2d 16). The Court also held that plaintiff was not entitled to an order amending the pleadings to permit him to submit a direct claim against the property owner, because as a non-appealing party, plaintiff was not entitled to seek that relief before the Appellate Division.

NEGLIGENCE—LABOR LAW § 240(1)—PERMANENT STAIRWAY

In ***Norton v. Park Plaza Owners Corporation*****,** 263 A.D.2d 531, 694 N.Y.S.2d 411 (1999), the Second Department held that a fixed, permanent staircase to an elevator machine room, upon which an elevator repairman fell, was a normal appurtenance to the building and was not designed as a safety device to protect him from an elevation-related risk, as was required to maintain a claim under § 240(1) of the Labor Law (*citing* ***Williams v. City of Albany*****,** 245 A.D.2d 916, *appeal dismissed* 91 N.Y.2d 957 [3rd Dept.]).

In ***Riccio v. Shaker Pine Inc.*****,** 262 A.D.2d 746, 692 N.Y.S.2d 189, the Third Department held that a building owner had no duty to provide planking or protective railings across an open permanent stairwell, pursuant to § 240(1) of the Labor Law.

In ***Greso v. Nichter Construction Co., Inc.*****,** 700 N.Y.S.2d 348 (1999), the Fourth Department held that Labor Law § 240(1) did not apply to a worker's fall down a permanent stairway while carrying a bolt of wall-covering, even if he could have safely performed his work with the aid of a material hoist.

In ***Sponholz v. Benderson Property Development*****,** 697 N.Y.S.2d 432 (1999), the Fourth Department held that a stairway which served as a permanent passageway between two parts of a building undergoing renovation was not transformed into a temporary tool or devise for providing access for providing access to an elevated work site within the meaning of § 240(1) of the Labor Law just because it was to be removed during the renovation, and thus, a worker who fell 12 to 15 feet when the stairs collapsed beneath him could not recover damages under § 240(1), *citing* ***Williams v. City of Albany*****,** 245 A.D.2d 916. Two judges dissented stating that the ***Williams*** case relied on by the majority was contrary to the intent of the statute and therefore it is possible that the Court of Appeals may be deal with the issue.

NEGLIGENCE—LABOR LAW—PRIME CONTRACTOR

In ***Hornicek v. William H. Lane, Inc.*****,** 265 A.D.2d 631, 696 N.Y.S.2d 557 (1999), the Third Department held that a general construction prime contractor on a school construction project was not liable, under the Labor Law, to an electrician employed by the electrical prime contractor for injuries he sustained when a step-ladder that he was standing on slipped and tipped over to the side, where the general contractor had no control over any aspect of the electrician's work, all such control rested in a "clerk of the works" employed by the owner, the elec-

trician was acting under the sole direction of his immediate supervisor when the accident occurred, the ladder was owned by the electrical contractor and the electrician had placed the ladder partially in a trench that had been dug by his co-employees and contained several inches of ice.

NEGLIGENCE—LABOR LAW—PROXIMATE CAUSE

In ***Sopha v. Combustion Engineering, Inc.,*** 261 A.D.2d 911, 690 N.Y.S.2d 813, the Fourth Department held that genuine issues of fact as to whether an asbestos abatement worker and other employees had been instructed not to use scaffolding as means of egress, whether they nevertheless commonly used the scaffolding in that manner, and whether there were stairs available for access to the second story work area precluded a summary judgment determination that the worker's own action was the proximate cause of his injuries (*citing* ***Weininger v. Hagedorn & Co.,*** 91 N.Y.2d 958, 672 N.Y.S.2d 840).

NEGLIGENCE—LABOR LAW—RECALCITRANT WORKER

In ***Lozada v. State,*** 700 N.Y.S.2d 38 (1999), the Second Department held that a worker who conceded that he had been told repeatedly to wear a safety belt when working on an elevated truck platform, and that safety belts were located in a storage drawer under the platform, was barred by the recalcitrant worker defense for recovering under Labor Law § 240(1) for injuries he sustained in a fall from the platform while not wearing a safety belt. The court said that the recalcitrant worker defense is premised upon the principal that the statutory protection of Labor Law § 240(1) does not extend to workers who have adequate and safe equipment available to them but refuse to use it (*citing* ***Jastrzebski v. North Shore School Dist.***, 223 A.D.2d 677, *aff'd* 88 N.Y.2d 946).

