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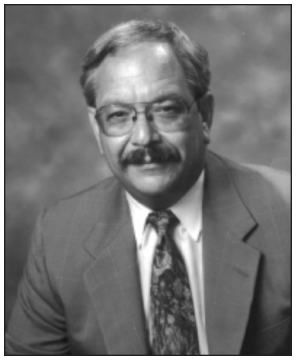
Message from the Section Chair



As the year nears its end, I have the privilege of addressing the Section.

Our past Chairs, including, but not limited to, Bucky Christo and Larry Bailey, have set a high standard and are difficult acts to follow. The standard set by the past Chairs and Executive Committees could be an example to all members of the Section, as well as the overall membership of the New York State Bar Association. It has been a privilege to serve the Section. More importantly, it has been a privilege to count all of you as colleagues and friends.

I look forward to an exciting future. For example, our 2002 meeting is scheduled for Disney World. I would like to think that, in addition to the fine work performed by the Section, we look for interesting and possibly exotic places to congregate.

We have a great deal to offer Section members in our educational programs of hot, up-to-the-minute topics and especially our *TICL Journal*, which has been so helpful to practitioners over the years.

I have spoken to many of the district delegates, as well as substantive committee Chairs. I am encouraged by their attitudes, industry and dedication. It seems that everyone is pulling their oars in the same direction. I congratulate you.

I look forward to completing my term with the help of a superlative team and, obviously, my continued association with the Section, reaching out to bring lawyers together with educational, as well as social, benefits.

Saul Wilensky

Editors' Note

The article appearing in the *TICL Journal* for the Winter of 2001, *Ethical Obligations and Prohibitions Facing Counsel*, did not properly attribute the article. The original article was written in 1996 by Wendy A. Scott of Kenney, Kanaley, Shelton & Liptak, LLP, of Buffalo, and was published in the NYSBA Fall 1996 coursebook for a Premises Liability/Construction Work Site Accidents seminar. The article was updated by Ms. Scott, James Bendall, Michael Dandini, Mary K. Knauf, Timothy Murphy and Arthur Smith for publication in the NYSBA Spring 1998 Premises Liability coursebook. We apologize for not investigating the proper source of this article.

Avoiding Malpractice and Client Grievances: A View from the Bench

By Hon. Richard T. Andrias

In the early 1970s, the Bronx Supreme Court branch of the Legal Aid Society was a very small office. Nevertheless, the group of 12 or so felony trial lawyers had a solid reputation. An incident involving one of my colleagues there is still etched in my mind and served me well in establishing client relationships over the years.

On one of my first days on the job, I was sitting in the audience of a Supreme Court part with one of the office legends, "Tex" Ginsburgh, watching one of our best trial lawyers getting worked over by his client. "Judge, I don't want this Legal Aid, I want an 18B!" The judge accurately responded, "You have one of the best trial lawyers in the Bronx or anywhere; he's had a string of acquittals!" The defendant was adamant. "I don't want any Legal Aid, I want an Appellate Division lawyer, your honor!"

I was astounded. Although years later, as a trial judge, I would hear that application in almost every criminal case, in the 1970s dismissing your assigned lawyer was an almost unheard-of event. I asked Tex, "What happened? Joe's a great lawyer!" He responded sagely, "He didn't line 'em up and light 'em up." Tex then explained that a call to the warden at the Bronx House of Detention would enable you to see a dozen or more clients on a long afternoon or early evening. The Correction Department enthusiastically supported the practice because it reduced tensions in the facility. As long as you stayed, they would continue to bring down prisoners for counsel visits. The only downside to the procedure was the "Light 'em up!" part—all of my clients smoked and it wasn't against the rules in those days.

The American Bar Association and the New York State Bar Association report that substantive errors are a major source of malpractice claims and most lay people and lawyers think of malpractice or disciplinary offenses as a missed deadline or misappropriated funds; but the staff of our First Department Disciplinary Committee inform me that failure to communicate, particularly failing to return telephone calls, is the most common complaint they hear from disgruntled clients. This is particularly surprising when today, for most attorneys, the means of returning a telephone call is literally in their hands (pocket, purse or briefcase).

The Lawyer's Code of Professional Responsibility, DR 6-101 A(3),[1] provides that a lawyer shall not "neglect a legal matter entrusted to the lawyer." Thus, although failing to communicate with a client could, in certain circumstances, itself constitute neglect, the problem is more fundamental: it is a sign that the lawyer isn't being proactive about developing the attorney-client relationship.

Judiciary Law § 90 governs lawyer discipline and the Code of Professional Responsibility's Disciplinary Rules and Ethical Considerations[2] tell us in black letters what we should and should not be doing; however, I would like to focus on some commonsense approaches to avoiding the nightmare of a malpractice claim or client grievance.

While some lawyers can't choose their clients—Legal Aid, legal services, assigned counsel and most government and institutional attorneys—the first thing the rest of us must do is to take great care before agreeing to represent a client on any matter. Disciplinary Rules 6-101A(1) and (2) inform us that a lawyer must not:

1. Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it.

2. Handle a legal matter without preparation adequate in the circumstances.

More important, however, than the strictures of the rule itself, are the underlying factors that must be taken into consideration when deciding to take on a case.

What are the motives of the client? What have been his or her prior dealings with lawyers? What are his or her expectations? Can the client afford the task proposed (or afford to wait for a verdict or an award)? What is his or her tolerance for delay or setbacks? Clients will be focusing solely on their one problem or dispute; the lawyer will have dozens or hundreds of matters, and the legal process itself proceeds at a measured pace. Lawyers too often raise unreasonable expectations or guarantee results to secure a new client or matter. The only thing this guarantees is a problem client down the line. Even if I am allowed under the rules to take on a matter outside my area of expertise (with an experienced associate), do I really want to? These questions are particularly difficult when one is starting out or building a practice, or when finances are tight, but this is probably the point at which to be especially cautious.

Once the decision has been made to take on a new client or matter, to avoid the common complaints that the Disciplinary Committee staff repeatedly hears, one must focus on the care and feeding of the attorney-client relationship. Clear understandings about fees and billing arrangements are the foundation of the relationship. In some areas, such as matrimonial matters, there are court-mandated guidelines regarding written retainers and other matters;[3] and in other areas the Disciplinary Rules themselves offer useful guidance—for example, promptly returning unearned fees paid in advance.[4] The importance of returning telephone calls has already been mentioned, but cannot be overemphasized. Preferably, the lawyer should make the call personally, or if this isn't possible immediately, a follow-up personal call should be made as soon as time permits. Equally important is communicating with the client on a regular basis about the status of the case, not just at key junctures. A corollary to this is supplying your client with copies of all court papers, pleadings and correspondence before the client requests these items.

Looking at malpractice claims and client grievances from a purely judicial perspective, we see many originating in response to suits for unpaid fees. There are non-litigation alternatives, such as mediation or arbitration, both mandatory[5] and optional, that should be considered before suing. Another, and probably safer, option is just to forget about it. It's just not worth it in time, money, annoyance and potential loss of reputation.

It is difficult to obtain a malpractice judgment against a lawyer in New York. A lawyer-client relationship must exist; negligence must be the proximate cause of damages; and actual damages must be sustained. The final hurdle is that the plaintiff must establish that, "but for" negligence, the underlying action would have been successful.[6] Similarly, out of the 3,500-4,000 complaints to the First Department's Disciplinary Committee roughly 33 percent are screened out immediately. Another 33 percent are resolved after a letter to the attorney and response. As to the final third that are given a formal investigation, only a small number, roughly 10 percent, result in formal charges. Should a lawyer take solace in the hurdles to a malpractice judgment or the relatively small number of grievances that lead to formal proceedings? Hardly. The experience of being named as a defendant in an action for malpractice or being the subject of a client grievance is a nightmare to be avoided at all costs; it's time consuming; it's expensive; and it takes a psychic toll. No one wants to square off against a client or former client.

Deadlines are a particularly troubling area. A missed deadline can mean dismissal, or, at a minimum, a long road to getting the matter restored to the calendar.

It is well established that to demonstrate an excusable default, the party seeking to vacate the default judgment must demonstrate both a valid excuse for the default and a meritorious claim in the underlying action.[7] While the courts of New York have repeatedly expressed a preference for dispositions on the merits,[8] and law office failure does not preclude the court from excusing a default in appearing on a motion,[9] the assessment of the sufficiency of the proffered excuse and the adequacy of merit rests within the sound discretion of the court.[10]

In sum, there are numerous minefields to be encountered by the practitioner: e.g., frivolous lawsuits; false filings; delaying tactics; direct communications with represented and unrepresented parties; conflicts of interest; preserving client confidences and secrets; sexual or business relations with clients. I am not suggesting that you commit the Disciplinary Rules or guidelines to memory, but it wouldn't be a bad idea to look at them from time to time. In fact, the recently mandated Continuing Legal Education rules require that out of the 24 hours of accredited continuing legal education in each biennial reporting cycle, four hours shall be in ethics and professionalism[11] as defined in 22 N.Y.C.R.R. § 1500.2(c). Don't look on these courses as a time-consuming burden to be endured, but as an opportunity to keep abreast with developments in the area and a reminder of the numerous pitfalls awaiting the unwary.

Finally, a word to the wise: If in doubt, look before you leap.

Endnotes

1. N.Y. Comp. Codes R. & Regs. tit. 22 § 1200.30(3) (N.Y.C.R.R.).
2. The disciplinary rules are found in N.Y. Judiciary Law art. 15 and 22 N.Y.C.R.R. pt. 1200.
3. 22 N.Y.C.R.R. pts. 136, 1400.
4. 22 N.Y.C.R.R. § 1200.15(a)(3).
5. *See* 22 N.Y.C.R.R. § 1400.7; 22 N.Y.C.R.R. pt. 136.
6. *See, e.g.*, *Cepeda v. Trolman & Glaser, P.C.*, 259 A.D.2d 355 (1st Dep't 1999); *Wall Street Assocs. v. Brodsky*, 257 A.D.2d 526, 527 (1st Dep't 1999).
7. *Ocasio v. the City of N.Y.*, 186 A.D.2d 520 (1st Dep't 1992).
8. *Santora & McKay v. Mazzella*, 211 A.D.2d 460 (1st Dep't 1995).
9. *See, e.g.*, *Mediavilla v. Gurman*, 272 A.D.2d 146, 148 (1st Dep't 2000); *Haberlin v. New York City Transit Auth.*, 228 A.D.2d 383 (1st Dep't 1994).
10. *Mediavilla,* 272 A.D.2d 146.
11. 22 N.Y.C.R.R. § 1500.22(a).

The Legal Malpractice Policy

By James A. Young

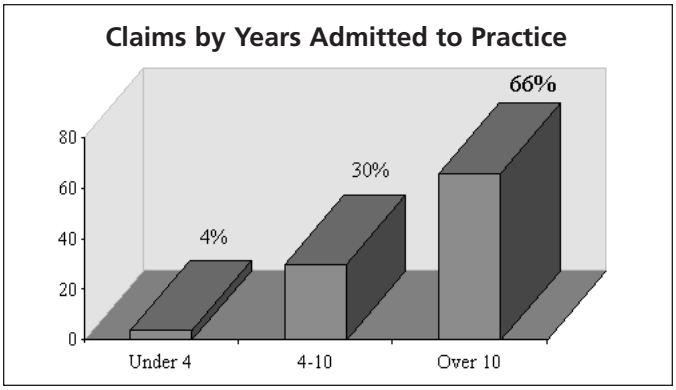
Summary and Analysis of Legal Malpractice Claims

The statistical data is provided by a national underwriter. This underwriter specializes in small firms and sole practitioners with an average firm size of 2.2 lawyers. The following criteria were evaluated:

- Years admitted to practice.
- Size of firm.
- Areas of law.

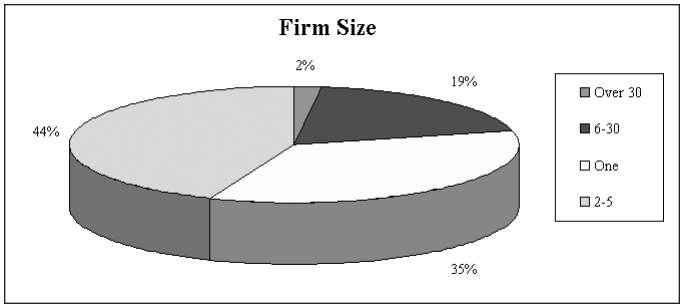
Years Admitted to Practice

The statistics indicate that younger attorneys account for a small share of malpractice claims. Attorneys with less than four years in practice account for only 4 percent of the reported claims, whereas attorneys with four to ten years account for 30 percent and those with more than ten years account for 66 percent of all claims. Possible explanations for this include the fact that over time a lawyer accumulates experience and takes on more and increasingly complex cases, often outside of an area of expertise. Accordingly, with a more complex caseload the opportunity for error grows. However, it is the volume of cases that leads to the greatest frequency of errors. A firm must adjust its practice to handle a larger volume of clients. Additional support staff, computerized docket controls and oversight from other attorneys are valuable loss prevention techniques.



Size of Firm

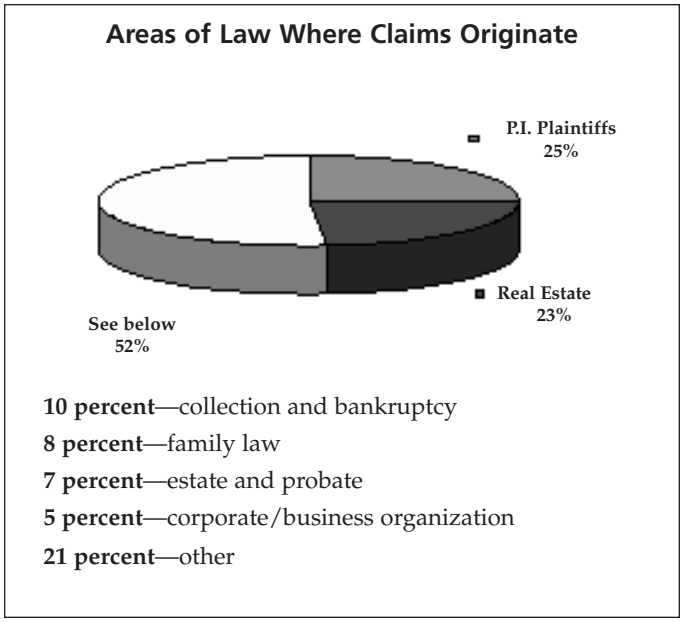
Sole practitioners account for 35 percent of all claims, firms of two to five attorneys account for 44 percent, firms of six to 30 attorneys, account for 19 percent, whereas firms of over 30 attorneys account for 2 percent of all claims. Sole practitioners are generally higher risk, by claim count, than larger practices. Lack of sophisticated risk management procedures, their inability to obtain backup assistance and a propensity to take on work outside of an area of expertise are contributing factors.



Areas of Law

The statistical review indicates that the areas of law generating the largest number of reported malpractice claims are as follows; personal injury plaintiff (25 percent); real estate (23.3 percent); collection and bankruptcy (10.5 percent); family (7.9 percent); and estate, trust and probate (7 percent).

With respect to areas of law related to dollars paid to claimants, the statistics provide the following breakdown: personal injury-plaintiff (23.3 percent); real estate (24.9 percent); estate, trust and probate (7.1 percent); family (8.2 percent); other areas (36.5 percent).



10 percent—collection and bankruptcy

8 percent—family law

7 percent—estate and probate

5 percent—corporate/business organization

21 percent—other

What a Law Firm Should Consider When Buying Malpractice Insurance

- The financial security of the insurance carrier.
- The experience of the broker.
- The expertise of the underwriter and claims department.
- The quality of service from the providers.

Security

A firm is purchasing a contract that **promises to pay** covered losses in the future. The security of the insurance carrier is critical. While it is the broker's job to know the details of the carrier's financial health, there are several benchmarks that the law firm should question.

1. A.M. Best Insurance Rating <www.ambest.com>. The A.M. Best Rating Company provides an independent analysis of an insurance company's financial condition. A.M. Best prepares comprehensive reports and assigns ratings to all significant insurers. Standard & Poor's Insurance Ratings services rates the financial strength of over 4,000 insurance companies <www.standardpoor.com/RatingsActions/RatingsList/Insurance/index.htm>.
2. The financial strength of the carrier. Ask about the admitted assets and surplus of the carrier, as they are indicators of a carrier's size and ability to pay claims.
3. Is the insurance company admitted in the state? Non-admitted or surplus lines carriers are approved, but not admitted to write coverage in the state. Admitted carriers contribute a percentage of premium to the state's insolvency fund. This fund provides a source of capital to pay claims for insolvent insurance carriers. Non-admitted or surplus lines carriers will not have funds available in the event of bankruptcy. Therefore, **insureds** with an unpaid claim will be treated as any other creditor.

Experience

Specialization is inherent in the practice of law and all professions today. The professional liability insurance industry is no exception. However, unlike the practice of law, the barriers to enter the insurance business are few. An insurance carrier can decide to commit its capital to writing professional liability insurance and immediately begin writing policies. There are no requirements that the company have staff experienced in the nuances of malpractice insurance. Virtually anyone with an insurance agent or broker's license can sell professional liability policies. It is incumbent upon the buyer to determine the expertise of the broker and the carrier.

This specialized segment of the insurance industry is less than 30 years old and still evolving. It covers medical professionals, directors and officers, and non-medical professionals. Over time, each of these areas has developed experts that include brokers, underwriters, defense attorneys and reinsurers. The expertise required in each of these areas is constantly changing, as new laws are written and precedents set by the courts. Ask your broker:

1. How many law firms do they represent?
2. How many years of experience do they have providing professional liability insurance to law firms?
3. How much business does the broker have with the insurance company they represent?
4. What is the experience of the claims department? Do they handle claims locally? What relationship does the broker have with the carrier's claims department?

Professional liability insurance is an intangible product making future promises. A law firm can protect its assets by using experienced professionals. Too often the decision to purchase malpractice insurance is based solely on the cost of the coverage. The clout of the broker and experience of the carrier can play an invaluable role in the handling of your claim.

Quality of Service

Law firms should demand the highest level of service from the purveyors of their insurance policies. A law firm can easily judge the broker's service capabilities during the quoting process. One may develop an opinion of the underwriter's abilities from responses to inquiries about the policy. However, the crucial service provider in this transaction is the claims department, and a firm does not find out about its quality of service until it's too late. If your renewal quotation was received after the policy effective date, or the policy was delivered late, it is easy to switch brokers. If the underwriter has not responded to questions about the policy or is refusing to change the terms of a policy, it's not too difficult to switch carriers. However, once an incident or claim is filed with an insurance carrier, it cannot be transferred to another carrier. Since your professional reputation and financial well-being are in their hands, you need to find out about the claims department before you purchase the policy.

- What is the experience level of the claims adjusters?
- Are they admitted to the bar?

- Are they dedicated to legal liability claims or do they handle other types of claims?
- On average is the claims adjuster expected to handle more than 75 claims at any one time?
- Obtain referrals of firms that have had claims and call them.

What Does the Underwriter Consider?

In the underwriting process, there are four general areas of consideration—practice diversification, previous claims history, general business conduct and the performance of non-legal services.

Areas of Practice

Most insurance companies prefer to write law firms with a diversified practice. While it is true that a firm that specializes is more knowledgeable in a particular area of law, it is also true that the firm will be held to a higher degree of care than a law firm with a general practice. Moreover, law firms that specialize are likely to be involved in more complex transactions which result in a greater risk of loss.

Underwriters also tend to avoid law firms with a significant practice in areas with high claims severity or frequency. Examples of the latter include securities, admiralty and patent/copyright law. Areas of the law with greater than average claims frequency include real estate, P.I.—plaintiff, and in recent years estate planning/wills/probate/trusts.

On the other hand, law firms that have a significant practice in perceived low hazard areas, such as criminal law, defense work, and family, domestic and juvenile law, are sought-after accounts and generally pay less for insurance coverage.

Claims Experience

Whether it is true or not, most insurance companies predict that a law firm that has had either a large number of claims, or several large claims, is likely to repeat the pattern in the future.

As with most general statements, there are exceptions to the rule. Larger law firms, because of the number of practicing attorneys, are expected to have more claims than a sole practitioner. Coverage for mid-size firms may still be available at a competitive price if the cause of the prior claims no longer exists (i.e., an attorney has left the firm) or an area of practice is excluded under the policy (i.e., financial institutions or securities).

General Business Practice

As with all areas of commercial insurance, underwriters expect firms to conduct their law practice as a business. Unfortunately, law schools provide limited training in this area so that most experience is gained on the job.