In ***Santangelo v. Fluor Constructors Intern.,*** 697 N.Y.S.2d 881 (1999), the Fourth Department held that a genuine issue of material fact existed as to whether a construction worker was wearing his safety harness and lanyard at the time he was struck by equipment and fell 53 feet at a construction site, and thus whether he was a recalcitrant worker, because he allegedly refused to tie off.

NEGLIGENCE—LABOR LAW § 240(1)—ROUTINE MAINTENANCE

In ***Cullen v. Uptown Storage Co., Inc.,*** 702 N.Y.S.2d 244 (2000), the First Department held that the replacement of ceiling tiles in a school building by maintenance mechanics employed by the city board of education was routine maintenance, and not part of the renovation work that had previously been performed by various contractors and subcontractors, or that was ongoing in other parts of the building, and thus, the maintenance mechanics did not have a claim under § 240(1) of the Labor Law.

In ***Jehle v. Adams Hotel Association,*** 264 A.D.2d 354, 695 N.Y.S.2d 22 (1999), the First Department held that an injured worker's tasks, involving or repairing relatively small components of an air conditioning unit that suffered from normal wear and tear, fell outside the purview of § 240(1) of the Labor Law.

In ***Rogala v. Van Bourgondien,*** 263 A.D.2d 535, 693 N.Y.S.2d 204 (1999), the Second Department held that a worker who fell from a ladder while installing or replacing window screens on his employer's motel was not engaged in an activity covered by § 240(1), since the worker was not making a significant physical change to the configuration or composition of the building at the time of his accident nor was he engaged in repair work (*citing* ***Joblon v. Solow,*** 91 N.Y.2d 457).

In ***Zevallos v. Treeco Plainview Limited Partnership,*** 700 N.Y.S.2d 194 (1999), the Second Department held that whether a commercial tenant's employee was examining the tenant's junction box in preparation for changing some wires which had been sparking, or investigating the cause of the sparking to determine if future maintenance was necessary, the employee's actions constituted routine maintenance and thus the employee could not recover against the building owner under § 240(1) of the Labor Law for injuries he sustained when he received an electric shock and fell to the floor from an elevated position.

In ***Goad v. Southern Elec. Intern. Inc.,*** 263 A.D.2d 654, 693 N.Y.S.2d 301 (1999), the Third Department held that a worker's replacement of a main steam safety valve at a steam co-generation facility did not constitute a "repair" or "alteration" within the meaning of § 240(1), and thus the facility's owner and operator were not liable under § 240(1) for injuries sustained by the worker when he fell from a platform to a catwalk, where the replacement of the valve was undertaken as part of routine maintenance, there was no evidence that the valve was operating improperly at the time the worker attempted to replace it, and the replacement of the valve did not entail any physical change to a structure. The court said that to constitute a "repair" under 240(1), there must be proof that the machine or object being worked upon was inoperable or not functioning properly.

In ***Noah v. IBC Acquisition Corp.,*** 262 A.D.2d 1037, 692 N.Y.S.2d 283 (1999), the Fourth Department held that

§ 240(1) of the Labor Law did not apply to a worker who was involved in routine maintenance in a non-construction, non-renovation context when she slipped while cleaning rainwater from the "Giant Slide" at an amusement park.

NEGLIGENCE—LABOR LAW § 240

1. Structure

a. Highways

b. Truck

2. Activity-Repairing Dump Truck

In ***Spears v. State*****,** 698 N.Y.S.2d 135 (1999), the Fourth Department held that a highway at grade is not a building or structure within the meaning of Labor Law § 240, and thus § 240 imposed no duty upon the owner of a highway under construction or repair. The court also held that although a dump truck may be considered a structure within the meaning of § 240, the act imposed no duty on the state toward a dump truck driver who fell from the top of his truck while attempting to repair the truck's tarpaulin retracting device in preparation for unloading asphalt at the site of a highway renovation project which his employer had contracted with the state to perform, where the state neither owned nor contracted for the repair of the truck.

NEGLIGENCE—LABOR LAW § 200—SUPERVISORY AUTHORITY OF SAFETY DIRECTOR

In ***Ricotta v. Praxis Biologics, Inc.*****,** 265 A.D.2d 878, 695 N.Y.S.2d 845 (1999), the Fourth Department held that the evidence that defendant's safety director had supervisory authority over safety standards and was authorized to stop the work of a contractor's employee if the safety director had a safety concern and the contractor failed to correct it did not establish that the defendant exercised control over the employee's work, as required to maintain claims for common law negligence and violation of § 200 of the Labor Law.

PREMISES—OUT-OF-POSSESSION LANDLORD—ASSAULT ON TENANT'S EMPLOYEE

In ***Zaglas v. Gironda*****,** 698 N.Y.S.2d 49 (1999), the Second Department held that out-of-possession commercial landlords were not liable for injuries sustained by tenant's employee when he was assaulted by masked intruders who entered the leased premises through a door which could not be locked from the inside, where, even though the landlords performed routine maintenance and were physically present on a portion of the property because their own business was located there, the landlords were not responsible under the lease for security of the premises, and did not retain control over either the warehouse or the tenant's business operations.

PREMISES—DUTY TO PROTECT VISITORS FROM CRIMINAL ACTS

In ***Mulvihill v. Wegmans Food Markets, Inc.*****,** 698 N.Y.S.2d 130 (1999), the Fourth Department held that a store owner owed no duty to protect a visitor criminally assaulted in its parking lot at 2:00 a.m. by unknown third parties where other incidents that occurred in the parking lot and store during the three years before the assault were dissimilar in nature from the violent attack upon the visitor. The court said that a landowner has no duty to protect visitors from the criminal acts of third parties unless it is shown that the landowner either knows or has reason to know from past experience that there is a likelihood of conduct dangerous to the safety of the visitor.

PREMISES—OUT-OF-POSSESSION LANDLORD—FALL THROUGH TRAP DOOR

In ***Dexter v. Horowitz Management*****,** 698 N.Y.S.2d 33 (1999), the First Department held that an out-of-possession landlord was not liable to a patron of a tenant's shop who fell through a trap door left open by the tenant, with knowledge that the patron was nearby, where the lease placed sole responsibility for maintaining the premises on the tenant and there was no evidence that the trap door itself was defective or that it created an unsafe condition.

PREMISES—OUT-OF-POSSESSION LANDLORD—GENERAL MAINTENANCE DEFECTS

In ***Del Rosario v. 114 Fifth Ave. Assoc.*****,** 699 N.Y.S.2d 19 (1999), the First Department held that an out-of-possession landlord and its managing agent were not liable to a janitor employed by a commercial tenant who slipped and fell on water that had leaked from a toilet while he was mopping a washroom floor, where the leaky toilet was not a substantial structural defect for which the landlord and the managing agent were responsible under the lease. The court said that an out-of-possession landlord with a general right of reentry is not liable for general maintenance defects.

PREMISES—*RES IPSA LOQUITUR*—FALLING PIPE

Reyes v. Active Fire Sprinkler Corp.**,** 699 N.Y.S. 391 (1999). Exclusive control of the instrumentality of injury is an essential element of the *res ipsa loquitur* doctrine (***Ebanks v. New York City Tr. Auth.*****,** 70 N.Y. 2d 621, 518

N.Y.S.2d 776). In this case, the First Department held that the property owner did not have exclusive control of the pipe that fell and struck a maintenance worker on the head, and thus the property owner was not liable, under the res ipsa loquitur doctrine, for the worker's injuries, where the fire sprinkler installation company had been working on pipe installation for several months, covering the period preceding and following the worker's accident.

PREMISES—SLIP AND FALL

In ***Bachrach v. Waldbaum, Inc.,*** 261 A.D.2d 426, 689 N.Y.S.2d 531 (1999), the Second Department held that a customer's speculation that the hazard upon which she purportedly slipped and fell was present on the floor of the supermarket for a sufficient length of time prior to the accident to permit the supermarket's employees to discover and remedy it was insufficient, for purposes of a summary judgment motion, to rebut the supermarket's prima facie showing that it had no constructive notice of the hazard.

In ***Baer v. Great Atlantic & Pacific Tea Co., Inc.,*** 264 A.D.2d 791, 696 N.Y.S.2d 58 (1999), the Second Department held that the store which neither created the hazardous condition posed by a slippery substance on its floor, nor had actual or constructive notice of such condition, was not liable for injuries sustained by a patron in a slip and fall accident. The plaintiff had contended that because she slipped in front of the bottle redemption area and had on prior occasions seen liquid drip out of bottles being redeemed by customers, the liquid upon which she slipped must have come from such a bottle. The court said that plaintiff's contention was speculative and unsupported by any evidence in the record.