There are specific areas of concern with sole practitioners and smaller law firms. In the case of sole practitioners, the presence of a backup attorney, in the event of illness or travel, is a necessity to ensure time lines are met and client contact continues. A significant number of claims occur from administrative errors, including failure to meet filing deadlines. It is extremely important, therefore, that docket controls are in place and to the extent possible, monitored by more than one person, regardless of your area of practice.

Regardless of the size of the firm, conflicts of interest represent a growing area of claims. The involvement of law firms in the financial institution crisis was caused as much by serving on the boards of directors of insolvent banks or savings and loans as in the performance of legal services. In addition, involvement with a client in a business transaction is likely to result in a claim in the event the venture fails. Finally, an attorney should use great care in providing legal services in a business in which he or she has a significant ownership interest.

Other underwriting considerations include the use of engagement letters, fee splitting with outside firms and the number of support staff.

Nonlegal Services

More frequently than in the past, law firms are providing nontraditional services, such as investment advice or accounting services. There is an obvious concern that the type of services rendered may be inextricably intertwined with legal activities, creating potential difficulty in the claims handling process.

Who Is Insured?

The easy answer is the attorneys in the firm. However, because of the changes in a law practice and the way malpractice suits are brought, you need to be sure the "insured" covers all of the necessary elements of the firm. There are a variety of insurance carriers, each offering a different definition of insured. The Boston Bar Association-sponsored carrier, Chicago Insurance Co., defines insured as follows:[1]

> **Persons Insured**
>
> Each of the following is an Insured under the policy to the extent set forth below:
>
> A. The entity or person named in Item I of the Declarations as the **Named Insured**;
>
> B. Any **Predecessor in Business** or **Successor in Business;**

C. Any past partners, officers, directors, stockholders or employees of any person or entity specified in item A. or B. above (except as provided in I. below), but only while acting within the scope of their duties on behalf of such person or entity; specified in A. or B. above;

D. Any current partner, director, stockholder or employed lawyer of any person or entity specified in item A. or B. above;

E. Any current non-lawyer employee of any person or entity specified in item A. or B. above, but only while acting within the scope of their duties on behalf of any such person or entity;

F. Any non-affiliated legal firm, including their partners, officers, directors, or employees, but solely for **Professional Services** performed within the scope of their contract with, and on behalf of, the **Named Insured, Predecessor in Business** or **Successor in Business**;

G. Any legal representative, if the **Insured** becomes incompetent, insolvent, bankrupt or dies.

H. Any lawyer acting as "Of Counsel" but only while performing **Professional Services** on behalf of any person or entity specified in sections A., B., C., or D. above.

I. Any past partner, director, officer or employed lawyer of any person or entity specified in Item A. or B. above who retires from the private practice of law while insured under a Lawyers Professional Liability Insurance policy issued by the company.

What Is the Extended Reporting Period?

Lawyers professional liability insurance is written on a claims-made basis. Typically, coverage is afforded only for claims made and reported to the company during the policy term. Exceptions would include incidents which are reported to the company under a discovery clause prior to policy expiration and subsequently result in a claim, and claims made during an extended reporting period. It is important to note that an extended reporting period only extends the time in which the firm can report claims to the company and only provides coverage for alleged acts, errors or omissions which happen prior to policy termination and is otherwise subject to the terms and conditions of the underlying policy.

There are three types of extended reporting periods:

1. Automatic—during the 60 days following policy termination, a law firm has the right to report claims with no prior action or the payment of additional premium necessary.
2. Time-limited—this extends the period during which claims can be reported for a specified number of years.
3. Unlimited—indefinitely extends the period of time during which claims can be reported.

The exercise of either the time-limited or unlimited extended reporting period options require the law firm to notify the company in writing of its intent to purchase an extended reporting period within a specific number of days of policy termination and the payment of additional premium.

Who Covers Lateral Hires?

Legal malpractice policies are written on a claims-made basis. In a perfect world, this type of policy requires that the **claim occur and be reported during the policy period**. This is not very practical, because of the nature of the acts, errors and omissions in the practice of law. Provisions were created in the policy that enable an insured to buy coverage for **prior** acts and to extend the policy after it expires through an **extended reporting period**. The provision for prior acts states that any act, error or omission that occurred back to a specific date and is reported during the current policy period will be covered by the current policy, provided you were not aware of, or could have reasonably foreseen, the circumstance that resulted in a claim.

For example, you come out of law school and buy a policy from AIG starting in 1980 and pay the premium every year for ten years. In 1991, you buy a policy from CIC with a prior acts date back to 1980. An incident that occurred in 1987 is brought in 1991. The CIC policy will handle it because it covers prior acts back to 1980 that are brought during this policy period. There is a surcharge to your policy for prior acts coverage. While the policy can be purchased without it, the law firm will not have coverage for those previous years, unless an extended reporting period is purchased. A simple cost-benefit analysis would show that the purchase of prior acts saves money compared to buying the extended reporting period.

The extended reporting period was created to extend the policy to cover prior actions brought in future years. For example, when a sole practitioner retires, he will have exposure from prior years that may be brought in the future. The purchase of an extended reporting period will protect him against claims brought after his policy has expired.

It is important to recognize that an insurance carrier will underwrite the prior exposure and may deny the coverage. However, the **extended reporting period** is a contractual right in the policy enabling the **named insured** to extend the policy to cover acts that happened in the past. To re-emphasize, in the current formula for rating law firms, it is more cost effective to purchase prior acts than an extended reporting period.

A critical element of this discussion is that the named insured firm, not the individual attorney, has the right to exercise the extended reporting period options. An individual attorney needs to consider this when changing firms or retiring.

All businesses today are undergoing changes, and law firms are not immune. Firms are downsizing, upsizing, rightsizing and merging. All of these events can have an effect on the legal malpractice insurance policy.

A lawyer who is working at a firm for several years decides to leave and join another firm. The new firm is glad to have an experienced attorney and the clients that will follow him or her. But that lawyer is also bringing prior exposure. The new firm and the lateral hire both need to understand how future claims from past incidents will be covered. The individual lawyer cannot purchase his or her own extended reporting period, as the named insured (the firm) has those rights under the policy. He or she must rely on his or her previous firm or the firm he or she is joining for coverage. Individual circumstances need to be considered, and each of the two ways to cover lateral hire exposure has its pitfalls.

1. The lawyer joining the new firm can rely on the firm he or she is leaving for coverage. All malpractice policies for lawyers cover *former partners and employees for duties performed on behalf of the firm*. The lawyer leaving the firm is giving up a great deal of control. Depending on the circumstance of his or her leaving, this may not be in the lawyer's best interest. The firm will have financial considerations, such as the deductible and limits of liability. A potential for conflict exists because the lawyer is without any employment status at the firm and it may be difficult for him or her to influence the decision. Another pitfall for the lawyer leaving a firm is the reliance on the firm to continue its coverage, not reduce the limits of liability and buy the extended reporting period if it disbands.
2. Obtaining lateral hire coverage from the new firm is the preferred method for the individual, provided it is available from the insurance carrier. However, the new firm's exposure will increase and the firm should consider this before hiring the new lawyer. Oftentimes the new firm does not want to expose its deductible and limits of liability, particularly since it did not have any control over the activities of the lawyer at the previous firm. However, oftentimes a firm does not have any choice, because the new lateral hire may make it a condition for joining the firm.

The best advice is to perform a high level of due diligence before hiring a new lawyer. Naturally, the hiring firm will determine a great deal of information about the individual, but knowing about the prior firm is also important. Inquire about its years of experience, type of practice, professional liability coverage (carrier, deductible and limits), and loss control practices. Agree on the preferred method to cover the lateral hire and contact your malpractice agent to be sure the new hire can be covered for prior acts under your policy.

The Importance of Prior Acts Coverage

As noted earlier, lawyers professional liability insurance is written on a claims-made basis. Coverage is typically afforded not only to acts, errors or omissions which happen during the policy period, but to those which occur prior to the policy term as well. This extension is generally known as "prior acts" coverage.

There are, however, certain instances in which prior acts coverage may not apply or is limited. These include:

1. where notice of a potential claim is given to a prior insurer before the policy effective date;
2. if the applicant knew, or should have known, there was a breach of professional duty or the likelihood of a claim being made prior to policy inception;
3. if a prior policy or policies afford coverage for a claim;
4. when a retroactive or prior acts date limits the dates for which coverage is provided; and
5. if coverage is limited by endorsement for a particular attorney in a firm or for services rendered to a specific client.

Coverage Upon Retirement

As noted earlier, claims-made policies only apply to claims made and reported to the company during the policy period. If you are no longer engaged in the full-time practice of law, but still work part-time, it will be necessary to continue to purchase a policy to afford protection without interruption.

If the decision is made to retire from the active practice of law, there are different issues to consider, depending on whether an attorney is a sole practitioner or works in a group practice. For sole practitioners, we recommend the purchase of an unlimited extended reporting period. This will provide the greatest protection in retirement. Under the Boston Bar Association-sponsored program, payment for the extended reporting period is waived in the event of death or disability, or if the attorney has been with the program for a specified number of years and has reached the required age, as follows:

1. seven consecutive years prior to such cancellation or non-renewal and is at least 55 years of age at the time of retirement, or
2. six consecutive years prior to such cancellation or non-renewal and is at least 56 years of age at the time of retirement, or
3. five consecutive years prior to such cancellation or non-renewal and is at least 57 years of age at the time of retirement.

If an attorney is in group practice, coverage for the period practiced with the firm will continue without interruption as long as the firm continues to purchase coverage and operates in substantially the same form as before retirement.

If the firm dissolves or substantially changes operations upon the attorney's retirement or at some future date, the firm should purchase an extended reporting period endorsement (ERP). Only an organization defined as a named insured can purchase this coverage. The premium is computed as a percentage of the last annual policy premium and the extended reporting period applies to the firm and all past and current attorneys.

However, in the event the firm doesn't purchase the ERP, any attorney who has been with the program underwritten by the sponsored plan for the specified number of years and has reached the required age at the time of retirement will be entitled to an unlimited extended reporting at no additional cost.

Issues for Mergers/Acquisitions

In the event of a merger or acquisition, immediately notify the insurance company underwriting coverage for the law firms. Certain professional liability policies require this report by their policy terms, but it makes good business sense to involve your agent and existing company in assessing the insurance needs of the newly formed or restructured entity. In addition, most policies exclude coverage for any entity not listed on the declarations.

There are several, general strategies in dealing with mergers and acquisitions:

1. Successor firm coverage—certain policies provide automatic coverage if the new firm is the majority successor in interest of the merging organizations.
2. Additional named insured—one of the existing policies can be endorsed to include the other firm affording continuity of coverage.
3. Cancel/re-write—the existing policies can be canceled, and a new policy issued covering the operations of the new firm as well as the runoff liabilities of the former practices.
4. Purchase of an ERP—under certain circumstances, it may be advisable for the existing firms to purchase an extended reporting period, and have a new policy issued to the new law firm. While there may be a significant up-front cost, the new policy could be issued with a retroactive date as of policy inception, providing significantly lower cost for the new policy.

There is no inherently superior method for addressing mergers or acquisitions, and your insurance professionals are best suited to assist in choosing a strategy for the new firm.

Endnote

1. Lawyer's Professional Liability Claims-Made Policy—Chicago Insurance Co. POJ-2018 (Jan. 1995).

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Expert Testimony: Scientific, Technical and Other Specialized Evidence

By Hon. Joseph J. Maltese

Introduction

In order to prove or disprove a *prima facie* case in various civil causes of action or in a criminal prosecution, the parties will rely heavily upon expert testimony, which generally will involve some type of scientific, technical or other specialized knowledge. Attorneys must be thoroughly familiar with the law involving the admissibility of expert witnesses and the basis of the opinions they present.

Common law generally regulated the rules of evidence involving expert testimony. However, in 1975 Congress codified the various rules of evidence into the Federal Rules of Evidence (FRE) which has been amended nine times—the last amendments were introduced on December 1, 2000. Many states have followed the federal lead and adopted rules of evidence which were identical or very similar to the Federal Rules of Evidence. New York, Connecticut and Massachusetts have refused to codify their rules of evidence.

Since New York courts generally follow common law evidence rules and the sparse rules of evidence located in CPLR article 45, CPL articles 60 and 670, and Family Court Act § 342.1-344.4, attorneys are more dependent upon evidence treatises than they would be with a code of evidence. Notwithstanding the New York Legislature's failure to adopt the proposed New York Code of Evidence in 1991, which was modeled after and modified the Federal Rules of Evidence, New York common law basically follows the FRE. Accordingly, judges and lawyers would be wise when analyzing rules of evidence in New York to start with the FRE organizational structure and then deviate from the FRE when appellate courts or the Legislature have ruled on such matters. A list of treatises on the New York and Federal Rules of Evidence, as well as scientific evidence, is contained in the bibliography.

The admissibility of scientific, technical or other specialized evidence differs depending on the jurisdiction where the case is pending. Many states, including New York and New Jersey, have refused to adopt the federal *Daubert* standard outright. However, there has been an expansion of the rigid *Frye* "general acceptance" test as the only standard of admissibility. Trial courts are pushing the limits of *Frye* towards *Daubert*.

A. The *Frye* Test[1]

Courts *will* admit expert testimony deduced from:

- a well-recognized scientific principle or discovery
- "generally accepted" in the field in which it belongs.

B. The *Daubert* Standard[2]

Before admitting scientific, technical or other specialized knowledge, a court should ascertain whether the theory or technique has or has not been:

1. tested (falsified or refuted);
2. subjected to peer review and publication;
3. found to have a known or potential rate of error;
4. generally accepted in the relevant scientific community.

1. General Acceptance

Frye Test = *Daubert* Standard No. 4. Is it "generally accepted" by relevant (scientific, technical or specialized) community?

Need not be unanimously endorsed.

Minority opinions may also be generally accepted.

2. Testing

Is it testable?

Who conducted the test?

Was there independent testing?

Was the testing for purposes of litigation?

How was it tested?

What methods were used?

How was data collected?

Was sample size large enough to be statistically significant?

3. Error Rate

What was the rate of error?

Was it statistically significant?

What is the rate of acceptability?

- <1 percent
- 5 percent
- 50-50 (a coin toss).

4. Peer Review

Who reviewed the tests and the data?

Were these true "peer review" journals? Did board of editors scrutinize and test theory before publishing?

Was it an "informational exchange" journal? Article published without testing the contents?

Are there critical journal articles?

C. *G.E. v. Joiner*[3]

Trial court has sole discretion to admit or reject proposed scientific evidence. The standard on appeal is abuse of discretion.

D. *Kumho Tire v. Carmichael*[4]

All matters of expert testimony—scientific, technical and other specialized knowledge—are to be reviewed for their methodology in forming conclusions or opinions.

E. *Weisgram v. Marley*[5]

Court of Appeals found that the trial court abused its discretion *as a matter of law* in erroneously admitting a scientific opinion based upon speculation. Under Fed.R. Civ. P. 50 the case need not be remanded for a new trial with a new expert, but may be dismissed outright.

F. The Judge's Role as a 'Gatekeeper' of Evidence

1. Pre-trial Hearings

Rule 104

Before every trial a judge should rule on:

- qualifications of witness; and
- admissibility of evidence.

2. Why Is the Evidence Relevant?

Rule 401

Relevant evidence: Does the evidence tend to make the existence of any fact of consequence more or less probable than it would be without the evidence?

Rule 402

If relevant—admissible.

If not relevant—not admissible.

3. May the Court Take Judicial Notice?

Rule 201

Statutory and regulatory presumptions.

Fact not subject to dispute because it is either generally known or capable of accurate and ready determination by resorting to an accurate source, i.e., the laws of physics.

4. Conduct Balancing Test

Rule 403

Where the evidence is relevant, is the probative value outweighed by:

- unfair prejudice,
- confusion of issues, or is it
- misleading to jury?

5. Court-Appointed Experts

Rule 706

Courts may appoint experts:

- to assist judge alone;
- in lieu of opposing experts; or
- in addition to opposing experts.

6. Who Is the Expert?

Rule 702

What is the expert's:

- education,
- training,
- knowledge,
- experience, and
- skill?

7. What Will the Expert Say?

Rule 702

Is it:

- science,
- technology, or
- other specialized knowledge?

8. Expert Opinions

Expert opinions must be based upon facts in the record or facts personally known to the expert. If based on an assumption (hypothetical) without any connection to facts, it must be set aside.

9. Standards of Expert Testimony

Expert opinion: "based upon a reasonable degree of (medical, chiropractic, engineering, etc.) certainty." Accountants: "based upon the generally accepted accounting principles."

10. Two-Prong Test Relevant and Reliable

Scientific relevancy means that the theory, studies or procedure "fits" the facts and issues before the court.

11. Scientific Validity = Reliable Evidence

If the science is valid, then the evidence is reliable. Only relevant and reliable evidence is admissible.

12. No *Ipse Dixit* Testimony

13. Rule 703—Basis of Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

14. Rule 705—Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

15. The Scientific Method

The scientific method is a set of procedures that is unique to each science and question within that science.

The procedures are designed to answer (new) questions or theories proposed by scientists. Procedures may vary, depending on the question.

The procedures promote "controlled observation." The scientist observes evidence to answer the question. The control insures that the scientist's observations are statistically valid and reliable.

The procedures assume that the status quo is correct. The scientist must refute the status quo with his/her evidence in order to profess that his/her *new* theory is correct.

16. *Post Hoc Ergo Propter Hoc*

17. Dual Approach

Judges should review both *Frye* and *Daubert* test—Is it generally accepted in the relevant specialized community? If not "generally accepted," then review for *Daubert* reliability factors, i.e., sound methodology in testing, acceptable error rate, peer review of results, and any other relevant and reliable factors.

Federal Rules of Evidence

Rule 104—Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination, it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy condition on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

* * *

Rule 201—Judicial Notice

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Rule 401—Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402—Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403—Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

New Amendments

Federal Rules of Evidence Relating to Expert Testimony
Effective December 1, 2000.

Rule 701—Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; *and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.* (Emphasis added.)

Rule 702—Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.* (Emphasis added.)

Rule 703—Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence *in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.* (Emphasis added.)

Federal Rules of Evidence Relating to Expert Testimony

Rule 704—Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Rule 705—Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706—Court-Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness

consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' finding, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Rule 803—Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

* * *

(18) Learned Treatises

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

* * *

26 Federal Rules of Civil Procedure—General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

* * *

(2) Disclosure of Expert Testimony. (A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 704 of the Federal Rules of Evidence. (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

* * *

(b) Discovery Scope and Limits

* * *

(4) Trial Preparation: Experts. (A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided. (B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(B) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

New York Civil Practice Law and Rules

CPLR 4511—Judicial Notice of Law

(a) When judicial notice shall be taken without request. Every court shall take judicial notice without request of the common law, constitutions and public statutes of the United States and of every state, territory and jurisdiction of the United States and of the official compilation of codes, rules and regulations of the state except those that relate solely to the organization or internal management of an agency of the state and of all local laws and county acts.

(b) When judicial notice may be taken without request; when it shall be taken on request. Every court may take judicial notice without request of private acts and resolutions of the congress of the United States and of the legislature of the state; ordinances and regulations of officers, agencies or governmental subdivisions of the state or of the United States; and the laws of foreign countries or their political subdivisions. Judicial notice shall be taken of matters specified in this subdivision if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it. Notice shall be given in the pleadings or prior to the presentation of any evidence at the trial, but a court may require or permit other notice.

(c) Determination by court; review as matter of law. Whether a matter is judicially noticed or proof is taken, every matter specified in this section shall be determined by the judge or referee, and included in his findings or charged to the jury. Such findings or charge shall be subject to review on appeal as a finding or charge on a matter of law.

(d) Evidence to be received on matter to be judicially noticed. In considering whether a matter of law should be judicially noticed and in determining the matter of law to be judicially noticed, the court may consider any testimony, document, information or argument on the subject, whether offered by a party or discovered through its own research. Whether or not judicial notice is taken, a printed copy of a statute or other written law or a proclamation, edict, decree or ordinance by an executive contained in a book or publication, purporting to have been published by a government or commonly admitted as evidence of the existing law in the judicial tribunals of the jurisdiction where it is in force, is prima facie evidence of such law and the unwritten or common law of a jurisdiction may be proved by witnesses or printed reports of cases of the courts of the jurisdiction.

CPLR 4515—Form of Expert Opinion

Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.

CPLR 3101—Scope of Disclosure

* * *

(d) Trial preparation.

1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.

(ii) In an action for medical, dental or podiatric malpractice, any party may, by written offer made to and served upon all other parties and filed with the court, offer to disclose the name of, and to make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial. Within twenty days of service of the

offer, a party shall accept or reject the offer by serving a written reply upon all parties and filing a copy thereof with the court. Failure to serve a reply within twenty days of service of the offer shall be deemed a rejection of the offer. If all parties accept the offer, each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in accordance with rule thirty-one hundred seven of this chapter. If any party, having made or accepted the offer, fails to make that party's expert available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action.

(iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

CPLR 3121—Physical or Mental Examination

(a) Notice of examination. After commencement of an action in which the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician, or to produce for such examination his agent, employee or the person in his custody or under his legal control. The notice may require duly executed and acknowledged written authorizations permitting all parties to obtain, and make copies of, the records of specified hospitals relating to such mental or physical condition or blood relationship; where a party obtains a copy of a hospital record as a result of the authorization of another party, he shall deliver a duplicate of the copy to such party. A copy of the notice shall be served on the person to be examined. It shall specify the time, which shall be not less than twenty days after service of the notice, and the conditions and scope of the examination.

(b) Copy of report. A copy of a detailed written report of the examining physician setting out his findings and conclusions shall be delivered by the party seeking the examination to any party requesting to exchange therefor a copy of each report in his control of an examination made with respect to the mental or physical condition in controversy.

Uniform Civil Rules for the Supreme Court and the County Court § 202.26—Pretrial Conference

(a) After the filing of a note of issue and certificate of readiness in any action, the judge shall order a pretrial conference, unless the judge dispenses with such a conference in any particular case.

(b) To the extent practicable, pretrial conferences shall be held not less than 15 nor more than 45 days before trial is anticipated.

(c) The judge shall consider at the conference with the parties or their counsel the following:

(1) simplification and limitation of the issues;

(2) obtaining admission of fact and of documents to avoid unnecessary proof;

(3) disposition of the action, including scheduling the action for trial;

(4) amendment of pleadings or bill of particulars;

(5) limitation of number of expert witnesses; and

(6) insurance coverage, where relevant.

* * *

(e) Where parties are represented by counsel, only attorneys fully familiar with the action and authorized to make binding stipulations, or accompanied by a person empowered to act on behalf of the party represented, will be permitted to appear at a pretrial conference. Plaintiff shall submit marked copies of the pleadings. A verified bill of particulars and a doctor's report or hospital record, or both, as to the nature and extent of injuries claimed, if any, shall be submitted by the plaintiff and by any defendant who counterclaims. The judge may require additional data, or may waive any requirement for submission of documents on suitable alternate proof of damages. Failure to comply with this subdivision may be deemed a default under CPLR 3404. Absence of an attorney's file shall not be an acceptable excuse for failing to comply with this subdivision.

* * *

Evidence Books

Robert A. Barker and Vincent C. Alexander, *Evidence in New York State and Federal Courts* (West Publishing, 1996).

Bert Black and Patrick W. Lee (editors), *Expert Evidence: A Practitioner's Guide to Law, Science and the FJC Manual* (West Group, 1997).

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Hon. Joseph J. Maltese is a judge of the New York State Supreme Court, Second Judicial District.

Judicial Criteria for Serious Injuries Under New York's No Fault Law

By Joseph Kelner, Robert S. Kelner and Gail S. Kelner

In *Oberly v. Bangs Ambulance Inc.*,[1] the Court of Appeals held that a "permanent loss of a body organ, member, function or system" must be "total" to constitute a "serious injury" under N.Y. Insurance Law § 5101(d). This section provides:

> A personal injury which results in death; dismemberment; significant disfigurement; a fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitutes such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

However, the two most frequently litigated categories of serious injuries are: (1) permanent consequential limitation of use of a body organ or member, and (2) significant limitation of use of a body function or system. The courts have held that in order to be a significant limitation, the limitation must be something more than a minor, mild or slight limitation of use.[2] The types of injuries which generally fall within these two categories require proper attention to detail and medical follow-up in order to meet threshold challenges from defendants. In this column we will review cases illustrating what the courts do and don't consider adequate to meet the threshold issues for these categories.

Plaintiff's Subjective Complaints Alone Are Insufficient to Defeat a Defendant's Motion for Summary Judgment on 'Serious Injury'

Plaintiff's subjective complaints of pain, without objective indicia, will not constitute a significant limitation to establish a prima facie "serious injury" to defeat defendant's motion to dismiss.[3] An objective and independent assessment by a physician is essential. For example, in *Shifano v. Golden*,[4] plaintiff's doctor's affirmation set forth specific objective data concerning his examination, testing and clinical findings. His opinion was based upon more than plaintiff's subjective complaints. Similarly, in *Verderosa v. Simonelli*,[5] the court held that the physician's affidavit was based upon more than plaintiff's subjective complaints. His conclusion, after conducting his own examination and reviewing other tests, was that the limitations were significant.

Plaintiff's Physician Should Demonstrate That Plaintiff's Limitations Have Been Objectively Measured or Quantified

It is important in making a *prima facie* showing of "serious injury" that plaintiff's treating physician has conducted his or her own examinations, and has conducted or reviewed objective tests and is able to quantify the degree of disability. For example, in *Grullon v. Chu*,[6] plaintiff's physician's affidavit was held adequate to establish a *prima facie* case that plaintiff sustained a serious injury where he concluded, based upon his examinations of plaintiff and a review of her medical records, that plaintiff had restricted motion of her lumbosacral spine of 35 to 40 degrees and that such limitation was significant and permanent. In *Hernandez v. Burkitt*,[7] plaintiff's treating chiropractor concluded, based upon a physical examination of plaintiff and a review of his medical records, that plaintiff had sustained restrictions of motion of the cervical and lumbar spine of up to 50 percent and these injuries were significant and permanent. The court refused to dismiss this case. In *Livai*,[8] a motion to dismiss the complaint was denied where plaintiff's physician affirmed that plaintiff suffered 20 percent permanent restriction of motion of cervical spine caused by cervical osteoarthritis and a continued impression of cervical radiculopathy. The court in *Amofa v. N.S.C. Leasing Corp.*[9] denied a motion to dismiss where plaintiff's treating neurologist concluded, based upon an examination and objective quantified findings that plaintiff suffered from a nerve root injury with a resulting 25 percent loss of range of motion of the spine. In *Parker v. Defontaine-Stratton*,[10] the court held there were triable issues of fact where plaintiff's physician stated that plaintiff suffered a quantified loss of range of motion in her shoulder which included 10 degrees of flexion, 40 degrees of abduction and 30 degrees of internal rotation. The court summarized the elements to establish a "serious injury":

> In order to establish a prima facie case, plaintiff must establish that she has suffered a "serious injury" within the meaning of Insurance Law § 5102(d) . . . In that vein, a medical affidavit which

> demonstrates that the plaintiff's limitations have been objectively measured or quantified is sufficient . . . Further, a physician's observations as to actual, quantified limitations in the plaintiff's ability to use a body function or system qualify as "objectively measured or quantified" . . . since they are based on the doctor's own examination, not the plaintiff's subjective complaints.

In *DiLeo v. Blumberg,*[11] affirmations of plaintiffs' treating chiropractor, based upon physical examinations of plaintiffs, a review of x-rays and MRIs, and the results of numerous tests showing limited range of motion and pain, were sufficient to make a *prima facie* showing of "serious injury." The doctor made specific findings as to these limitations and identified the quantified result of each of 12 range of motion tests. In *Garcia v. Arrington*,[12] specific findings regarding the existence and extent of plaintiff's spinal range of motion limitation constituted sufficient objective evidence of serious injuries to defeat motion to dismiss.

In *Marquez v. New York City Transit Authority,*[13] plaintiff defeated defendant's motion to dismiss where defendant contended that plaintiff's complaints of pain and dizziness were related to degenerative joint and spine disease unrelated to the accident. Defendant submitted a spinal CT scan showing degenerative changes. However in opposition, plaintiff submitted his neurologist's report indicating specified neurological conditions purportedly arising from the injuries sustained in the accident and describing an extended course of treatment and medication. The neurologist also submitted his findings relating to a re-examination of plaintiff two years after the initial examination, revealing an extensive loss of spinal motion which he characterized as permanent limitations arising from the injuries sustained in the accident. The court held that these findings were based upon the physician's observations and not plaintiff's subjective complaints and were sufficient to defeat defendant's motion.

Duration of Limitation as Well as Significance May Be Important

In *McCleary v. Hefter,*[14] the court held that any assessment of the significance of a bodily limitation requires consideration not only of the extent of limitation, but its duration as well. In *McCleary*, medical reports indicated that plaintiff's range of motion was normal, less than three months after the accident which negated any claim of significant limitation. In *Partlow v. Meehan,*[15] the only diagnosis of limitation was made on the date of the accident and medical evidence thereafter was scant. Defendant's examination 22 months later purported to show no limitation. However, in *Verderosa,*[16] plaintiff made a *prima facie* case of "serious injury" where plaintiff's treating physician conducted a recent examination and concluded that plaintiff continued to suffer significant limitation of use of neck and right leg and knee more than two years after the accident.

Continuing Treatment May Be Significant

In *Grossman v. Wright,*[17] the court noted that any significant lapse of time between the cessation of plaintiff's medical treatment after the accident and a physical examination conducted by his own expert must be adequately explained. Objective findings should be based upon a recent examination. In *Pierre v. Nanton,*[18] plaintiff failed to explain a four-year gap between the initial course of treatment following the accident and the most recent examination. However, in *Abedin v. Tynika Motors, Inc.,*[19] plaintiff defeated a motion to dismiss where plaintiff's treating orthopedist opined that plaintiff had sustained permanent quantifiable limitations of motion in the cervical and lumbar spine. His opinions were based on both recent examinations and examinations shortly after the accident, with physical tests confirming his opinions.

In Addition to a Positive MRI Finding of a Herniation, Evidence of a Limitation Should Be Submitted to Defeat a Threshold Motion

There is some judicial disagreement as to whether a positive MRI for a herniated disc (with or without plaintiff's subjective complaints) is sufficient by itself to establish a *prima facie* showing of a "serious injury." Thus, even where a plaintiff has a positive MRI finding showing a herniated disc, it is very important to provide objective evidence of physical limitations and not rely solely on the MRI. In *Noble v. Ackerman*[20] (where the case was remanded for a new trial on the issue of a "serious injury"), the court noted:

> Contrary to the view of the trial court, the existence of a herniated disc does not per se constitute serious injury . . . Even accepting that plaintiff's disc and cervical spine injuries were medically verified it was still incumbent upon plaintiff to provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration.

In several recent cases, the courts have held that proof of herniation of a disc will not constitute a "serious injury" without objective evidence of the extent or degree of physical limitations resulting from such injuries and their duration. In *Descovich v. Blieka,*[21] and *Nisnewitz v. Renna*,[22] the court found no objective evidence of limitation and duration; and in *Guzman,*[23] the court held there was evidence of herniation, but no

objective evidence of the extent, degree or duration of the limitation. The subjective complaints were insufficient to defeat defendant's motion. *Pierre v. Nanton*[24] held that a herniated disc was insufficient to constitute a serious injury without objective evidence of extent and degree of physical limitation.

However, there is some disagreement with the concept that a herniated disc is insufficient to meet the threshold. In *Duldulao v. City of New York*,[25] although the majority held that plaintiff failed to present adequate objective evidence of the extent or degree of the alleged physical limitation resulting from a herniated disc and dismissed the complaint, Justice Goldstein dissented and opined that the MRI results constituted "objective manifestation of physical injury" which satisfied the requirements of the Insurance Law and provided an ample medical foundation for plaintiff's subjective complaints of pain. Similarly, in *Toure v. Avis Rent A Car Systems, Inc.*,[26] the majority held that a bulging or herniated disc was insufficient to establish "serious injury" in the absence of objective medical evidence of the degree and duration of the physical limitation resulting from the injuries. However, Justice Mazzarelli dissented and opined that at least one court held that an MRI showing a herniated disc constituted *prima facie* evidence of a serious injury. She further noted that, although plaintiff's physician did not assign a quantitative value to plaintiff's limitations, in his affirmation he attested to having examined plaintiff as well as reviewing reports of other health care providers. Justice Mazzarelli found that the plaintiff had a number of significant specified permanent impairments which raised issues of fact that should prevent dismissal.

In *Lesser v. Smart Cab Corp.*,[27] plaintiff suffered herniated discs and made subjective complaints of pain, numbness and tingling. Defendant's physician never reviewed the MRI. Defendant's motion to dismiss for lack of "serious injury" was denied by the appellate court which held that the positive MRI and plaintiff's subjective complaints were sufficient to raise triable issues of fact:

> On a motion for summary judgment to dismiss a personal injury complaint, the defendant carries the burden of establishing that the plaintiff's injury is not causally related to the accident; without making such a prima facie case, the defendant is not entitled to summary judgment as a matter of law . . . An MRI constitutes objective evidence providing an ample medical foundation in support of a patient's subjective complaints of extreme pain . . . and thus raises a triable issue on the question of "serious injury."

Objective and quantified evidence of the extent, duration and degree of limitation of use as well as timely physical examinations are extremely helpful to defeat dismissal motions for lack of "serious injury."

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11. *DiLeo v. Blumberg*, 250 A.D.2d 364, 672 N.Y.S. 2d 319 (1st Dep't 1998).
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13. *Marquez v. New York City Transit Auth.*, 259 A.D.2d 261, 686 N.Y.S.2d 18 (1st Dep't 1999).
14. *McCleary v. Hefter*, 194 A.D.2d 594, 599 N.Y.S.2d 81 (2d Dep't 1993).
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19. *Abedin v. Tynika Motors, Inc.*, 279 A.D.2d 597, 719 N.Y.S.2d 698 (2d Dep't 2001).
20. *Noble v. Ackerman*, 252 A.D.2d 392, 675 N.Y.S.2d 86 (1st Dep't 1998).
21. *Descovich v. Blieka*, 279 A.D.2d 499, 718 N.Y.S.2d 870 (2d Dep't 2001).
22. *Nisnewitz v. Renna*, 273 A.D.2d 210, 709 N.Y.S.2d 435 (2d Dep't 2000).
23. *Guzman v. Paul Michael Mgmt.*, 266 A.D.2d 508, 698 N.Y.S.2d 719 (2d Dep't 1999).
24. *Pierre*, 279 A.D.2d 621.
25. *Duldulao v. City of N.Y.*, 725 N.Y.S.2d 380 (2d Dep't 2001).
26. *Toure v. Avis Rent A Car Sys., Inc.*, 278 N.Y.S.2d 140 (1st Dep't 2001).
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Settling Lawsuits When the Plaintiff Has Received Government Entitlements

By Joan Lensky Robert

I. Introduction

In settling a lawsuit, personal injury attorneys must assess the adequacy of the award in terms of actual damages, proximate cause and the depth of the defendant's pockets. In addition to these concerns, however, the attorney must analyze the benefit of the recovery to the victim who has ongoing medical needs or who has previously received medical treatment paid for by government programs. In particular, the recovery should not merely replace the government funds with the defendant's moneys so that the client receives no net benefit from having pursued the case.

Some of the plaintiff's future needs may be so costly that ongoing eligibility for government entitlements is the only way in which to assure the economic security of the plaintiff. In advising the client whether or not to accept a settlement for less than the actual damages, the personal injury attorney must be knowledgeable about the eligibility rules for various entitlement programs. The existence of liens against the lawsuit proceeds also affects the client's decision as to whether or not a settlement is beneficial and whether or not to risk a defendant's verdict in a case of difficult liability.

Many personal injury attorneys have developed relationships with the elder law bar to assist them in assessing the client's needs and to help explain the maze of the entitlement programs to the client. If the client is likely to need government benefits after a lawsuit recovery, the elder law attorney can discuss planning to preserve assets and eligibility for government entitlements based upon need. The age of the client, his or her physical and mental condition, his or her marital status, and residency in an institution or at home are factors that affect the planning strategies. A discussion of these issues at the inception of a case may reduce the number of disgruntled clients who are dismayed to have pursued the painful litigation process only to learn that they cannot freely maintain and control their own assets and still remain eligible for government benefits based upon need.

The following is an overview of government entitlements the plaintiff is likely to have received, the liens that might be imposed against the lawsuit proceeds due to these benefits, planning techniques that preserve assets and entitlements, and ethical considerations in advising clients who wish to know the net amount of the recovery, whether they will lose their benefits and what will happen to remaining assets upon the death of the plaintiff.

II. Overview of Eligibility for Government Entitlements

A. Medicaid

1. Overview of Medicaid Program

Medicaid provides medical assistance that pays for home health aides, therapies, prescription drugs and hospital and physician's bills. It is a joint federal-state program established by federal law in 1965.[1] Disabled individuals of any age, as well as those who are medically needy under the age of 21 or over the age of 65, are eligible for Medicaid benefits so long as they meet the financial criteria. Medically needy individuals are those whose assets and income do not meet the cost of necessary medical care. Individuals eligible for SSI, a federal program that gives a cash stipend to the aged, blind and disabled, automatically receive Medicaid benefits.[2]

Medicaid will pay for care at home or in a nursing facility whether the care is custodial or skilled. Medicaid will provide to community-based Medicaid recipients care based on an assessment of the patient's medical and social needs. Medicaid provides payment directly to participating institutions and providers. The fees for services are established by the state and may not be supplemented from any source. Medicaid is the payer of last resort and all insurance, including Medicare, must be applied to the bill first, with Medicaid paying only the balance, so long as the balance does not exceed the Medicaid rate for the service provided.

2. Medicaid Eligibility for Unmarried Adults

a. Resource and Transfer Rules

Disabled adults under the age of 65 and individuals over the age of 65 are eligible for Medicaid so long as they have no more than $3,750 in available resources and the waiting period, if any, caused by the gifting of assets has passed. For those residing at home, the home is an exempt resource. For those residing in a skilled nursing facility, the home loses its exempt status for Medicaid eligibility.

For community Medicaid, there is no ineligibility period for Medicaid caused by the transfer of resources.[3] Other home care programs are waivered

services.[4] Tort victims who have had a traumatic brain injury, for example, may access the TBI waiver. For waivered programs, the transfer of assets results in a waiting period for Medicaid benefits. The waiting period is calculated by dividing the amount of assets transferred by the average cost of a nursing home in the county in which the individual resides.[5] Certain transfers of assets, including those to a supplemental needs trust discussed below, do not result in any ineligibility period for the Medicaid program.[6]

b. Income Rules

A Medicaid recipient residing in a nursing facility will pay all income but $50 per month to the facility to offset the cost of care. A Medicaid recipient residing in the community may retain income of approximately $600 per month. Cash income above the Medicaid allowable income must be "spent down" on medical needs. In-kind income provided by a person not legally responsible for the support and maintenance of the Medicaid recipient is not countable income pursuant to New York regulations.[7]

3. Medicaid Eligibility for Married Adults

When assets are transferred to a spouse, there is a no period of ineligibility for Medicaid caused by this transfer of assets.[8] When the ill spouse is in a nursing home or receiving benefits under a waivered program, the community spouse may retain between $74,820 and $87,000 in resources. The home in which the community spouse resides is an exempt asset. The community spouse may retain $2,175 per month in income. If the community spouse's income is less than $2,175, he or she may retain assets necessary to generate the income to bring the income to $2,175.[9] When the ill spouse is receiving community Medicaid services, the husband and wife are considered a fiscal unit, and if their joint assets exceed approximately $5,000, they will have resources in excess of the Medicaid program.

If the spouse has income and/or resources in excess of the Medicaid program requirements, he or she may refuse to make them available for the support and maintenance of the spouse. Although the counties have the right to pursue these resources in a lawsuit against the well spouse, they may not deny Medicaid to the ill spouse.[10]

4. Medicaid Eligibility for Infants Under the Age of 18

For infants, eligibility for most Medicaid programs is tied to the economic eligibility of the parents. Children whose parents receive Home Relief and Aid to Families with Dependent Children, both of which are poverty-based programs, are eligible for Medicaid.[11] Disabled children who receive SSI also are eligible for Medicaid.

Disabled children under the age of 21 who are receiving care away from their own homes in state and other schools, hospitals and group homes also are eligible for Medicaid. The parents' ability to pay also is investigated. The right to a free and appropriate education, however, is not means tested.

PRACTICE TIP: If a parent has a cause of action in a child's case and receives a lawsuit settlement, the disabled child will lose SSI and Medicaid benefits that are based upon the parents' financial need, even if the child's recovery is placed into a supplemental needs trust.