In ***Bouloukos v. Vassar Brothers Hospital,*** 262 A.D.2d 342, 691 N.Y.S.2d 570 (1999), the Second Department held that the plaintiff's mere statements that she observed the floor in the hospital's lobby to be very shiny and that she believed the floor was excessively waxed did not establish the negligent application of wax or polish, as required for a negligence action against the hospital for her alleged slip and fall.

In ***Brandefine v. National Cleaning Contractor, Inc.,*** 265 A.D.2d 441, 696 N.Y.S.2d 520 (1999), the Second Department held that in the absence of evidence of a negligent application of floor wax or polish, the mere fact that a smooth floor may be shiny or slippery does not support a cause of action to recover damages for negligence, nor does it give rise to an inference of negligence. The court said that the conclusions of plaintiff's purported expert were wholly speculative, since they were not based upon an inspection of the accident site but were derived solely from plaintiff's conclusory statements that there was excessive wax on the floor.

In ***Cellini v. Waldbaum, Inc.,*** 262 A.D.2d 345, 691 N.Y.S.2d 569 (1999), the Second Department held that a store patron's mere speculation that the store should have had constructive notice of an advertising circular on which the patron allegedly slipped and fell while in the store's exit vestibule did not overcome the store's prima facie showing of lack of actual or constructive notice of the dangerous condition.

In ***Chini v. Wendcentral Corp. Inc.,*** 262 A.D.2d 940, 692 N.Y.S.2d 533 (1999), the Fourth Department held that res ipsa loquitur did not apply to injuries suffered by a restaurant customer in a fall caused by a collapsing chair, to which other restaurant patrons had access, as the restaurant's control of the chair was not sufficiently exclusive to rule out the chance that the defect was caused by an agency other than the restaurant's negligence.

In ***Cottingham v. Hammerson Fifth Avenue, Inc.,*** 259 A.D.2d 348, 687 N.Y.S.2d 45 (1999), the First Department held that the premises owner was not liable in a slip and fall action in the absence of evidence that the owner had actual or constructive notice of the wet floor. The court said that the premises owner was not affirmatively responsible for creating the wet floor where the alleged fall occurred by reason of the circumstance that, in placing mats between the door and the elevators, the owner did not have them placed along the route plaintiff chose to follow, or by reason of the owner's failure to have the lobby continuously mopped.

In ***Doherty v. Great Atlantic and Pacific Tea Co.,*** 696 N.Y.S.2d 236 (1999), the Second Department held that a store owner which neither created the hazard posed by a piece of plastic lying in its parking lot, nor had actual or constructive notice of the hazard, was not liable for injuries sustained by a patron who slipped and fell on the plastic as she was returning to her automobile. The court said that a landowner's "general awareness" that a dangerous condition might have been present is insufficient to establish constructive notice of the particular condition so as to warrant imposition of liability for an injured plaintiff's fall.

In ***Huber v. East 149th Parking Corp.,*** 698 N.Y.S.2d 16 (1999), the First Department held that plaintiff's evidence that she slipped and fell on an oil puddle in a parking garage, which puddle she had not noticed prior to her fall, although she had noticed other oil puddles at other areas of the garage, was insufficient to avoid summary judgment in favor of the defendants. The court said that the record established that defendants did not have a sufficient opportunity, with the exercise of reasonable care, to remedy the situation.

In ***Lee v. Rite Aid of New York, Inc.,*** 261 A.D.2d 368, 689 N.Y.S.2d (1999), the Second Department held that a retail store was not liable in negligence for injuries suf-

fered by plaintiff in a slip and fall on a slippery floor based on mere speculation that the floor condition was caused by improper waxing, since the plaintiff did not notice any wax buildup or observe any wax stains on her clothing after the fall. The court said that in the absence of evidence of negligent application of floor wax or polish, the mere fact that a smooth floor may be shiny or slippery does not support a cause of action for negligence.

In ***Moorman v. Huntington Hospital***, 262 A.D.2d 290, 691 N.Y.S.2d 548 (1999), the Second Department held that the hospital was not liable for injuries sustained by a pedestrian who slipped and fell on a clear substance on the floor of the hospital utility room, where there was no indication that the substance was visible, and that the substance was on the floor for a sufficient length of time prior to the accident to permit the hospital's employees to discover and remedy it.