5. Waivered Medicaid Home Care Programs

Certain programs waive the federal requirements that the parents be poor in order for the child to receive Medicaid. These programs provide Medicaid coverage for a disabled infant even if the parents' assets and income exceed the financial guidelines set by the Aid to Families with Dependent Children and Home Relief programs. These include:

1. **The Care at Home Program** for physically disabled or developmentally disabled children who might otherwise qualify for hospital or nursing home or intermediate care facility placement.

2. **Family Support Services** through the OMRDD Developmental Disabilities Services Offices provide respite, recreation, case management, counseling, behavior management, training, transportation and special adaptive equipment.

3. **Early Intervention Program** to enhance the development of infants and toddlers with disabilities or developmental delays provides service coordination, family training, counseling, parent support groups, speech and audiology services, physical therapy, occupational therapy, nursing services, social work services, transportation and assistive technology devices.

4. **Physically Handicapped Children's Program** serves children with severe chronic illnesses or physical disabilities by providing diagnostic services and evaluation and reimbursement to health care providers for treatment rendered inpatient, or at physician's offices. Families must have low incomes or inadequate private coverage.

5. **Home and Community-based Services Waiver for Children and Adolescents with Serious Emotional Disturbances** provides services and support to families and children to enable them to remain at home and in the community. The child must be eligible for Medicaid, although the parents' assets and resources will not be counted in computing eligibility.

PRACTICE TIP: Prior to having a parent accept a lawsuit recovery for his or her cause of action in the child's case, the child should be evaluated for one of these waivered programs if ongoing Medicaid benefits are needed for the child.

PRACTICE TIP: The home in which the parents reside is an exempt resource for Medicaid, and the purchase of the home may be one way to have the parents utilize their own proceeds without affecting Medicaid eligibility for the child.

B. Supplemental Security Income (SSI)

1. Resource Rules for Adults

SSI[12] is a federal program that provides a cash stipend to aged, blind and disabled individuals whose available resources and income do not exceed the guidelines of the program. An individual may have $2,000 in available resources, with a $1,500 burial fund, while a couple may have $3,000 and a $3,000 separate burial fund. Available resources are liquid assets, i.e., cash or items that can be converted to cash within 20 days to be used for the support and maintenance of the SSI recipient, as well as real property or personal property that an individual could convert to cash to be used for his support and maintenance.[13] If the individual does not have the right, authority or power to liquidate the property, it is not a resource of the SSI recipient.[14] See, for example, *Navarro v. Sullivan*,[15] which found that assets retained by a guardian that could not be converted to cash, to be used for the support and maintenance of the SSI recipient, were not an available resource in computing eligibility for SSI.

2. Income Rules for Adults

For 2001, the SSI stipend is $618 per month for an individual living alone. SSI is usually paid to those who have not worked and who have not paid into the Social Security system. However, it may also supplement other benefit programs, including Social Security disability and old age and survivors benefits, for those who have worked but who receive a lower monthly stipend than SSI provides. When computing the monthly SSI payment, the Social Security Administration considers other income received by the SSI recipient. The agency distinguishes between earned and unearned income, and between cash income and income received in kind.

An SSI recipient who earns income will have this income deducted from the SSI stipend according to a formula set out at in the regulations.[16] Unearned income, such as that provided by a trust, given *in cash* to the SSI recipient, will also be deducted from the SSI stipend.[17] Certain items received by the SSI recipient are not countable income. For example, bills paid directly to the supplier of services other than food, clothing and shelter will not result in a reduction of the SSI benefit.[18] This is noncountable income provided in kind to the SSI recipient. However, bills paid directly to the supplier of food and clothing will result in a reduction of SSI benefits.[19] Bills paid directly for housing that does not result in an actual economic benefit for the SSI recipient will not result in a reduction of the monthly stipend so long as the person making the payment is not legally responsible for the SSI recipient and does not reside in his or her household.[20] Because SSI recipients automatically receive Medicaid in the state of New York,[21] the state rules prescribing the manner in which to count income and resources can not be more restrictive than the federal rules.[22] Indeed, the Medicaid resource allowance for 2001 was more generous than that for SSI—$3,750 for an individual.

3. Income and Resource Rules for Children Under 18

As with Medicaid eligibility for children, the financial eligibility of the disabled child for SSI depends upon the economic situation of the parents. The parents' assets and income are deemed available to the child when computing eligibility for SSI for the disabled child. The larger the size of the household, the larger the size of the income that may be earned without eliminating SSI. If a single parent has one disabled child, that parent's earned income over approximately $1,200 per month will disqualify the disabled child from SSI**.** Unearned income of a parent, however, reduces SSI benefits dollar for dollar.[23]

PRACTICE TIP: If a court order authorizes a stipend to a parent for caring for the child, the court should characterize this stipend as earned rather than unearned income in order to continue eligibility of the child for SSI and automatic eligibility for Medicaid.

4. Transfer of Resource Rules

From July 1, 1988 until December 14, 1999, if an SSI applicant/recipient received resources and then transferred these resources to another, there was no ineligibility period for SSI benefits.[24] As of December 14, 1999, however, if an SSI recipient transfers resources, there may be a wait for SSI benefits. These new rules mirror, to a large extent, Medicaid eligibility rules for institutionalized individuals and are as follows:

a. Uncompensated Transfers

In general, the uncompensated transfer of resources will result in a period of ineligibility for SSI. The wait is calculated by dividing the resources transferred by the monthly SSI benefit. Thus, if $18,570 were gifted and the monthly benefit is $617, there would be a wait of 30

months. There is a 36-month look-back, and the ineligibility period is capped at 36 months, no matter how great the transfer.[25]

b. Exempt Transfers

Transfers of resources to a spouse or to a minor or disabled adult child do not incur a waiting period for SSI. The home may be transferred to a spouse, a minor child or a disabled child, to a caregiving child, or to a sibling with an equity interest in the home.[26] Resources transferred to a spouse, to a trust for the benefit of a disabled child, or to a trust for the benefit of a disabled individual under the age of 65 likewise incur no ineligibility period for SSI.[27]

c. Transfers into a Supplemental Needs Trust

No ineligibility period will be assessed to transfers into a trust which provides a payback to the state for the lifetime of Medicaid provided pursuant to 42 U.S.C. § 1396p(d)(4)(A) for a disabled individual under the age of 65 or to a pooled income trust pursuant to 42 U.S.C. § 1396p(d)(4)(C) for SSI for a disabled person of any age.[28]

d. Transfer of Income

In 1993, OBRA 1993 redefined resources and income for Medicaid purposes. "The term 'assets' . . . includes all income and resources of the individual and of the individual's spouse."[29] The Medicaid statute as of 1993 imposes an ineligibility period for the transfer of assets, said term incorporating income and resources.[30] For SSI, however, the statute still talks about the transfer of resources.

PRACTICE TIP: Advocates should argue that the transfer of income, i.e., funds received in one month and then transferred out in the same month, should not incur a 36-month ineligibility period for SSI. The month, however, is a calendar month rather than 30 days, and if the plaintiff retains a lawsuit recovery on the first day of the month following its receipt, it will be much more difficult to argue that it has not become a resource.

C. Social Security Disability

Individuals who have worked and paid into the Social Security Trust Fund through the Federal Insurance Contributions Act (FICA) tax[31] may acquire insured status by having paid sufficiently into the Social Security system for the requisite number of quarters per year prior to becoming disabled.[32] To receive Social Security disability benefits, one must be "currently insured." Workers disabled after the age of 31 must have 20 quarters of coverage within the ten-year period immediately preceding the onset of their disability.[33] Those disabled under the age of 31 require fewer quarters of coverage but never fewer than 6.[34] Individuals over the age of 31 who become disabled after they have left work and who do not have 20 quarters of coverage within the ten years prior to becoming disabled will not be "currently insured" and will not be able to receive Social Security disability.

Disability means that one is unable to perform "any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months."[35] This is the same standard used for determining eligibility for SSI and Medicaid benefits based on disability. However, unlike SSI and Medicaid, Social Security disability pays regardless of one's resources and unearned income. It is not "means-tested," and a lawsuit recovery will not affect ongoing eligibility for Social Security disability benefits. The more one has paid into the Social Security system, the higher the monthly Social Security disability benefit will be. Disabled individuals who have received Social Security disability benefits for 25 months become eligible automatically for Medicare.[36]

PRACTICE TIP: Sometimes Workers' Compensation plaintiffs are eligible for Social Security disability but have not applied for coverage. An application may be brought for retroactive Social Security disability benefits, which will be retroactive one year from date of application, even if disability is established more than one year prior to the date of application. Medicare benefits will begin 17 months after application date if disability is established one year prior to application date.

D. Medicare

Medicare[37] is a Social Security health insurance program that provides coverage under Part A for hospital, skilled nursing facilities and home care, and under Part B for physicians. Individuals 65 years of age who are entitled to receive Social Security, widows or Railroad Retirement benefits are eligible for Medicare,[38] as are disabled individuals who have received Social Security disability benefits for 25 months.[39] Those with end-stage renal disease who require dialysis or a kidney transplant also are eligible for Medicare, regardless of age.[40] As qualification for Medicare is not dependent on a showing of financial need,[41] a lawsuit recovery will not affect ongoing eligibility for Medicare.

E. Public Assistance

Public assistance in the form of Home Relief, veteran assistance and Aid to Families With Dependent Children is provided to needy individuals who are exempted from work requirements and/or who have not

refused to work.[42] A monthly stipend is given based upon the number of persons in the household. Certain earned income of a dependent child or household members is disregarded, as well as certain support payments, federal income tax refunds and earnings that are part of the federal job training partnership act.[43] Parents and siblings of a minor applying for public assistance who are living together are considered part of the same household, and their income is considered when making a determination as to need.[44] Exempt resources include $2,000 for the household, or, in the case of households where any member is 60 years of age or older, $3,000; the home which is the usual residence of the household; an automobile with a fair market value of $4,650; and a burial plot and a funeral agreement worth $1,500.[45] When a recipient of public assistance receives assets in excess of the allowable resources, he or she will lose eligibility for benefits. Whether he or she gives the assets away or retains them and uses them, he or she will be considered to have utilized them at the rate per month of the public assistance payment. Thus, if a public assistance recipient receives $50,000 in a lawsuit recovery, and if the recipient receives $500 per month from the Department of Social Services, he or she will lose ongoing eligibility for public assistance for 100 months.[46] This occurs whether or not the moneys are expended prior to 100 months and whether or not he or she has gifted the moneys to another.

F. Office of Mental Health Benefits

Residents of New York State psychiatric hospitals pay for their stays.[47] The patient, his estate and his spouse are liable for such charges.[48] Those under the age of 21 and over the age of 65 eligible for the Medicaid program will have their stays paid for by Medicaid. Those between the ages of 21 and 65 unable to pay will have their stays paid for by the state of New York.

G. HIV Uninsured and Underinsured Care Programs

The New York State Department of Health offers three programs to provide access to state residents with HIV infection who are uninsured or underinsured. The AIDS Drug Assistance Program (ADAP) pays for medications for treatment of HIV/AIDS. ADAP Plus (Primary Care) pays for primary care services at enrolled clinics, hospitals, laboratory providers and private doctors offices. The HIV Home Care Program pays for home care services to the chronically medically dependent individuals as ordered by the doctor. The program covers home health aide services, intravenous therapy and supplies and durable medical equipment. Services must be ordered through a home health care agency which is enrolled in the program. These programs can pay the co-insurance of private insurance or the Medicaid spenddowns. The ADAP program imposes a liquid asset limitation of $25,00 per household and an income cap of $74,400 for a household of three.[49]

III. Liens and Personal Injury Lawsuits

A. Medicaid

1. Assignment, Subrogation and Liens

The federal Medicaid statute prohibits the imposition of liens against the assets of Medicaid recipients during their lifetimes if Medicaid has been correctly provided.[50] The federal Medicaid statute does, however, require that the state pursue third parties legally liable for medical costs borne by the Medicaid program.[51] The federal statute requires that Medicaid recipients assign to the state any rights that they have to receive payment from third parties such as insurance companies to pay for medical care.[52] New York law provides that a social services district is subrogated, to the extent of the medical care furnished, to any rights the Medicaid recipient may have to medical support or third-party reimbursement.[53] New York law allows a social services district to impose a lien against a personal injury action for public assistance provided after the date of receiving services,[54] so long as such lien will not violate federal law.[55]

In 1993, federal legislation was enacted which removed the obstacles that had prevented disabled individuals from creating trusts while maintaining eligibility for government entitlements.[56] (See discussion in Section V concerning supplemental needs trusts (SNT)). As these trusts provided a payback to the state upon the death of the Medicaid recipient for an amount up to the total Medicaid provided, litigation ensued to clarify the interrelationship between the assignment, subrogation and lien statutes and these payback trusts. The issues to be decided were as follows:

1. When a personal injury plaintiff had received Medicaid and a recovery was made, must the lien be satisfied prior to the establishment of a payback SNT?
2. If so, was the entire amount of an award, or only that portion intended to compensate the plaintiff for past medical expenses available to satisfy the lien?
3. How do the SNT lien rules apply to an infant?

2. Court of Appeals *Cricchio/Link* Decisions

The first question was answered by the Court of Appeals in *Cricchio v. Pennisi* and *Link v. Town of Smithtown*.[57] The court determined that a lien must be satisfied prior to the establishment of a payback trust. Personal injury plaintiffs Christopher Cricchio and Patricia Link had argued that a deferral of the lien was consis-

tent with the statute, as the statute called for a payback upon death from all remaining trust assets for an amount up to the total value of all medical assistance paid on behalf of the individual. The Court of Appeals held that the assignment statute, requiring that the Medicaid recipient assign to the state the rights against third parties, meant that the trust assets did not pass to the plaintiff and hence to the trust until the lien had been satisfied. Pursuant to this decision, when a plaintiff in a personal injury action received Medicaid benefits on account of the injury and a social services district imposed a lien against the lawsuit proceeds payable by a third-party tortfeasor, this lien had to be satisfied prior to the establishment of a supplemental needs trust fund.[58]

The *Cricchio/Link* decision remitted the cases to the courts below to decide whether the entire amount of the personal injury settlement or only that portion attributable to past medical expenses is available to satisfy the lien. Plaintiffs argued that when a case settled, the settlement was comprised of many causes of action, such as pain and suffering, lost future earnings, lost past earnings and past and future medical bills. They argued that only that portion of the settlement intended to reimburse the plaintiff for the medical expenses incurred by the Department of Social Services should be available to reimburse the state. They argued that the court could and should allocate the damages and determine what percentage, if any, of the lawsuit recovery was properly attributable to past medical expenses. They further argued that a jury allocation explicitly finding percentages of a verdict attributable to past medical expenses should be followed in determining the extent that a lien must be satisfied prior to the establishment of a payback trust.

3. *Calvanese v. Calvanese* and *In Re Callahan*

In *Calvanese v. Calvanese* and *In re Callahan*,[59] the New York State Court of Appeals decided that the Medicaid agencies had unreviewable discretion to determine the amount of settlement funds that were to be paid to satisfy a Medicaid lien prior to the establishment of a supplemental needs trust. Pursuant to this decision, the entire amount of a personal injury recovery is available to satisfy a Medicaid lien prior to any other damages being paid. A Medicaid lien must be satisfied prior to the establishment of a supplemental needs trust and the amount of the Medicaid lien to be paid to satisfy the lien is at the discretion of the Medicaid agency. Plaintiffs could transfer the settlement proceeds into an SNT only after the liens are satisfied.

The Court of Appeals rejected the appellants' argument that the trial courts should make a factual determination as to the "allocation" of a settlement as and between pain and suffering, past medical expenses, loss of earnings and future needs. The effect of the decision is to provide the Medicaid agencies with a priority claim for reimbursement for past medical expenses from the proceeds of any settlement.

4. Even Infants Must Satisfy This Medicaid Lien

The plaintiffs in *Cricchio-Link* and *Calvanese-Callahan* were adults when their cases settled. Although Christopher Cricchio had received Medicaid benefits when he was under the age of 21, no lien had been placed against these proceeds. New York statute[60] and case law[61] had prevented the imposition of liens against the lawsuit recovery of a recipient of public assistance under the age of 21 unless he or she had assets sufficient for his or her reasonable needs during the time that benefits had been provided.[62]

After the *Calvanese-Callahan* decision, the local Medicaid agencies argued that *Cricchio-Link* and *Calvanese-Callahan* had overruled *Baker v. Sterling*.[63] The agencies argued that because a Medicaid recipient assigned the cause of action to the agency as a condition of receiving benefits[64] and that because the assignment statute did not limit the assignment requirement to adults,[65] that the decisions of *Cricchio-Link* and *Calvanese-Callahan* now required that even lawsuit recoveries of infants be subject to full reimbursement of a Medicaid lien.

The Court of Appeals has spoken and agreed with the agencies. In *Gold v. United Health Services Hospitals Inc.*, and *Santiago v. Craigbrand Realty*,[66] the Court determined that the full proceeds of an infant's tort recovery are available to satisfy a Medicaid lien. The Court found that the Medicaid agencies have broad powers to recoup payments from third parties legally liable for expenditures that have been paid by the Medicaid program. The Court found that this recoupment, required by federal law and implemented in New York state law, superseded the specific language in section 104(2) that limited recovery against infants' lawsuits.[67] The Court reiterated its findings in *Cricchio* and *Calvanese* that the assignment, subrogation and recoupment provisions of the federal Medicaid statute give rise to the agency's right to recover payments from a third party who is responsible for the costs paid by Medicaid. The Court found that Social Services Law § 104(1), (2) remain applicable for other forms of public assistance, but not for Medicaid.

Kimberly Santiago had received $12,877 in Medicaid benefits. She must pay them back before establishing a supplemental needs trust. Abraham Gold had received Medicaid benefits of $1,770,294. Abraham Gold's case did not involve a lawsuit settlement. Rather, the jury had reached a verdict in favor of the plaintiffs for close to $100,000,000. However, the plaintiffs and defendants had agreed, prior to the jury's decision, that should there be a plaintiff's verdict, it would be capped

at $5,000,000. If there were a defendant's verdict, the plaintiffs would receive $450,000.

Upon issuing its verdict, the jury allocated a portion of the verdict for future needs, pain and suffering and past medical expenses. As only $5,000,000 would be paid, the plaintiffs sought to reduce the Medicaid lien to the proportionate share that it represented in a $100,000,000 verdict, or approximately 2 percent of the total recovery. The plaintiffs asked the trial court to fix the Medicaid lien at $103,000 instead of requiring that it be paid in full at $1,770,294, or approximately one-third of the recovery. They asked that after attorney's fees, all remaining assets be placed into a supplemental needs trust.

In addition to requiring that the Medicaid lien be paid in full, the trial court then denied the plaintiffs' request that the net recovery be placed into a supplemental needs trust. The trial court found that as the jury had explicitly allocated funds for the future medical and custodial needs of the infant plaintiff, these funds should not be placed in a supplemental needs trust. Rather, they should remain outside of a supplemental needs trust as an available resource to pay for the future medical and custodial needs of the infant plaintiff. The court held that these funds, $2,173,626, should be utilized for the medical and custodial needs of the plaintiff rather than having them fund a supplemental needs trust for items of need that the government would not provide. By the court's refusing to fund a supplemental needs trust, the plaintiff lost eligibility for ongoing Medicaid services. Only when the $2,173,626 has been consumed on medical and custodial needs will Abraham Gold be eligible once again for Medicaid services.

The Court of Appeals first found that the entire Medicaid lien must be paid, dollar for dollar, notwithstanding the 20-fold reduction between the jury's verdict and the agreed-upon settlement. Next, the Court of Appeals determined that the supreme court had used a mathematical formula and had not exercised its discretion in determining the amount that would fund a supplemental needs trust. The Court then remanded *Gold* so that the trial court could articulate its use of discretion pursuant to CPLR 1206 as to the manner in which to invest or disburse the proceeds of an infant's recovery in order to best serve the infant's needs.

B. Medicare Claims

Medicare is the secondary payer of claims for medical items and services payable under automobile liability insurance, uninsured motorist insurance, underinsured motorist insurance, homeowner's liability insurance, malpractice insurance, product liability insurance and general casualty insurance.[68] Thus, Medicare that has been provided due to the injuries caused by a tortfeasor may be recouped from a lawsuit settlement. Pursuant to federal regulations,[69] Medicare is considered to have been conditionally provided, and HCFA, the Health Care Financing Agency, now known as Center for Medicare and Medicaid Services (CMS) must initiate recovery from a third party as soon as it learns that payment has been made or could be made under any insurance plan.[70] If CMS does not have to take legal action to recover, it receives the lesser of the amount of the Medicare primary payment or the amount of the third party payment. If it is necessary for CMS to take legal action to recover from the patient, CMS may recover twice that amount.

CMS has a direct right of action to recover from any entity responsible for paying for medical costs Medicare has covered, including an employer or an insurance carrier. CMS is subrogated to any individual, provider, supplier, physician, private insurer, state agency, attorney or other entity entitled top payment by a third-party payer for services for which Medicare paid.[71] CMS may recover without regard to any claims filing requirements that the insurance program or plan imposes on the beneficiary which may or may not have been followed.[72] However, CMS must file a claim for recovery by the end of the year following the year in which the Medicare program that paid the claim has notice that the third party should have paid for those particular services.[73] HCFA has a right of action to recover its payments from any entity, including a beneficiary, provider, supplier, physician, attorney, state agency or private insurer that has received a third-party payment.[74] CMS has a right to recover regardless of how amounts may be designated in a liability award or settlement, e.g., loss of consortium, special damages or pain and suffering.[75]

PRACTICE TIP: As the attorney is liable to reimburse the Health Care Financing Agency, the attorney should satisfy any Medicare claim prior to disbursing funds to the client.

Once lawsuit proceeds have been received, Medicare must be repaid within 60 days. CMS may charge interest if payment is not made within 60 days. In the case of liability insurance settlements and no-fault insurance, which should know that Medicare should be reimbursed, if Medicare is not reimbursed, the third-party payer must reimburse Medicare even though it has already reimbursed the beneficiary or other party.[76]

Medicare's claim is not a statutory lien that follows the requirements of SSL § 104-b. CMS must be reimbursed if one knows or should have known that Medicare made expenditures for which a third party is liable and is now paying.

PRACTICE TIP: The attorney should suspect that Medicare has paid for hospital stays and physicians and up to 100 days in a skilled nursing facility when the plaintiff is over 65, or under 65 but disabled and receiving Social Security disability for two years.

C. Public Assistance Liens

1. Adults

The government may pursue reimbursement from the assets of a person who has received public assistance within ten years of receiving an inheritance or lawsuit recovery.[77] Thus, if a public assistance recipient receives a $50,000 lawsuit recovery and has received $20,000 in public assistance benefits during the past ten years, there will be a $20,000 reimbursement to the government. The $30,000 remaining will result in ineligibility for public assistance during the next 60 months if he or she receives $500 per month from the Department of Social Services.

The claim against the assets of a public assistance recipient may be brought during lifetime or against the individual's estate. The claim will not be defeated because the individual correctly received the benefits or was without sufficient funds to pay for his or her reasonable needs during the period of time when the benefits were provided.[78] This claim may also be brought against an individual legally liable for the support of a recipient of public assistance.[79]

Thus, if a parent of a minor child on public assistance settles a lawsuit, recovery may be made against the parent's assets within ten years of the child's receiving services. The public welfare official is a preferred creditor above all others.[80] When a person over the age of 21 receives funds such as a lawsuit recovery, the government may recover the cost of public assistance benefits provided under the age of 21 if within ten years from receiving the lawsuit proceeds.[81]

2. Public Assistance and Children Under the Age of 21

If a child under the age of 21 who has received public assistance recovers funds either in a lawsuit or inheritance, reimbursement to the government may be made only if at the time the assistance was granted he or she had assets in excess of his reasonable requirements, taking into account his maintenance, education and medical care.[82]

D. Office of Mental Health Liens

When a resident of a state psychiatric hospital receives funds, he or she will have a duty to pay the cost of care based upon an ability to pay.[83] If the patient has established a self-settled trust that allows an invasion of principal but does not provide a payback to the state in conformance with EPTL 7-1.12, the assets in the trust will not be insulated from claims from the state.[84] If the funds are the result of a lawsuit, the state may make a claim for reimbursement even if the lawsuit was brought against the state for injuries sustained in the hospital.

IV. Negotiating Liens

A. Medicaid Liens

1. Plaintiff Counsel's Dilemma When There Is a Medicaid Lien

If plaintiff has a case with no problems proving defendant's liability and the defendant has insurance or assets that will cover all of plaintiff's damages, then the negotiations are simple. If there is a Medicaid lien, then that lien provides a base upon which to add the damages to the plaintiff which include the plaintiff's pain and suffering, future needs, past economic loss and future economic losses. The higher the Medicaid lien, the higher the defendants' payout. The Medicaid lien becomes a pass-through cost to the defendant upon which are piled on the non-Medicaid damages.

However, if the plaintiff has liability or recovery problems and there is a relatively large Medicaid lien, then the plaintiff's counsel has a negotiating dilemma. The Medicaid lien is a priority lien that must be paid prior to the plaintiff's recovering for pain and suffering, future needs, past economic loss and future economic loss. Only the plaintiff's attorney, who has a well-earned contingency retainer, and the hospital, have priority of payment to the Medicaid lien.

The plaintiff's attorney now also has a potentially very disgruntled client if the victim's net recovery is dwarfed by Medicaid's recovery and the plaintiff's attorney's contingency fee. Perhaps the best example of this dilemma is plaintiff Callahan, whose Medicaid lien was greater than the settlement.[85] Frances Callahan, who cannot walk or talk or live independently, will receive no benefit from her lawsuit settlement, as the lien was greater than the recovery.

The Court of Appeals' decisions have eviscerated the federal remedial statute enacted in 1993 to exempt disabled individuals under the age of 65 from the new, harsher rules for Medicaid eligibility and trusts. All Medicaid recipients must satisfy Medicaid liens imposed against lawsuit recoveries prior to retaining any proceeds of a lawsuit. However, practitioners should note the following:

2. Practice Tips

a. Verify the Amount of Medicaid Expended

In order to verify the amount of Medicaid expended, plaintiff's attorney should request that the local Department of Social Services order a claim detail report from the New York State Department of Health. The claim detail report lists services rendered, the dates of services, the diagnosis, the location where services were rendered, and the cost of the services. Whenever possible, dates of services should be verified with the client, and independent records kept by the client may be used to challenge services incorrectly billed.

b. Verify That Income Paid to Offset the Cost of Care (NAMI) Is Properly Credited in the Claim Detail Report and Reflects Reduced Medicaid Expenditures

Each month, many Medicaid recipients must pay income in excess of the Medicaid allowable income to the facility or agency providing care. For nursing home residents, all income in excess of $50 is paid to the facility. For home care recipients, income in excess of approximately $600 per month is spent on health care needs. This is often paid directly to a certified agency, whose bill to Medicaid should reflect this offset to the cost of care.

c. Only Medicaid Benefits Causally Related to the Lawsuit Should Be Subject to a Lien

Only Medicaid benefits causally related to the lawsuit should be subject to a lien, as the assignment, subrogation and recoupment rights are based upon the theory that the tortfeasor is legally responsible for the expenditures made by the Medicaid program and that the agency has a duty to pursue third parties legally liable to pay for expenses paid by the Medicaid program, which is the payer of last resort.[86] If a plaintiff was disabled prior to the injury which is the subject of the lawsuit, the attorney should challenge any claim for reimbursement of services billed for a pre-existing condition. Sometimes a mentally retarded adult is injured in a bus crash. Prior to the injury, the client received Medicaid home care services. After the injury, the client received Medicaid home care services. Only if the nature and frequency of the Medicaid services changed after the bus crash should any of the home care be part of a claim for reimbursement from the proceeds of the lawsuit. Other examples include a patient with multiple sclerosis who is injured in an ambulette. Prior to the injury, she did not receive Medicaid home care. Afterwards, she does, as she is unable to walk unassisted. However, her physician states that the progressive nature of her disease would have resulted in the need for home care even without the ambulette injury. The attorney should argue that the full cost of the Medicaid home care expense subject to the lien should be reduced.

d. The Lien That the Agency Must Place Against the Lawsuit Has Strict Procedural Requirements

As the Medicaid lien did not exist in common law, in order for a lien to be valid, the statutory requirements of SSL § 104-b must be followed. No lien should be effective unless the procedures outlined in the statute have been met. A written notice containing the name and address of the injured recipient, the date and place of the accident, the name of the person alleged to be liable to the injured party together with a brief statement of the nature of the lien, the amount claimed, and that the lien is claimed against the suit must be served by registered mail upon the defendant and insurance carrier prior to the plaintiff's receiving any funds. A copy of the notice of lien must also be served by regular mail to the plaintiff and to the attorney for the plaintiff, if known.[87] The public welfare official must also file a true copy of the notice of lien in the office of the county clerk in which the public welfare official has an office.[88]

It must be noted that a Medicaid recipient has a duty to report any change of financial circumstance and the existence of a cause of action when recertifying annually for Medicaid. If the department's failure to comply with the statutory procedural requirements of SSL § 104-b is due to the plaintiff's failure to notify the Department as to the existence of the lawsuit, a court might easily declare that each party's omissions neutralize the other's and that the lien will be upheld if the procedural requirements are corrected. However, if the county is the defendant in the lawsuit, is that not actual knowledge?

e. Challenge Educational Costs That May Be Listed as Medicaid Expenses

Severely disabled infants may receive various therapies in school. Disabled infants receive special education services, sometimes in schools away from home. The Medicaid program, rather than the local school district, often pays for this components of this schooling and even for room and board in residential school placement.[89]

Plaintiff's attorney should reject items on a claim detail report for medically related expenses rendered in an educational setting. Rather, these items comprise a free and appropriate education mandated by the Individuals with Disabilities Education Act.[90] Such education emphasizes special education and related services designed to meet the unique needs of these children.[91] In New York State, Education Law § 4401 defines what constitutes a child with a disability and what special services or programs should be provided him. Trans-

portation, speech-language pathology, psychological services, physical and occupational therapy, recreation, social work services, counseling, and educational and diagnostic medical services comprise related services available at public expense to a disabled child.[92]

New York case law has now developed in which courts have rejected the Department of Social Services' attempts to be reimbursed for medical components of education. In *Contreras v. Residential Plaza Realty, Inc.*,[93] Justice Garson determined that medical procedures performed in medical settings would be reimbursable from an infant's lawsuit proceeds but that medical procedures performed in educational settings would not be subject to a Medicaid lien, notwithstanding Medicaid's payment to the board of education for these medical treatments. "[T]he public policy expressed in the statutory scheme for providing a free education to handicapped children in this State takes precedence over considerations of fiscal expedience."[94] "[T]he infant cannot be held financially accountable for the Byzantine rules and regulations of the New York State Medicaid reimbursement programs."[95] In *Lawson v. Dinally*,[96] the court reduced a $55,87.49 lien to $1,786.49, as almost all of the expenditures claimed were educational rather than solely medical.

In *In re Sharon Roxanne Weiss*,[97] the court reduced a Medicaid lien from $276,288.96 to $71,950.06, finding that more than $200,000 claimed by the Department of Social Services represented the plaintiff's educational expenses at the Devereux Foundation School and, therefore was not recoverable from the proceeds of the lawsuit settlement. In *Hannah v. New York City Housing Authority*,[98] Justice Rappaport vacated the lien, as all medical expenditures were really educational services. These cases all demonstrate the necessity of examining the claim detail report and of advocating strongly for the rights of the disabled.

f. As It Is the Agency's Duty to Pursue Liable Third Parties, Bring DSS into the Settlement Process

The federal assignment statute[99] obliges the states to pursue third parties legally liable for the costs incurred by the Medicaid program. This obligation does not rest with the Medicaid recipient, who has a duty only to assist in identifying such third parties.[100] In a 1995 California decision,[101] the federal government refused to make federal Medicaid payments of $7,592,786 to the state of California because California had failed to seek reimbursement from liable third parties for Medicaid expended by the federal government.

This denial was based upon California's policy that had allowed Medi-Cal recipients to retain at least 50 percent of any settlement or award, notwithstanding Medicaid expenditures made on behalf of the plaintiff and which were causally related to the lawsuit. In defending its policy, California asserted that HCFA unreasonably prohibited California from allowing recipients to retain portions of lawsuit recoveries which did not represent payment for medical care.

The federal government, however, decided that it must be fully reimbursed for the federal share of Medicaid before the recipient may receive any money from a lawsuit against a third party. The federal government determined that it was California's duty to pursue the third party responsible for the Medicaid expenses, not the Medicaid recipient's duty. The federal government recognized that California had structured its tort recovery system to encourage lawsuits by recipients and private attorneys rather than by the state. Nonetheless, such structure could not obviate California's obligation to pursue third parties. Unless the private attorneys were to be considered acting on behalf of the state, California could not rely upon their efforts to satisfy the state's obligation to pursue liable third parties. The Medicaid agency, not the Medicaid recipient, had the "superior status" to pursue the third party responsible for the Medicaid expenditure. The federal government legally segregated the Medicaid agency's cause of action to recover for medical expenditures made on behalf of a Medicaid recipient and the Medicaid recipient's own causes of action for pain and suffering and economic loss.

The state of New York, like California, has been abrogating its duty to pursue third parties legally liable for Medicaid expenditures by relying upon private attorneys to pursue tortfeasors and then to reimburse the state from the plaintiff's recovery. The Medicaid agencies should be forced to pay their equitable share of attorney's fees as in Medicare and Workers' Compensation. In addition, the agency should participate in negotiating settlements that provide ample compensation to the tort victim so that the plaintiffs faced with no net recovery will not reject a settlement and risk a defendant's verdict in cases of difficult liability.

The agencies should expand the model used in the tobacco litigation in which the private bar secured billions of dollars from third parties for Medicaid costs.[102] When the plaintiff informs the local Medicaid agency of the pending tort action, the local agency can make a choice whether to pursue the action with its own staff or retain private counsel to pursue the defendants to recover the medical expenses. If local Medicaid agency retains private counsel, then, like any client, it will have to balance the risks of proceeding to trial versus accepting a settlement. It also will have to bear its share of litigation costs.

Cricchio, *Calvanese*, *Callahan*, *Gold* and *Santiago* have changed the litigation landscape of cases involving large Medicaid liens when there are liability or collection problems. As Medicaid has a priority claim, it is now necessary to change the negotiating strategies to secure a reasonable settlement from the defendant in a problematic or weak case. With a problematic case, plaintiff's counsel can better control the negotiations if counsel is negotiating directly for Medicaid's cause of action. If plaintiff's counsel explains the risk of not settling, the local Medicaid agency will make its own reasoned decision as to the amount of moneys it will accept from the defendant to satisfy the agency's cause of action. By inviting Medicaid into the problematic case *prior* to negotiating a settlement in the case, the Medicaid recipient's own causes of action are independently protected. The negotiations are for segregated causes of action and not for a "lump sum" settlement from which the Medicaid recipient receives the crumbs after the Medicaid agency applied its priority right to 100 percent recovery off the top. All of the negotiating cards are on the table for both Medicaid and the Medicaid recipient to consider when the settlement decision is made. The Medicaid agency becomes the plaintiff's ally and not the plaintiff's creditor.

g. Purchase a Structure to Pay the Lien

Structured settlements are used to provide an income stream for the lifetime of the plaintiff. In cases where the lien is great but the lump sum recovery is small, the local agency may be willing to receive periodic payments to pay the lien over time.

h. If the Defendant Is a Nursing Home, Recoveries Need Not Be Used to Pay for Medical Expenses

Lawsuit proceeds received by a nursing home resident as the result of an action against the facility because of improper or inadequate treatment is not required to be applied toward the cost of care.[103] If the proceeds are exempt, may the Department of Social Services impose a lien against the lawsuit proceeds if the lawsuit is causally related to expenditures made by Medicaid? Plaintiffs' advocates would argue that exempt assets should not be subject to a lien, while Medicaid agencies would argue that only the net amount, after payment of liens and attorneys fees, do not affect eligibility for Medicaid.

B. Social Security Disability and SSI

There is no lien filed against a lawsuit when SSD or SSI has been provided.

C. Medicare Claims

Medicare recognizes that it is responsible for paying its share of the cost of procuring a third-party recovery. A form is utilized in which the total procurement costs (attorney's fees and expenses) are divided by the amount of the settlement to determine the ratio of procurement costs to the settlement. If, for example, the settlement is for $600,000 in a personal injury case, and expenses are $20,000, and the attorney's retainer agreement provides for one-third of the net settlement as a legal fee, the attorney's fee will be $191,400. When added to the expenses, the procurement cost will be $211,400. When divided by the recovery amount, the ratio of procurement costs to settlement is 35 percent. If the total Medicare expended had been $40,000, Medicare's share of the procurement costs will be $40,000 times 35 percent, or $14,000. Medicare's claim to be recovered is $26,000.

HCFA may reduce its claim if there is a hardship due to great damages and a small recovery.

V. Planning to Preserve Ongoing Eligibility for Government Entitlements

Once the plaintiff has paid all fees and liens, he or she now has a net recovery. Disabled individuals may need the special services provided by Medicaid or may wish to continue eligibility for SSI.

PRACTICE TIP: Sometimes Medicaid recipients wish to continue eligibility because they really need health insurance and know of no other way to obtain such insurance. Medicaid acts as existing health insurance which avoids an elimination period for pre-existing conditions for new health insurance. Clients may be able to enroll in private health insurance and pay the premiums privately without continuing Medicaid services if the private health insurance covers their need for physicians, hospitalizations and medications.

Other clients need home health care services or therapies or day programs provided through Medicaid. Planning opportunities to preserve assets and access government entitlements differ depending upon the age of the disabled individual and whether services are provided in the community or in a facility.

A. The Use of Supplemental Needs Trusts for Disabled Individuals Under the Age of 65

1. Statutory Authority

A supplemental needs trust fund is a principal planning tool to enable the disabled individual under the age of 65 to retain eligibility for SSI and Medicaid. Although the Court of Appeals has determined that a Medicaid lien must be paid in full prior to establishing the trust, the trust provides a public/private partnership in order to supplement rather than supplant SSI and Medicaid.

In August 1993, as part of the Omnibus Budget Reconciliation Act (OBRA), the federal Medicaid program created harsher rules for the use of trust funds for Medicaid applicants.[104] The Congress carved out an exception to these rules for disabled individuals under the age of 65.[105] If a disabled individual under the age of 65 funds a trust established by his parent, grandparent, legal guardian or through court order, the transfer of assets into this trust will not result in any period of ineligibility for Medicaid or SSI for that individual.[106] Moreover, the corpus of such a complying trust will not be considered available to the disabled individual when computing his or her eligibility for Medicaid.[107] However, "upon the death of such individual, the state will receive all amounts remaining in the trust up to the total value of all medical assistance paid on behalf of such individual."[108] Hence the term "payback trusts."

OBRA '93 was implemented in New York State by amending the Social Services Law, as discussed above, and also by amending the EPTL 7-1.12. Prior to the federal enactment of OBRA '93, the New York State Supplemental Needs Trust Statute was restricted to third-party trust funds. After OBRA '93, however, the EPTL was amended at 7-1.12(a)(5)(v) to provide that the creator of a supplemental needs trust fund may be the beneficiary so long as the trust conforms with SSL § 366(2)(b)(2).

PRACTICE TIP: Income distributed in cash to the Medicaid/SSI recipient will reduce the benefit dollar for dollar. In-kind disbursements of income are not countable for Medicaid purposes.[109] **Use of trust assets for food and clothing will reduce the SSI benefit by one-third. Use of trust assets for shelter may reduce the monthly SSI benefit by one-third. (**See discussion in Section II.)

2. Applicability of SNTS to Office of Mental Health Patients

When a person between the ages of 21 and 65 is an inpatient in a state psychiatric facility, that person's stay is not paid for by the federal Medicaid program. The OMH has asserted that a payback supplemental needs trust does not protect assets from being available to pay for room and board at facilities under the auspices of the OMH. While the EPTL 7-1.12 as originally enacted in July 1993 did not provide for self-settled trusts, it was amended in June 1994 to reflect the applicability of OBRA '93 and the federal payback trusts.

The language of EPTL 7-1.12 reveals that the trust should protect assets of third parties whose disabled loved ones reside in such facilities and need such care. "A 'beneficiary' [of a supplemental needs trust] means a person with a severe and chronic or persistent disability who is a beneficiary of a supplemental needs trust."[110] "'Person with a severe and chronic or persistent disability' means a person (i) with mental illness . . ." [111] "The trustee of the trust shall not be deemed to be holding assets for the benefit of the beneficiary for purposes of section 43.03 of the mental hygiene law or section one hundred four of the social services law."[112]

The government has argued that if an OMH patient receives a lawsuit settlement, it may place a lien against these funds prior to the establishment of a trust. Advocates may argue that if the lawsuit is not causally related to the reason for the institutionalization, the recovery should not be subject to a lien and that the full recovery should be placed into a supplemental needs trust. MHL § 43.03(d) offers support for this proposition, though no courts have as yet determined this issue.