In ***O'Rourke v. Williamson, Pickett, Gross***, 260 A.D.2d 260, 688 N.Y.S.2d 528 (1999), the First Department held that absent any claim that the building's managing agent or cleaning and maintenance contractor created or had actual notice of the one-foot-long, linear-shaped "smear" plaintiff saw after slipping and regaining his balance, and absent any evidence that there was any water on the floor near where the plaintiff slipped other than this smear, and the fact that it had been raining for several hours prior to the accident did not, without more, permit an inference of constructive notice. The court said that liability could not be predicated upon the theory of a recurring dangerously slippery condition routinely unaddressed, absent any evidence that the floor was actually slippery before plaintiff walked into the building on the day of the accident.

In ***Tkach v. Golub Corporation***, 265 A.D.2d 632, 696 N.Y.S.2d 289 (1999), the Third Department held that a grocery store neither created a hazardous condition posed by an accumulation of chicken grease on the floor in front of a cooked chicken display, nor had actual or constructive notice of the condition, and thus was not liable for the injuries sustained by a patron who slipped and fell on the grease, where a store employee checked the floor in the area every ten to 15 minutes for spills, and the employee had checked the floor approximately five minutes before the patron's accident and found no grease on the floor.

In ***Werner v. Neary***, 264 A.D.2d 731, 694 N.Y.S.2d 734 (1999), the Second Department held that the slippery nature of glossy latex paint which covered basement stairs and allegedly caused a boiler repairman to fall did not support the repairman's negligence action against the owner of the house, absent a showing that the fall was caused by a dangerous or defective condition on the basement stairway.

In ***Wodowski v. Wegmans Food Markets, Inc.***, 265 A.D.2d 819, 696 N.Y.S.2d 334 (1999), the Fourth Department held that neither the accident schedule from the store nor the store's general awareness that produce might occasionally fall to the floor was sufficient to constitute constructive notice of a recurrent dangerous condition for purposes of a negligence action brought against the store by a customer, who allegedly slipped and fell on a grape.

PREMISES—SLIP AND FALL—EXPERT AFFIDAVIT

In ***Beyda v. Helmsley Enterprises, Inc.***, 261 A.D.2d 563, 691 N.Y.S.2d 81 (1999), the Appellate Division, Second Department held that the opinion of a plaintiff's expert that there was too much "grit" on the marble floor of a hotel vestibule, based on his inspection conducted three weeks after the plaintiff slipped and fell on the floor, was without probative value in the plaintiff's personal injury action against the hotel, particularly since the plaintiff herself testified that she could feel no foreign substance on the floor after she fell on it.

In ***Mroz v. Ella Corporation***, 262 A.D.2d 465, 692 N.Y.S.2d 156 (1999), the Second Department held that observations of a hotel guest's safety expert, which were based upon an inspection made over six years after the guest's slip and fall accident, were conclusory and insufficient to establish that the hotel's failure to properly clean the bathroom floor created a dangerous condition on the date of the guest fall.

Philips v. McClellan Street Associates, 262 A.D.2d, 748, 691 N.Y.S.2d 598 (1999). An expert's affidavit proffered in opposition to a motion for summary judgment must contain more than mere conclusory assertions (***Romano v. Stanley***, 90 N.Y.2d 444). In this case, the Third Department held that the affidavit of a supermarket consultant which contained only conclusory opinions with respect to the store's deviation from an alleged industry-wide practice of displaying grapes was insufficient to raise a triable issue of fact in a personal injury action brought by a patron who slipped and fell on a grape which had rolled onto the floor from a store display.

PRETRIAL PROCEDURE—FAILURE TO PRODUCE WITNESS FOR DEPOSITION

In ***Palmenta v. Columbia University***, 698 N.Y.S.2d 657 (1999), the First Department held that defendant's single incident of noncompliance in failing to make a witness available for a deposition warranted precluding defendant from presenting testimony at trial, unless any subsequently-located witness was timely produced for a deposition, rather than striking its answer, where there

was no evidence of defendant's willfulness or bad faith and defendant's attorney presented evidence of her difficulty in locating her client. The court said that while the nature and degree of the penalty to be imposed for a discovery violation is a matter of discretion with the court, striking an answer is inappropriate absent a clear showing that the failure to comply is willful, contumacious or in bad faith.

RELEASE

In ***Chaudhry v. Garvale***, 262 A.D.2d 518, 692 N.Y.S.2d 447 (1999), the Second Department held that a motorist's contention that he did not understand, nor did he intend that the release would cover both personal injury and property damage claims against the defendant motorist with respect to an automobile collision, was insufficient to prevent enforcement of the release, where the language of the release plainly and unambiguously released all claims of any kind and plaintiff's counsel had the opportunity to negotiate the terms of the release and advise plaintiff of the consequences of its execution.