3. Medicaid Budget with SNT

In general, a disabled individual who has income above the Medicaid allowance must spend down this excess income each month on medical expenses, as set forth in a Medicaid budget. Such an individual's income may be derived from Social Security disability, private pension, or disability pension. Oftentimes this income cannot be assigned to another, or to a trust, without violating the anti-alienation provisions of the Social Security Act or of ERISA.

When this income is paid to the disabled individual, directly, but then placed each month into the SNT, the income will not be countable income for Medicaid purposes. Thus, when a disabled person has income of $2,000 per month and receives home care benefits, all of that income may be placed monthly into the SNT. This income will not be subject to a spend down of all income above $600 per month. It is a way to allow the disabled to remain in the community.[113]

4. Pooled Income Trusts

OBRA 1993 authorized a second kind of "exception" trust that protects the assets of disabled individuals. When assets of a disabled individual are held in a trust established and managed by a nonprofit association which maintains separate accounts for the benefit of disabled individuals, but which pools the accounts for purposes of investment and management of the trust funds, the assets in the trust will not be considered available resources when applying for government entitlements. Upon the death of the disabled individual, the remaining moneys in his or her own account may remain in a pool for other disabled individuals. Any funds not so retained will be used to pay back the state for Medicaid benefits. A not-for-profit corporation may, in furtherance of and as an adjunct to its corporate purposes, act as a trustee of this trust so long as a bank acts as co-trustee.[114] For disabled individuals under the age

of 65, there will be no ineligibility period for Medicaid benefits, whether at home or in a nursing facility or waivered, when the trust is established. Moreover, the trust may be established by the disabled individual him/herself, thereby eliminating the need for a guardianship proceeding when the disabled individual has capacity. These trusts provide professional management of trust assets and an ongoing pool of funds for other disabled individuals upon the death of the beneficiary should assets remain.

B. Planning for the Tort Victim Over the Age of 65

The supplemental needs "payback" trusts authorized pursuant to OBRA '93 and codified in the EPTL at 7-1.12 must be funded prior to the disabled individual's 65th birthday. When the tort victim is 65 years of age or older, the "payback" trust is not applicable. Nonetheless, even without a payback trust, planning can be undertaken to retain benefits for the elderly tort victim and his or her family. Two viable alternatives are transfers of assets, including application of the "Rule of Halves," and the use of pooled income trusts.

1. Transfers of Assets and the "Rule of Halves"

Not every tort victim over the age of 65 wishes to establish eligibility for Medicaid. Some, however, are nursing home patients or home care patients already eligible for Medicaid at the time of their award. If the victim receives $100,000, this will be consumed in approximately one year by paying privately for the nursing home. The plaintiff will not have reserved a pool of fund for extra needs in the future.

If the elderly plaintiff wishes to preserve any part of the assets and accelerate eligibility for Medicaid, he or she may do so by transferring (gifting) assets to loved ones. For nonwaivered home care services, there is no ineligibility period for Medicaid caused by gifting the assets. The plaintiff can gift the $100,000 and remain eligible for community home care services paid by the Medicaid program. If he or she receives SSI, there will, however, be a waiting period of 36 months for resumption of benefits for all gifts above approximately $22,000 ($617 X 36).

For waivered Medicaid services provided in the community and for nursing home care, the gifting of assets will result in a period of ineligibility for Medicaid. If the plaintiff gifts $100,000, and the average cost of a nursing facility in the county in which he or she resides is $8,000, there will be a 12-month wait for future Medicaid benefits. However, if he or she is already in the facility, sufficient assets must be retained to pay privately during the waiting period caused by the gifting of assets. Hence, instead of gifting all of the assets, he or she may gift half of the assets, or $50,000. This will result in a six-month wait for Medicaid benefits, beginning the month after the transfer. Depending upon the actual cost of the nursing home and depending upon the income of the plaintiff, the remaining $50,000 could be enough to pay privately for the nursing home during the ineligibility period. After the expiration of the ineligibility period, the elderly plaintiff will be eligible once again for Medicaid in the facility.[115]

What has the plaintiff gained by gifting one half of the moneys? If gifted to a trusted family member or friend, the moneys can be used to supplement the needs of the elderly institutionalized individual by providing services and goods not furnished in the nursing home. Upon the death of the elderly tort victim, any remaining moneys that have been gifted will be owned by the donee. A previously impoverished individual may thus enjoy additional services during lifetime and also provide an inheritance to loved ones.

2. Use of Pooled Trusts for Those Over the Age of 65

Disabled individuals over the age of 65 may use pooled trusts, but the customary periods of ineligibility caused by the transfer of assets apply for Medicaid. Thus, if an elderly nursing home patient transfers money into a pooled trust, the elderly disabled individual can enjoy the use of both income and principal from moneys placed into the trust. The charitable nature of the pooled trust also may appeal to many clients. He or she must understand, however, that half of the moneys must be spent by paying the private rate of the nursing home while awaiting the ineligibility period for the gift into the trust to expire.

For SSI, the transfer of assets into a pooled trust incurs no ineligibility period.[116] Hence, if a disabled individual over the age of 65 resides in the community and receives SSI and community Medicaid, the assets may be transferred into a pooled trust without incurring any ineligibility period for SSI or Medicaid. Most pooled trusts have a minimum initial deposit.

VI. What Happens to Remaining Assets Upon the Death of the Plaintiff?

The plaintiff now knows what the net award will be and how to preserve eligibility for government entitlements. Even if a lien has been paid in full prior to receiving lawsuit proceeds, however, there may still be claims against the plaintiff's estate upon death. Estate recovery depends upon the type of benefits that have been provided and the age of the decedent.

A. The Death of the Beneficiary of a Supplemental Needs Trust

New York State regulations provide guidance to the trustee of the payback trust. Upon the death of the SNT beneficiary of a payback trust, the trustee has a duty to notify the Department of Social Services as to the death of the beneficiary. At that time, the trustee should examine the claim detail report for accuracy as to the benefits provided.

In addition, now that liens will be satisfied prior to the establishment of an SNT, the SNT language must provide that payment shall be made only to the extent that a lien has not been satisfied prior to the establishment of the SNT. The claim detail report must then be reconciled with the previous lien satisfaction.

The statute authorizing self-settled trusts provides that at the death of the beneficiary, the state shall be reimbursed from remaining trust assets for an amount up to the total Medicaid expended.[117] This statute requires reimbursement for Medicaid provided both prior to age 55 and after age 55. This statute requires reimbursement for Medicaid benefits not causally related to a lawsuit. This statute requires reimbursement for Medicaid benefits even if the beneficiary is survived by a spouse or minor children or disabled children.

B. The Death of a Medicaid Recipient With Assets Outside a Supplemental Needs Trust

When a Medicaid recipient dies without having established a supplemental needs trust, the state may recover the cost of Medicaid provided after age 55 from his probate or intestate estate so long as he or she is not survived by a spouse or disabled child or minor child.[118] Although most Medicaid recipients do not die with assets in an estate, certain plaintiffs may have exempt assets during lifetime which pass through an estate upon death. A home and guaranteed periodic payments are two assets which may escape estate recovery if not owned by a supplemental needs trust.

1. The Home

If a Medicaid recipient owns a home in which he or she resides, during lifetime that home is an exempt asset. If the Medicaid recipient dies owning the home in his or her own name prior to age 55, there will be no reimbursement to the state for Medicaid provided. If he or she dies after age 55, the state will be reimbursed from the estate for Medicaid provided after age 55 so long as he or she is not survived by a spouse or disabled or minor child.[119] However, if the home is an asset of the supplemental needs trust, it will be part of the trust assets available to pay back all Medicaid expended during the lifetime of the Medicaid beneficiary, even if death occurs prior to age 55.

2. Future Periodic Payments

Often the plaintiff's recovery is comprised of a structured settlement, with guaranteed payments made to the plaintiff's estate should he or she not survive the guaranteed term. Even if the payments during lifetime are made to an SNT, remaining payments directed to be made to the estate of the beneficiary should escape estate recovery if the beneficiary dies prior to age 55.

If a former recipient of public assistance dies with an estate, recovery may be made for benefits paid within ten years of death.[120]

For Medicare, SSI and Social Security disability recipients there are no estate recovery issues.

QUERY: Are the proceeds of a nursing home tort, excluded during a Medicaid recipient's lifetime from being utilized to pay for medical care, exempt from estate recovery?

VII. Ethical Considerations

Elder law attorneys are always plagued by the question: who is the client? Often, the interests and concerns of the family unit coincide with the best interest and desire of an elderly or disabled individual. In other instances, the benefits of certain planning to the elderly/disabled individual may be separate from the benefit to the family unit. When advising as to lawsuit settlements and government entitlements, the following issues may arise:

A. Advising as to a Structure

As per the discussion above concerning estate recovery, back-ending a structure might avoid estate recovery and allow a disabled individual's heirs to inherit lawsuit proceeds upon his death. However, back-ending a structure would avoid having the plaintiff enjoy the full benefit of the lawsuit recovery should he or she not survive. What do you advise the parent settling a case for a severely disabled infant plaintiff?

B. Advising as to Divestiture of Assets

For most entitlement programs, the gifting of assets hastens eligibility. If one gifts assets, however, one loses control over these assets. What do we advise disabled clients as to the relative benefits of divesting themselves of assets in order to access entitlements compared with retaining the assets but losing entitlements? If they are gifting assets with the implied expectation that the assets will be held for their in-kind use during lifetime, is that really a divestiture for Medicaid purposes?

C. Do We Need a Supplemental Needs Trust?

When is an award sufficient to provide for a lifetime of needs and comforts without accessing govern-

ment entitlements? Is it ethical to show clients how to obtain Medicaid or SSI eligibility if the lawsuit would provide sufficient resources without public benefits?

D. What if No Medicaid Lien Has Been Filed, but You Know That Medicaid Has Made Payments That Are Causally Related to the Action?

Social Services Law does not require that the attorney notify the Department of Social Services that a settlement has been reached. Should plaintiff's attorney notify the Department of Social Services prior to disbursing a lawsuit settlement? What if plaintiff's attorney does notify the Department of Social Services and they send a claim detail report that you believe misses most of the Medicaid or public assistance expended? Should you disburse the proceeds?

VIII. Conclusion

When evaluating whether a disabled plaintiff who is about to receive a lawsuit recovery requires ongoing eligibility for government entitlements, the attorney should consider whether or not the lawsuit settlement provides adequate compensation without the future need of Medicaid or SSI. If not, a supplemental needs trust is one way of preserving assets and eligibility for government entitlements. Only a pooled income trust is available for those over 65, but the applicable resource divestiture of assets rules apply for their Medicaid eligibility. Prior to funding a trust, and prior to receiving any net lawsuit proceeds, all liens must be satisfied. If the client understands the interrelationship between the lawsuit recovery and government entitlements from the beginning, there are likely to be fewer disgruntled plaintiffs who are shocked to learn, upon the lawsuit's conclusion, that they cannot retain unfettered control over huge recoveries while having all of their medical needs met by the government.

Endnotes

1 42 U.S.C. § 1396; SSL § 366; 42 C.F.R. § 430; 18 N.Y.C.R.R. § 360.1.

2. SSL § 366(1)(a)(2).
3. SSL § 366(5)(d)(3).
4. 42 U.S.C. § 1396n; 10 N.Y.C.R.R. § 505.21.
5. SSL § 366(5)(d)(4).
6. SSL § 366(5)(a)(d)(3)(ii)(D).
7. 18 N.Y.C.R.R. § 360-4.3(e).
8. SSL § 366(5)(d)(3)(ii).
9. SSL § 366-c(8)(c).
10. *See In re Shah*, 95 N.Y.2d 148, 711 N.Y.S.2d 824 (2000).
11. 18 N.Y.C.R.R. § 360-3.3(a).
12. 42 U.S.C. § 1381.
13. 20 C.F.R. § 416.1201(a), (b).
14. 20 C.F.R. § 416.1201(a)(1).
15. 751 F. Supp. 349 (E.D.N.Y. 1990).
16. 20 C.F.R. § 416.1112.
17. 20 C.F.R. § 416.1123.
18. 20 C.F.R. § 416.1103(g).
19. 20 C.F.R. § 416.1130.
20. *See Ruppert v. Bowen*, 871 F.2d 1172 (2d Cir. 1989); 20 C.F.R. §§ 416.1132, 416.1133, 416.1140, 416.1141.
21. SSL § 366(1)(a)(2).
22. *Comacho v. Sullivan*, 786 F.2d 32 (2d Cir. 1986).
23. 20 C.F.R. § 416.1160.
24. 20 C.F.R. § 416.1245(f).
25. 42 U.S.C. § 1382b(c)(1)(A).
26. 42 U.S.C. § 1382b(c)(1)(C)(i).
27. 42 U.S.C. § 1382b(c)(1)(C)(ii).
28. 42 U.S.C. § 1382b(e)(5).
29. 42 U.S.C. § 1396p(e).
30. *See generally* 42 U.S.C. § 1396p.
31. 42 U.S.C. § 409.
32. 20 C.F.R. § 404.132.
33. 20 C.F.R. § 404.130(d).
34. 20 C.F.R. § 404.130(c).
35. 42 U.S.C. § 1382c(a)(3).
36. 42 C.F.R. § 406.12.
37. 42 U.S.C. § 1395.
38. 42 C.F.R. § 406.5.
39. 42 C.F.R. § 406.12.
40. 42 C.F.R. § 406.13.
41. 42 U.S.C. § 426.
42. SSL § 131-a.
43. SSL § 131-a(8).
44. SSL § 131-c.
45. SSL at § 131-n.
46. SSL § 131-a(12); 18 N.Y.C.R.R. § 352.29(h)(i).
47. MHL § 43.01(a).
48. MHL § 43.03(a).
49. *See* SSL § 367-e.
50. 42 U.S.C. § 1396p(a); SSL § 369(2).
51. 42 U.S.C. § 1396a(a)(25)(A).
52. 42 U.S.C. § 1396k(a)(1)(A); SSL § 366(4)(h)(1).
53. SSL § 367-a(2)(b).
54. SSL § 104-b.
55. SSL § 104-b(12).
56. 42 U.S.C. § 1396p(d)(4)(A); SSL § 366(2)(b)(2)(iii)(A).
57. 90 N.Y.2d 296 (1997).
58. *Id.*
59. 93 N.Y.2d 111, *cert. denied sub nom Callahan v. Suffolk Co.*, 120 S. Ct. 323 (1999).
60. SSL § 104(2).
61. *Baker v. Sterling*, 39 N.Y.2d 397 (1976).

62. *Id.*
63. 39 N.Y.2d 397 (1976).
64. SSL § 366(4)(h)(i).
65. *Id.*
66. __ N.Y.2d __, __ N.Y.S.2d __ (Feb. 15, 2001).
67. *See* 42 U.S.C. §§ 1396a(a)(25)(A), (B), 1396k(a)(1)(A); SSL § 366(4)(h)(1).
68. 42 U.S.C. § 1395(b)(1).
69. 42 C.F.R. § 411.24.
70. 42 C.F.R. § 411.24(b).
71. 42 C.F.R. § 411.25.
72. *Id.*
73. 42 C.F.R. § 411.25(2).
74. 42 C.F.R. § 411.24(g).
75. *See Holle v. Moline Pub. Hosp.*, 598 F. Supp. 107 (C.D. Ill. 1984); *see also Zinman v. Shalala*, 67 F. 3d 841 (9th Cir. 1995) (general discussion of Medicare claims).
76. 42 C.F.R. § 411.24(i)(1), (2).
77. SSL § 104(1).
78. *Id*.
79. *Id*.
80. *Id*.
81. *Id*.
82. SSL § 104(2). *See Baker*, 39 N.Y.2d 397, now limited to assistance other than Medicaid pursuant to *Gold v. United Health Serv. Hosp. Inc.,* and *Santiago v. Craigbrand Realty*, ___ N.Y.2d ___, ___ N.Y.S.2d ___ (Feb. 15, 2001).
83. *See* MHL § 43.03(a).
84. *See State v. Hawes*, 564 N.Y.S.2d 637 (3d Dep't 1991).
85. *In re Callahan*, 93 N.Y.2d 111.
86. 42 U.S.C. §§ 1396a(a)(25)(A),(B), 1396k(a)(1)(A); SSL § 366(4)(h)(1).
87. SSL § 104-b(2).
88. SSL § 104-b(3). *See, e.g., In re Corine Gilbert*, N.Y.L.J., July 24, 1998, p. 25, col. 1, 2 (Sup. Ct., Kings Co.), (the Department of Social Services' failure to comply with these statutory requirements resulted in the court's vacating the lien).
89. *See* SSL § 368-d.
90. 20 U.S.C. § 1400.
91. 20 U.S.C. § 10(1)(a).
92. 10 U.S.C. § 1401(22); Educ. Law § 4401.
93. Index No. 21296/94 (Sup. Ct., Kings Co. Sept. 28, 2000).
94. *Id.*, slip opinion at 6.
95. *Id.*
96. Index No. 484/96 (Sup. Ct., Kings Co. Sept. 29, 2000).
97. N.Y.L.J., Feb. 2, 2000 (Sur. Ct., Nassau Co.).
98. N.Y.L.J., June 26, 2001, p. 20, col. 2-4 (Sup. Ct., Kings Co.).
99. 42 U.S.C. § 1396a(a)(25)(A), (B).
100. SSL § 366(4)(h)(2).
101. California Dep't of Health Services, Docket No. A-94 (DAB APP 1-5-95, dec. no. 1504), issued by the Department of Health and Human Services Departmental Appeals Board.
102. *New York v. Morris*, 686 N.Y.S.2d 564.
103. *See* PHL § 2801-d(5); 18 N.Y.C.R.R. § 360-4.9(a)(5)(i).
104. 42 U.S.C. § 1396p(c).
105. 42 U.S.C. §§ 1396p(d)(4)(A), (C), 1396p(c)(2)(B)(iv).
106. 42 U.S.C. § 1396p(c)(2)(B)(iv); SSL § 366(5)(d)(3)(ii)(D); 42 U.S.C. § 1382(b)(e).
107. 42 U.S.C. § 1396p(d)(4)(A); SSL § 366(2)(b)(2)(iii)(A).
108. SSL § 366(2)(b)(2)(iii)(A).
109. 18 N.Y.C.R.R. § 360-4.3(e); 20 C.F.R. § 416.1130(b).
110. EPTL 7-1.12(a)(6).
111. EPTL 7-1.12(a)(3).
112. *Id*.
113. *See* 96 ADM-8, as amended.
114. SSL § 366(2)(b)(2)(iii)(B).
115. *See* 42 U.S.C. § 1396p(c); SSL § 366(5).
116. 42 U.S.C. § 1382b(e)(5).
117. 42 U.S.C. § 1396p(d)(iv)(A).
118. SSL § 369(2)(B), (6).
119. SSL § 369(2)(B).
120. SSL § 104(1).

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Appellate Division Establishes Objective Standard to Assure That AIDS Phobia Claims Are Genuine and Treated Consistently

By John M. Shields

The Appellate Division has recently articulated a clear and objective standard to apply to the relatively recent area of AIDS phobia litigation. In order to maintain a claim for the fear of contracting Acquired Immune Deficiency Syndrome (AIDS), plaintiffs who have tested negative for HIV must establish actual exposure and a likelihood of contracting the disease. The court has established that actual exposure requires evidence of a scientifically accepted method of transmission and proof that the source of the blood or bodily fluid transmitted was indeed infected with HIV. In establishing the actual exposure criterion, the court intended to insure that plaintiff's fear has a genuine basis and assure that all similar claims will be treated consistently. The court has further held that even upon a showing of actual exposure, no recovery may be had beyond six months after the alleged exposure, since the fear of contracting AIDS after that point is unreasonable as a matter of law.