Falconieri v. A&A Discount Auto Rental, 262 A.D.2d 446, 692 N.Y.S.2d 137 (1999). The general rule is that a valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between the parties (***Thailer v. LaRocca***, 174 A.D.2d 731). In this case, the Second Department held that since the motorist willfully subscribed to the release, releasing all claims against the owner and driver of the car as to property damage and personal injury, she could not subsequently avoid the obligation by merely stating that she did not understand its terms. The court said that the motorist's mistake as to the consequences or the future course of a known injury was an insufficient basis to avoid the release.

SETTLEMENT—TIMELY PAYMENT

In ***Liss v. Brigham Park Cooperative Apartments***, 264 A.D.2d 717, 694 N.Y.S.2d 742 (1999), The Second Department held that a general release and stipulation of settlement sent by plaintiff to defendant were defective in failing to provide for release of plaintiff's Medicare lien and, thus, plaintiff was not entitled to costs, disbursements and interest for defendant's failure to timely tender a stipulated payment. The court said that since federal government had a right of subrogation and could collect the amount of the Medicare lien directly from the defendant in a personal injury action, it was incumbent upon plaintiff to provide for the release of the lien in the general release and stipulation of settlement of a personal injury action.

SUMMARY JUDGMENT—TIMELINESS

In ***Maravalli v. Home Depot U.S.A., Inc.***, 698 N.Y.S.2d 708 (1999), the Second Department held that the lower court properly exercised its discretion in entertaining the defendant's motion for summary judgment, even though the motion was not made within the time constraints imposed by the court's preliminary conference order. The court said that the mere fact that a summary judgment motion is made on the eve of trial is not in and of itself sufficient reason for denying the motion, especially in a case such as this where the motion is so clearly meritorious.

WORKERS' COMPENSATION—RIGHT OF NEW JERSEY WORKERS' COMPENSATION CARRIER TO RECOVER LIEN

In ***New Jersey Manufacturers Ins. Co., v. Steckert***, 264 A.D.2d 314, 694 N.Y.S.2d 39 (1999), the First Department held that the claim of a New Jersey workers' compensation insurer, seeking to collect benefits mistakenly paid to an injured resident of New York, who was not the insured's employee, implicated New York insurance law, as applied to the resident's settlement of his underlying tort claims, rather than the allocation of liability under the New Jersey statute allowing a statutory lien for two-thirds of workers, compensation benefits paid to an injured employee by a third party. The court noted that this was a case of an out-of-state insurer essentially seeking rights with respect to a New York judgment that would be unavailable to a New York carrier.

Scenes from the
TICL/Trial Annual Meeting

January, 2000 • New York City

(l-r) (Seated) Hon. Joseph W. Bellacosa, formerly of the Court of Appeals; Lawrence Bailey, Jr., retiring TICL Chair; Thomas Trevett, former TICL Chair; Robert H. Coughlin, Jr., at the podium receiving the Section's Committee Chair of the Year Award at the dinner program.

(l-r) Louis B. Cristo, present TICL Chair; Lawrence Bailey, Jr., retiring TICL Chair; Saul Wilensky, TICL Vice-Chair; Edward S. Reich, former TICL Chair; and Kevin Lane at the Executive Committee Meeting.

Meeting of Association Insurance Programs Committee. John A. Williamson, Jr., NYSBA Associate Executive Director (far right); Larry Schiffer, Chair (to Williamson's right); and Dennis McCoy, member and former Chair of TICL Committee on Professional Liability, (to Schiffer's right) meet with executives of Bertholon-Rowland.

(l-r) (Seated) Lawrence Bailey, Jr., retiring TICL Chair; Hon. Joseph W. Bellacosa at the podium; Richard Long, retiring Chair of the Trial Lawyers Section at the dinner program.

(l-r) Harry F. Mooney; James C. Gacioch, speakers on Jury Trial Panel. Seated, Susan L. English, Program Chair.

(l-r) Robert H. Coughlin, Jr., Chair, Law and Practices Committee; David Beekman, Co-Editor, *TICL Journal*; and Mark Anesh.

(l-r) Saul Wilensky, TICL Vice-Chair; Paul Edelman, *TICL Journa*l Co-Editor; and Lawrence Bailey, Jr., retiring TICL Chair.

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