The term AIDS applies to the most advanced stages of HIV infection.[1] The virus gradually weakens the human immune system. A claim for the fear of contracting AIDS, commonly referred to as "AIDS phobia," is essentially considered a claim for the negligent infliction of emotional distress.[2] Claims for AIDS phobia have been compared to the earlier line of cancer phobia cases.[3] To succeed in an action to recover damages for emotional distress, unaccompanied by physical injury, the general standard requires that a plaintiff must produce evidence sufficient to guarantee the genuineness of the claim and a rational basis for the fear.[4]

Proof of "Actual Exposure" to HIV Required

If a plaintiff tests positive for HIV antibodies within six months after exposure, the positive test result is evidence of actual exposure and thus the plaintiff's fear is considered reasonable. Consequently, the plaintiff can recover for the period of exposure prior to the test result, in addition to the associated AIDS phobia. The Appellate Division, in *Brown,* held that "any discussion of the elements of proof of a claim for damages based on the fear of contracting AIDS must be grounded on medical facts about the disease and its transmission."[5] However, proof of actual infection is not necessary to establish that the fear of contracting AIDS is reasonable, when a plaintiff has presented adequate proof of actual exposure.[6] In *Brown*, the Second Department held that "in order to maintain a cause of action for damages due to the fear of contracting AIDS, a plaintiff who has not tested seropositive *must* offer proof of *actual exposure*."[7] Actual exposure was defined by the court as proof of a scientifically accepted mode of transmission of the virus *and* proof that the source of the allegedly transmitted fluid was *in fact HIV positive*.

The case in *Brown* involved a nurse who was stuck by a needle that had remained in the crib of an HIV-positive infant. A blood test and preventative medication were immediately administered to the plaintiff. Several years later, the plaintiff still exhibited no signs of HIV infection, but refused to allow a blood test to be performed.[8] The Appellate Division noted that it is generally accepted within the scientific community that most HIV carriers will test positive for the virus within six months of exposure.[9] Therefore, assuming negative test results, a fear of contracting AIDS is considered unreasonable after six months from the alleged exposure. Absent a positive test result, a cause of action for the fear of contracting AIDS is no longer viable after six months. Accordingly, the court limited plaintiff's AIDS phobia claim to damages suffered to the first six months after exposure, unless positive evidence of infection was presented.[10]

The court in *Brown* established that proof was required that the source of the blood was actually HIV positive. "Requiring proof of actual exposure in this manner will, we believe, insure that there is a genuine basis for the plaintiff's fear of developing the disease."[11] "The existence of the channel for infection makes the threat of infection much more of a real possibility to be feared and far more than a speculative worry."[12] The "actual-exposure requirement in the AIDS-phobia cases is intended to ensure that the fear is genuine and prevent the courts from being flooded by every person who suffers an accidental cut or prick."[13]

Accepted Method of Transmission and Presence of HIV Necessary

It has become well settled in New York that in order to recover damages for AIDS phobia, a plaintiff who tests negative for HIV must first show that there was a viable method of transmission, that would enable

HIV contamination to enter the bloodstream with reasonable likelihood. Additionally, the plaintiff must prove the actual or probable presence of HIV when the alleged exposure occurred.[14] In *McLarney v. Community Health Plan*, where the plaintiff was accidentally stuck by a needle that was subsequently discarded prior to it being tested, the court held that if a plaintiff does not test positive for HIV, he cannot recover for AIDS phobia, unless he is able to show that he was actually exposed to the virus.[15]

The scientific community has recognized that the AIDS virus can only be transmitted through certain unique fluids, when infected, if introduced into the bloodstream of another individual.[16]

HIV, a necessary prerequisite to developing AIDS, is a fragile virus that can survive only in the habitat of select bodily fluids.[17] It is extremely difficult to contract HIV from a single needle stick by a needle that is actually infected. Accordingly, the risk of exposure to HIV where a needle cannot be traced to a previous user, let alone an HIV-infected individual, is remote and speculative.[18]

In *Hare v. State of New York*, an X-ray technician was bitten on the forearm by an inmate while assisting a correctional officer in subduing the inmate. The court denied the AIDS phobia claim as too remote and speculative because no proof was introduced at trial as to the likelihood of the plaintiff contracting AIDS and the plaintiff tested negative for AIDS several times.[19]

In *Bishop*, *supra*, the plaintiff alleged that her fingers were lacerated by an unidentified sharp object protruding from a bag of garbage in a Dumpster that fell off a loading dock outside of a hospital. In the hospital's emergency room, plaintiff was offered an HIV test and prophylactic medication, which she refused, and she tested negative for HIV a year later. The hospital presented evidence that its waste disposal procedures required sharp objects to be placed in protective containers, and that the relevant Dumpster contained kitchen waste, making it unlikely that a sharp or potentially infectious object would have been present. Defendant's medical expert indicated that the HIV test is considered completely accurate to detect the antibody, and that in nearly all cases, the antibody appears within six months of exposure.[20] The Appellate Division dismissed the claim as overly speculative and remote, since plaintiff did not offer any proof that she was exposed to HIV-infected fluids.[21]

In *O'Neill v. O'Neill*, the court reiterated that the plaintiff must prove both a "scientifically accepted method of transmission of the virus" *and* "that the source of the allegedly transmitted blood or fluid *was in fact HIV-positive*."[22] In *O'Neill*, because it was undisputed that the plaintiff could not establish that the alleged potential source of HIV was actually HIV-positive, the case was dismissed.[23]

In *Lombardo v. New York University Medical Center*, an undertaker claimed to have been cut by the remnants of a syringe concealed within the shroud of a man who died of AIDS. The Appellate Division dismissed the case "because the plaintiff cannot identify what cut him with reasonable certainty, he cannot establish the actual or probable presence of HIV on the offending object."[24]

In *Blair*, *supra*, a four-year-old found a hypodermic needle while attending pre-kindergarten orientation. Although the hypodermic needle was destroyed without being tested, there was no evidence that the needle had previously been used or that the child had actually been stuck by the needle. The court in *Blair* held that the plaintiff's alleged fears were too remote or speculative to sustain the complaint and by definition not genuine.[25]

In *Montalbano*, the plaintiff commenced an action alleging AIDS phobia after he purchased and ate french fries that he subsequently discovered were covered with blood. The plaintiff could not prove that the blood he ingested had been HIV-positive blood. The Appellate Division held that the plaintiff could not prove actual exposure and a plausible means of transmission, stating that there was "no logical probability that the blood allegedly found on a McDonald's french fries bag would be infected with HIV" and noted that it would be "most unlikely" that HIV could have entered plaintiff's bloodstream through his mouth. Although within the plaintiff's possession, the food and bag were never tested, but the plaintiff tested negative for HIV several times after the alleged incident. The court determined that the claim was not genuine and the purported fears were too irrational, remote and speculative to sustain the cause of action.[26]

Recently, in *Kelly v. Our Lady of Mercy Medical Center*, the court held that the plaintiff, who had tested negative for HIV for seven years, failed to present evidence sufficient to raise a factual issue as to whether the discarded lancet upon which she pricked herself while a patient in defendant hospital was contaminated with HIV.[27] Although plaintiff's experts testified that 25 percent of patients in Bronx hospitals were HIV positive, the court held that such statistics were insufficient to raise a factual issue as to whether plaintiff was actually exposed to the virus, where plaintiff's HIV tests have been consistently negative, and hospital records demonstrate that no patient on plaintiff's floor for the month preceding the incident had been treated for either HIV or AIDS and that for a week preceding the incident, no patient in the area where plaintiff was being treated had been diagnosed with HIV or AIDS.

Additionally, the court in *Kelly* held that absent any real possibility that plaintiff was exposed to HIV when she stuck herself, no negative inference should be drawn against the defendant due to the fact that defendant's nurse, in what was clearly not an intentional act of evidentiary spoliation, discarded the lancet in the immediate aftermath of plaintiff's pricking. Defendant's disposal of the lancet, combined with its delay in revealing the HIV status of the patients on plaintiff's floor, did not amount to "special circumstances" providing an independent basis for a finding of negligent infliction of emotional distress.

Finally, a claim for AIDS phobia typically has an associated secondary physical injury claim based on simple negligence, such as being stuck by a needle, which will generally survive a summary judgment, even if the AIDS phobia claim does not. In *Barbara S. and Michael S. v. County of Nassau*,[28] where a nurse was stuck by a needle while moving a patient, the court dismissed the AIDS phobia claim, but allowed the negligence claim to continue.[29]

Conclusion

In order to insure that plaintiff's fear has a legitimate basis and insure that all similar claims are treated consistently, the Appellate Division has established a clear and objective standard to apply to AIDS phobia litigation. To successfully maintain a claim for AIDS phobia, plaintiffs who have tested negative for HIV must establish actual exposure, which requires evidence of a scientifically accepted method of transmission and proof that the source of the blood or bodily fluid transmitted was indeed infected with HIV. Even upon a showing of actual exposure, no recovery may be had beyond six months after the alleged exposure, absent positive test results, since the fear of contracting AIDS after that point is unreasonable.

Endnotes

1. *Brown v. New York City Health and Hospitals Corp.*, 225 A.D.2d 36, 43, 648 N.Y.S.2d 880 (2d Dep't 1996).
2. *Id.* at 37.
3. *See* Nancy A. Breslow, *Standard of Proof to Sustain AIDS Phobia Claims*, N.Y.L.J., June 10, 1998, p. 1.
4. *Brown,* 225 A.D.2d 36, citing *Conway v. Brooklyn Union Gas Co.*, 189 A.D.2d 851, 592 N.Y.S.2d 782 (2d Dep't 1993); *Doner v. Ed Adams Contracting Inc.*, 208 A.D.2d 1072, 617 N.Y.S.2d 565 (3d Dep't 1994).
5. *Brown*, 225 A.D. 2d at 42.
6. *Id.* at 44.
7. *Id.* at 44 (emphasis added).
8. *Id.* at 38-39.
9. *Id.* at 43.
10. *Id.* at 47-49.
11. *Id.* at 44.
12. *Id*. (citations omitted).
13. *Baker v. Dorfman*, 239 F.3d 415, 421, at 14 (2d Cir. 2000); *Bishop v. Mount Sinai Med. Ctr.*, 247 A.D.2d 329, 669 N.Y.S.2d 530, 532 (1st Dep't 1998).
14. *O'Neill v. O'Neill*, 264 A.D.2d 766, 694 N.Y.S.2d 772 (2d Dep't 1999), *app. dismissed*, 94 N.Y.2d 858, 704 N.Y.S.2d 533 (1999); *Blair v. Elwood Union Free Pub. Sch.*, 238 A.D.2d 295, 656 N.Y.S.2d 521 (2d Dep't 1997); *Bishop,* at 531.
15. *McLarney v. Community Health Plan,* 250 A.D.2d 310, 680 N.Y.2d 281 (3d Dep't 1998*).*
16. *Brown* at 44, citing *Faya v. Almaraz*, 329 Md. 435, 620 A.2d 327 (1991).
17. *Faya v. Almaraz*, 329 Md. 435, 620 A.2d 327, 332 (1991).
18. *Brown* at 47.
19. *Hare v. State,* 173 A.D.2d 523, 570 N.Y.S.2d 125 (2d Dep't 1991).
20. *Bishop*, 669 N.Y.2d at 531-32.
21. *Id.* at 532.
22. *O'Neill,* 264 A.D.2d 766, 694 N.Y.S.2d 772 (2d Dep't 1999), quoting *Brown*, 225 A.D.2d at 45; *Schott v. St. Charles Hosp.*, 250 A.D.2d 587, 588, 672 N.Y.S.2d 393 (2d Dep't 1998) (plaintiff's hand was pricked by a small needle in the folds of a newly laundered hospital gown); *Blair*, 238 A.D.2d 295; *Sargeant v. New York Infirmary Beekman Downtown Hosp.*, 222 A.D.2d 228, 635 N.Y.S.2d 8 (1st Dep't 1995) (claim based on a blood transfusion held legally insufficient due to an absence of objective medical evidence of a likelihood of contracting any illnesses).
23. *O'Neill*, 694 N.Y.2d at 773.
24. 232 A.D.2d 459, 648 N.Y.S.2d 658 (2d Dep't 1997).
25. *Blair* at 53; (2d Dep't 1997); *Fosby v. Albany Mem'l Hosp.*, 252 A.D.2d 606, 675 N.Y.S.2d 231 (3d Dep't 1998); *Kaufman v. Physical Measurements Inc.*, 207 A.D.2d 595, 615 N.Y.S.2d 508 (3d Dep't 1994).
26. *Montalbano v. Tri-Mec Ent.,* 236 A.D.2d 374, 652 N.Y.S.2d 780 (2d Dep't 1997).
27. *Kelly v. Our Lady of Mercy Med. Ctr.,* 279 A.D.2d 290, 719 N.Y.S.2d 50 (1st Dep't 2001).
28. N.Y.L.J., Feb. 9, 1998.
29. *See* Brian Del Gatto, *Litigating AIDS Phobia Claims*, N.Y.L.J., Dec. 6, 2000, p. 1.

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Novel Approaches to Avoiding Hung Juries and Mistrials

By Alan Kaminsky

Recently, I had the opportunity to try a premises security case in the supreme court for New York County. The case itself was pretty significant—a 16-year-old young woman had been forced at knife point off of an elevator and into her apartment where she was raped and sodomized and her family was terrorized for hours by a serial rapist—but it was what happened after closing arguments were given that is the focus of this article.

The issues in the case were straightforward: Was the owner of the apartment complex negligent for not having minimal security; were the front entrance door locks working; did the assailant enter the premises behind the plaintiff after she opened the door and before the door closed behind her; was the crime foreseeable; was any negligence on behalf of the defendants a substantial factor in causing the plaintiff's injuries, and if so, what percentage of fault was to be apportioned between the defendant and the assailant? Importantly, a favorable answer to any one of the above questions for the defendant would have resulted in a dismissal of the case.

Based upon the evidence, it was not surprising that the jury informed the court after several hours of deliberations that they were deadlocked on trying to decide whether or not the assailant followed the plaintiff into the building before the door closed behind her. According to the plaintiff's trial testimony, she had been waiting in the lobby for the elevator when she observed her assailant enter the premises after the front door closed shut. According to two police officers who interviewed the plaintiff following the occurrence, the plaintiff told them that her assailant came into the building behind her after she opened the door, suggesting the door had not yet closed behind her. An affirmative answer would have resulted in a verdict in favor of the defendant. A negative answer would have resulted in the jury proceeding the next interrogatory.

After another full day of deliberations, the jury sent a subsequent note to the court indicating that they had answered all the questions on the verdict sheet, except that particular question, upon which they remained deadlocked.

The court gave an appropriate *Allen* charge to the jury, instructing them to continue their deliberations in good conscience, and further indicating to them that they should not have proceeded beyond the interrogatory at issue.

Following the three-week trial and after seven years of litigation, neither party nor the court wanted a mistrial, but as each hour of deliberations passed, it became clear that we were indeed nearing an unavoidable mistrial. The court, indeed, had begun making plans for a retrial to begin immediately.

It was at this point that the parties raised an interesting proposal to the court: Since we knew what issue the jury was stuck on, we proposed—pursuant to the court's approval—that the jury could be called back into the jury box, and the parties would each be permitted to "reopen" their case, and give a five-minute supplemental closing argument. Each party expressed confidence that a brief argument to the jury would sway the verdict to their side.

The court (Judge Ellen Brandsten in the case of *Jacqueline G.*) at first shrugged off the proposal, but upon further prompting, gave serious consideration to the proposal as a possible way to avoid a hung jury, questioning counsel as to the proposed parameters for any such arguments. Ultimately, however, the court did not permit the parties to "reopen" their case, but the situation raised interesting questions: What do and do not the Civil Practice Law & Rules allow for where hung juries are imminent, and what have courts ruled on such matters?

Although the CPLR does not squarely address this situation, it nevertheless can be suggested that a liberal reading of pertinent sections of the CPLR and the Pattern Jury Instructions (PJI), would allow for the parties to present a supplemental closing argument to avoid a mistrial following a hung jury.

Closing arguments are not evidence and juries are routinely instructed as such, in accordance with PJI 1:5 (Summations). Precisely for that reason, presenting supplemental closing arguments would not require either party to technically "re-open" their case, and, therefore, doing so would not violate Rule 1016 of the CPLR which mandates that closing arguments are to be given only at the close of all evidence.

CPLR 2104 further allows for parties to enter into a written stipulation relating to any matter in an action.

This provision has been interpreted by the courts to suggest that parties are "free to stipulate the way a controversy is to be resolved . . . without interference from the courts."[1] It has also been held that parties are even free to stipulate away statutory rights.[2] Generally, unless a stipulation were deemed to violate public policy, the parties to any litigation are "free to chart their own procedural course."[3]

Since it is highly unlikely that a good-faith effort by all parties to avoid a mistrial would be deemed to violate public policy, it appears that there is no prohibition to preclude a court from allowing parties to present supplemental closing arguments.

Surprisingly, there is little guidance to be gleaned from looking at other jurisdictions. Arizona courts and commentators appear receptive to such action. Arizona Rule 39(a), Assisting Jurors at *In Posse*: "If the jury advises the court that it has reached an *in posse*, the court may, in the presence of counsel, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberation process."

This rule has been interpreted by one commentator to apply to cases "where the jury is deadlocked . . . reopening the case for additional argument . . . is thought to be less potentially coercive than the standard *Allen* charge and a reasonable alternative to declaring a mistrial."[4]

The trial mentioned in the beginning of this article also raised another interesting opportunity to avoid a mistrial. Since the parties knew from the jury's communications to the court that the jury had actually answered all of the liability questions on the verdict sheet, and since an answer favorable to the defendant on any of the questions, and not just the question the jury was hung on would have resulted in a dismissal of the case, was there anything prohibiting the court from reviewing the answers to the other interrogatories, to see if any of the answered questions were favorable to the defendant, thereby obviating the need for the jury to answer the question they were having difficulty with. In other words, was the court permitted to instruct the jury to, in a sense, "skip" a specific interrogatory on the verdict sheet and answer other liability questions that may have resulted in the dismissal of a case?

Actually, that tactic was employed by Judge Kapnick of the supreme court for New York County during the first trial of the case entitled *Sandy B*. There, the jury informed the court that it was deadlocked on the first interrogatory. The court recognized that subsequent interrogatories also dealt with liability, and a verdict on a subsequent question would have negated the need for the jury to answer the first question. As it turned out, it remained necessary for the jury to answer the initial question, and when it remained unable to, a mistral was declared. The case was ultimately re-tried before a second jury shortly thereafter.

Courts—and counsel—should be receptive to novel ideas to avoid mistrials. A five-minute supplemental closing argument, or an instruction to skip a question on a verdict sheet, is certainly more efficient than a potential re-trial.

Endnotes

1. *Town of Orangeburg v. Magee*, 88 N.Y.2d 41, 643 N.Y.S.2d 21 (1996).
2. *Trump v. Trump*, 179 A.D.2d 201, 582 N.Y.S.2d 1008 (1st Dep't 1992).
3. *See Smitchell v. N.Y. Hosp.*, 61 N.Y.2d 208, 473 N.Y.S.2d 148 (1984).
4. Paula Harrisford, *How Judges View Civil Juries*, 48 DePaul L. Rev. 247, 26 (1998) (footnoting Arizona Court Rule 39).

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The Scaffold Act: Has the Court of Appeals Defined Its Outer Limit?

By James K. O'Sullivan and Andrew Zajac

N.Y. Labor Law § 240(1), the statute which imposes absolute liability on owners and contractors for certain gravity-related injuries suffered by workers at construction and renovation sites, has been subjected to increasingly strident calls for its legislative repeal.[1] Critics contend that the statute has been construed too broadly by the courts, resulting in increased insurance costs and consequent harm to the construction industry in New York. Many of its critics, however, may be failing to take note of the increasing trend of the Court of Appeals in recent years to, if not narrow the reach of the statute, at least reject the invitation of workers' advocates to continue its expansion. The most recent decision of the Court of Appeals, involving two cases, *Narducci v. Manhasset Bay Associates* and *Capparelli v. Zausmer*,[2] continues this trend.

The statute has been construed to protect workers from the "extraordinary risks" associated with construction sites, such as the danger of falling from a height, or the danger that "materials or load" will fall on them. These two types of risks are generally referred to in case law as the "falling object" and the "falling worker" tests.[3] *Narducci* and *Capparelli* concerned the "falling object" test.

In *Narducci*, the plaintiff was injured while standing on an extension ladder, about six feet from the ground, while when removing the first of several damaged window frames, a pane of glass from the adjoining window fell towards him. He turned to avoid being hit by the glass, but was severely cut on his right arm. Plaintiff did not fall from his ladder, nor did the ladder malfunction in any way. Plaintiff's claim under the Labor Law was premised on the contention that if he had been provided with a type of moveable scaffold, he would have been able to begin his work at the top of the windows, and would not have been subject to the risk of injury from falling glass. The supreme court denied motions by defendants for dismissal of the Labor Law § 240 cause of action. A divided First Department panel affirmed.

In *Capparelli*, plaintiff was installing a light fixture onto the grid work of a dropped ceiling. The fixture was approximately four feet long, two feet wide and five inches in height. Plaintiff was provided with an eight-foot stepladder in order to reach the grid work; plaintiff began to proceed down in order to move the ladder so he could secure the fixture. After plaintiff took one step down the ladder, the fixture fell. To prevent the fixture from striking him, plaintiff attempted to catch it. In so doing, the plaintiff sustained a laceration to his wrist. By plaintiff's own testimony, the fixture fell only a foot to a foot and a half. As in *Narducci*, plaintiff did not fall from the ladder. Plaintiff moved for summary judgment on the issue of section 240 liability and third-party defendant cross-moved to dismiss that claim. The supreme court denied both motions. The Fourth Department modified by dismissing the Labor Law § 240(1) claim, holding that plaintiff's injuries stemmed from the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by section 240.

The Court of Appeals held that neither of these plaintiffs could recover under Labor Law § 240. In *Narducci*, the Court of Appeals rejected plaintiff's claim by ruling that the pane of glass could not be considered "material or load being hoisted or secured," the *sine qua non* of a "falling object" claim under the statute. For the statute to apply, plaintiff must show more than simply that an object fell causing injury to a worker. "A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute."[4]

The decision does not precisely define the term "material or load being hoisted or secured" but it hints that the falling object must be something that has been brought to the structure in furtherance of the construction or renovation. The Court took great pains to note that the glass that fell "was part of the pre-existing building structure as it appeared before the work began. This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected."[5]

Nor was the fact that plaintiff was working at an elevation sufficient to bring the scenario within the ambit of the statute. Plaintiff did not contend that the ladder on which he was standing malfunctioned, and he was not injured as the result of a fall. Therefore, the ladder had no legally sufficient causal connection to the injury to invoke Labor Law § 240 protection.

In *Capparelli*, the light fixture apparently would have qualified as "material or load being hoisted or secured" under this test, as it was something being added to the renovated structure, not a part of the pre-existing premises. However, plaintiff had no "falling object" claim because of the *de minimis* height differential between plaintiff and the falling object. The mere fact that gravity contributed to the occurrence of the

accident did not render this one of the "extraordinary" risks common in construction sites that the statute was enacted to prevent.

Narducci appears to be the latest in a series of decisions by the Court which construe the statute narrowly so as not to go beyond the Legislature's intended purview. For example, in *Misseritti*, *supra*, plaintiff was severely injured while working at ground level when a fire wall collapsed onto him. Plaintiff premised his Labor Law § 240 claim on the absence of "bracing" on the wall. Notwithstanding that a "brace" is a safety device enumerated in the statute, the Court of Appeals dismissed the claim. The Court construed "braces" referred to in the statute as those used to provide support for elevated work sites, not braces designed to shore up completed structures. Thus, the Court held that the plaintiff was not faced with the extraordinary perils contemplated by the statute. Rather, plaintiff's injuries were the "type of peril a construction worker usually encounters on the job site."[6] The quoted language amounts to a highly significant exception to the protection of the statute.

In construing Labor Law § 240 narrowly in recent years, the Court of Appeals has engrafted terms and conditions onto the statute that do not appear on its face. In *Brown v. Christopher Street Owners' Corp.*,[7] the plaintiff was injured when he fell while cleaning windows of a residential cooperative apartment. Notwithstanding that "cleaning" is one of the enumerated protected activities in section 240, the Court held that the statute did not apply to "routine, household window washing."[8] The Court differentiated this situation from the painting of a house or the cleaning of all of the windows of a large, nonresidential building, which the Court stated are activities covered by the statute. In *Joblon v. Solow*,[9] the Court was faced with the question as to how extensive an alteration to a building or structure must be in order to trigger the protection of the statute. "Altering" is one of the statute's protected activities. The Court held that in order for the statute to apply, the alteration "requires the making of a *significant* physical change to the configuration or composition of the building or structure," notwithstanding that such a condition does not appear on the face of the statute.[10] However, it should also be noted that certain aspects of the *Joblon* holding were favorable to injured workers. The Court held that the seemingly routine task of the plaintiff in *Joblon* of chopping a hole through a block wall to route conduit pipe and wire through a hole to mount a clock was a statutorily-protected alteration. The Court also held that the statute's reach is not limited to accidents occurring at construction sites.

In *Melber v. 6333 Main Street, Inc.*,[11] plaintiff utilized 42-inch stilts in order to accomplish his work of installing metal studs on top of drywall. Nothing out of the ordinary occurred while he performed his work. However, because he needed a clamp which was a distance away, he ambulated down a hallway without removing his stilts. In so doing, he tripped and fell over an electrical conduit protruding from the floor. In reversing the Appellate Division and dismissing the Labor Law § 240(1) claim, the Court of Appeals held that this case fell outside of the limited class of hazards covered by the statute. The Court noted that a different situation would have been presented had the stilts failed while he was working on the drywall. However, since the plaintiff's injuries were unrelated to the need for the stilts in the first instance, i.e., the work at the top of the wall, the statute did not provide the plaintiff with a remedy for his fall of three and a half feet.

Finally, it is noteworthy that in the Court's most recent pronouncement concerning the statute in *Narducci* and *Capparelli*, discussed above, the Court cited with approval a law review article that questions the Court's decision in *Joblon v. Solow*, *supra*, specifically with respect to the holding that the scope of Labor Law § 240 is not limited to construction sites.[12] The author states the following with respect to section 240 and the Court's holding in *Joblon*:

> [I]t appears that the most faithful rendering of the legislative intent would be to provide coverage under Section 240 for all height-related work, however routine and humble, at a *construction site*, and to require workers in a non-construction setting to prove negligence in order to recover.
>
> * * *
>
> The Court of Appeals' 1998 decision in *Joblon* has removed the requirement that an accident take place on a traditional construction site in order to qualify for Section 240 coverage, thereby expanding the scope of absolute liability to protect any worker who sustains a height-related injury while making a significant alteration to a building or structure. The Legislature should consider whether the Court of Appeals has interpreted the Labor Law too broadly, beyond the original intent to protect construction workers who ascend scaffolds at building construction sites.

The Court's citation to the article is intriguing. Perhaps it is a signal that it is willing to reconsider its holding in *Joblon*, or, perhaps it is an implicit invitation to the Legislature to revisit the statute in light of the Court's decisions.

Endnotes

1. *See Hargobin v. K.A.F.C.I. Corp.*, ___ A.D.2d ___, 724 N.Y.S.2d 155 (1st Dep't 2001).
2. *Narducci v. Manhasset Bay Assoc.*, 2001 N.Y. LEXIS 1108.
3. *Misseritti v. Mark IV Const. Co.*, 209 A.D.2d 931, 932, 619 N.Y.S.2d 473, 473 (4th Dep't 1994), *aff'd*, 86 N.Y.2d 487, 634 N.Y.S.2d 35 (1995) (citations omitted).
4. *Narducci*, 2001 N.Y. LEXIS 1108.
5. *Id.* The opinion also indicates that the fact that no one was working above plaintiff was a factor militating against a finding that the glass was a "falling object."
6. 86 N.Y.2d 491, 634 N.Y.S.2d 38.
7. 87 N.Y.2d 938, 641 N.Y.S.2d 221 (1996).
8. *Id*. at 939.
9. 91 N.Y.2d 457, 672 N.Y.S.2d 286 (1998).
10. *Id.* at 465.
11. 91 N.Y.2d 759, 676 N.Y.S.2d 104 (1998).
12. Barry R. Temkin, *New York's Labor Law 240: Has It Been Narrowed Or Expanded By The Courts Beyond The Legislative Intent?* 44 N.Y.L. Sch. L. Rev. 45 (2000).
13. *Id.* at 67-68.

James K. O'Sullivan, associated with Fiedelman & McGaw in Jericho, New York, represented one of the appellants in *Narducci*.

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How the Claims Process Works

By Steve Harrison

Topical Outline

This article is an overview of the need for information regarding the catastrophic nature of claims being brought to the forefront of insurance companies in order to expedite resolution.

It also deals with what the typical insurance carrier looks for in addressing a catastrophic claims scenario. The claims discussion will include:

- Timing of the notice to the carrier—why it's important from both a plaintiff and defense point of view to get all possible carriers on board as soon as is practicable.
- Appreciating the number of issues and complexity of the case (and how that can drive both the claims process and the litigation exposure).
- Understanding what motivations exist (on both sides) in moving the case towards resolution.

Insurance Carrier Considerations

I. Notice of occurrence or suit to insurer

Why it's important from both a defense and plaintiff point of view to get all possible carriers on board

A. Rationale

1. Policy condition—contractual obligation

a. Notice of occurrence

"In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof and the names and addresses of the injured and of available witnesses shall be given by or for the insured to the company or any of its authorized agents as soon as practicable."

b. Notice of suit

"if claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative."

2. Importance of notice to insurer

a. Insurer charged with duty of reasonable investigation

b. Insurer obliged to defend suits

3. Critical considerations, generally

a. Timeliness of notice

Differing timeliness requirements depending upon whether the "claim," "suit" or "occurrence" is at issue

Where it's an "occurrence" = as soon as practicable

Where it's a "suit" = immediately

b. Adequacy of notice

B. Notice considerations—different things are important to different types of insurers

1. Primary insurers
2. Umbrella insurers
3. Excess insurers
4. Reinsurers

C. Methods of notification

1. "Written" notification
2. "To the company or any of its authorized agents"

a. What is an "authorized agent"?

Various kinds/classes of agents, not all of whom are "authorized," received notice of claim

D. Channels for notice to company

1. Direct to company by insured
2. Direct to company via insured's legal representative
3. To company via agent/broker direct from insured
4. To company via agent/broker through insured's legal representative

E. The issue of constructive notice (all direct or through legal representative)

1. Additional insureds
2. Co-defendants

3. Third parties who have independently acquired knowledge of company
4. Plaintiffs

F. "Claim-made" vs. "occurrence" based policies

II. Actions after receipt of notice by insurer

A. Assignment to appropriate claim officials

B. Verification of existence of policy

Finding coverage

1. Insurer's current records/data sources
   a. Underwriting/policy file
   b. Automated policy records
2. Insurer's historical records/data
   a. Automated policy records
   b. Underwriting records
   c. Loss control department
   d. Prior claim records
   e. Actuarial reports
   f. Accounting records: agent commission payments
   g. Accounting records: premium payment records
   h. Dividend payment records
   i. Marketing/sales department
   j. Reinsurance department records
   k. Recollection of long-term employees
3. Insured's records and data sources
   a. Insured's original policy
   b. Records of insurance claims made
   c. Accounting records of premium payment
   d. Financial reports
   e. Independent audit reports
   f. Minutes of board of directors or other corporate records
   g. Corporate counsel records
   h. Loan applications
   i. Engineering/maintenance department records of prior loss control inspections
   j. Risk management department
   k. Workers' compensation claim records
   l. Legal compliance/government affairs office
   m. Safety committees
   n. Union grievance committees
   o. Marketing/sales
   p. Environmental affairs department
   q. Employee/payroll records
4. Other sources
   a. Agent/broker
   b. Governmental regulatory agencies
   c. Workers' compensation agencies
   d. Accident investigation agencies
   e. Financial (lending) institutions
   f. Retained counsel
   g. Vendors, suppliers
   h. Architects, engineers, contractors
   i. Maintenance services
   j. Unions
   k. Prior/subsequent insurers
   l. Insurance archaeologist

C. Insured's duty of cooperation

D. Duty to provide information

E. Coverage analysis and reconstruction
1. Investigation pre-planning
   a. Policy reconstruction/review
      (1) Policy type (CGL, auto, property, etc.)
      (2) Forms and endorsements
      (3) Limits of liability
      (4) Limits impairment—prior claim payments (aggregate)
      (5) Legal issues
         (a) Statutes of limitation
         (b) Estoppel
         (c) Cooperation by insured
         (d) Exclusions

b. Potential coverage issues

(1) Coverage trigger ("occurrence," "accident")

(2) Duty to defend

(3) "Expected or intended"

(4) "As damages"

(5) "Property damage"

(6) "Bodily injury"

(7) "Suit"

(8) Lost policy issues

(9) Pollution endorsement

(a) Sudden and accidental

(b) Qualified exclusion

(c) Absolute exclusion

(10) "Owned property"

(11) Limits (occurrence/aggregate)

2. Loss investigation
3. Coverage decision and position
   a. Acceptance of claim
   b. Denial of coverage
   c. Reservation of rights
4. Coordination with other insurers
   a. Coverage positions/interpretation
   b. Claim handling agreement
   c. Joint defense agreement
   d. Shared defense agreement
   e. Allocation (defense/indemnity)
      (1) Volumetric
      (2) Time on risk
      (3) Limits
      (4) Toxicity
      (5) Combination
      (6) Per capita
      (7) Stated participation
5. Communication with insured re coverage issues
6. Consideration of legal analysis and opinion
7. Evaluation of all factors (liability, damages and perhaps unresolved coverage issues)
8. Internal reporting and review
   a. Wide variance in hierarchy and structure
   b. Reinsurance implications
9. Disposition
   a. Negotiated resolution
   b. Litigated resolution
   c. Alternative resolution mechanism
10. File closure and archival

Investigating Large Loss Transportation Claims

Tractor

1. Make, year and model number, vehicle identification number (VIN)
2. Registration state and number
3. Registered owner
4. Place principally garaged
5. Insurance information on vehicle, owner, all lessees
6. Maintenance records, who responsible
7. Vehicle monthly inspection report

Trailer

1. Make, year and model number, type
2. VIN
3. Registration state and number
4. Registered owner
5. Place principally garaged
6. Insurance information on vehicle, owner, all lessees
7. Maintenance records, who responsible?

Leases

1. Either vehicle leased from owner?
2. To whom?
3. Was person leasing from owner operating?
4. Was the vehicle leased under an ICC/DOT permanent lease?
5. Obtain DOT identification numbers for all lessors and lessees, permanent, subleases and trip
6. Obtain copies all leases

7. Identify all available insurance—auto liability, cargo G/L contractual and nontrucking ("bobtail and deadhead") coverages

Driver Information

1. Who hired?
2. Who dispatched?
3. Who paid?
4. How paid?
5. Was he leased with rig (i.e., owner/operator, rig with driver lease etc.)? state of license, CDL qualification date
6. License numbers, class, length of class certification, present and all prior licenses
7. Training for truck driving, prior experience
8. DOT qualification file, including date and doctor of last physical, road test, written test, hazmat testing, drug screen, driver license record check
9. Log entries with monthly summary sheet, tachograph or computer communication records if available
10. Drug and alcohol testing, post accident

Trip

1. Origin
2. Destination
3. Expected duration
4. Expected route, actual route
5. Planned stops
6. Planned layovers—and where
7. Unplanned layovers, stops route deviations
8. Return trip—when arrangements made ("out-and back")—expected load or deadhead
9. Expected return of rig, termination of trip
10. Placards, return of placards
11. All activities and contacts while deadheading, trip leasing arranging other loads or return loads
12. Identity of dispatchers, dispatch contacts, instructions
13. Obtain "trip folder" with all fuel, toll and other receipts

Load (and Cargo Claims)

1. Shipper
2. Consignee
3. Point of loading—shipper, warehouse, dock, other
4. Who loaded?
5. Point of delivery—warehouse, consignee, other
6. Who accepted delivery?
7. Who unloaded?
8. Exceptions on carrier B/L
9. Exceptions on unloading
10. Who packaged shipment?
11. Who arranged for shipping-broker, shipper, consignee, freight forwarder or consolidator?
12. Where is cargo now?
13. What was purpose of cargo—for use in manufacturer, components, re-sale at wholesale, retail, etc.?
14. What freight classification/tariff did carrier ship it under—any released rate valuation limit?
15. Obtain identify of all intermediary shippers and carriers
16. Obtain detailed load placement and securement information and load diagrams, photographs if possible
17. Obtain weight tickets, all scale location or identification

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The Court of Appeals Clarifies Article 16 Apportionment for Cases Involving Joint and Several Liability

By John M. Shields

Article 16 of the CPLR, adopted as part of 1986 Tort Reform Legislation, was drafted to address inequities created by the common law rule of joint and several liability.[1] Prior to the enactment of Article 16, a joint tortfeasor could be held liable for an entire judgment, regardless of the relative share of culpability.[2] Thus, joint and several liability provides an incentive to sue "deep pocket" defendants, including municipalities, even if they are only minimally involved with the injury-causing event. In 1986, the Governor's Advisory Commission on Liability Insurance recommended that the rule of joint and several liability be amended "to assure that no defendant who is assigned a minor degree of fault can be forced to pay an amount grossly out of proportion to that assignment."[3]

CPLR 1601 provides that when there is a verdict for a plaintiff in a personal injury action involving multiple tortfeasors who are jointly liable, and the liability of one of the defendants is found to be 50 percent or less of the total liability, "the liability of such defendant . . . for non-economic loss shall not exceed the defendant's equitable share." Although Article 16 was intended to remedy the inequities created by joint and several liability where one defendant is found to be minimally at fault, "deep pocket" defendants, including municipalities, remain subject to various exceptions that preserve the traditional rule.[4]

Initially, CPLR 1602 establishes that the limitations created by the general rule in CPLR 1601 do not apply to cases involving the use or operation of motor vehicles, although municipalities are entitled to protection for accidents involving fire or police vehicles. Additionally, CPLR 1602(2)(iv) excludes apportionment protection for "any liability arising by the reason of a non-delegable duty." Section 1602(2)(iv) is not an exception to the rule of apportionment, but one of four provisions in 1602(2) that reaffirm certain pre-existing statutory and common law limitations on liability.[5]

Section 1602(2)(iv) does not contain the unequivocal language employed when the purpose of the legislature is to create an exception. The plain language of CPLR 1602(2)(iv) clearly indicates that the Legislature did not intend to create an exception to the apportionment rule, but rather 1602(2)(iv) was drafted to preserve the principles of vicarious liability and prevent defendants from improperly disclaiming responsibility for nondelegable duties.

Rangolan v. County of Nassau

In *Rangolan*, the plaintiff, who had cooperated as a confidential informant against other inmates, was seriously beaten by a fellow inmate while incarcerated at the Nassau County Correctional Center.[6] Although the plaintiff's inmate file specifically cautioned that he was not to be housed with his assailant, the two inmates were placed in the same dormitory.[7] Rangolan commenced a federal action against the County of Nassau, alleging, among other things, negligence for failure to protect him while in custody and violation of his Eighth Amendment rights under 42 U.S.C. § 1983.[8] The district court dismissed his 1983 claim, but granted judgment as a matter of law on his negligence claim.[9] The court refused to instruct the jury on apportionment of damages between the county and the attacker, holding that CPLR 1602(2)(iv) prohibited apportionment where the defendant's liability arose from a breach of a nondelegable duty.[10]

Following a damages award for pain and suffering, both parties appealed to the U.S. Court of Appeals for the Second Circuit.[11] The appellate court affirmed the dismissal of the section 1983 claim, but, noting the absence of controlling precedent interpreting CPLR 1602(2)(iv), certified to the New York State Court of Appeals the question whether a municipal tortfeasor can seek to apportion its liability with another tortfeasor, pursuant to CPLR 1601, or whether CPLR 1602(2)(iv) precludes such apportionment.[12]

CPLR 1602(2)(iv) Is Not an Exception to Apportionment, But a Savings Provision That Preserves Vicarious Liability

The Court of Appeals held that under the facts and circumstances of the case in *Rangolan*, the defendant was permitted to seek apportionment of its liability with another tortfeasor, such as the other inmate. The fact that the precise "shall not apply" language drafted by the Legislature to delineate the exceptions to the rule is absent in 1602(2)(iv) indicates that the Legislature did not intend to include an exception for liability based on a breach of a nondelegable duty.[13] Therefore, the court in *Rangolan* held that CPLR 1602(2)(iv) does not create an exception to apportionment, but is a "savings provision that preserves the principles of vicarious liability."[14]

CPLR 1602(2)(iv) was drafted to prevent defendants from disclaiming liability for duties for which they are responsible by delegating such responsibilities to another party. Accordingly, CPLR 1602(2)(iv) ensures that a defendant is liable to the same extent as its delegate or employee, and that CPLR Article 16 is not construed to alter this liability.[15] When a municipality delegates a duty for which it is legally responsible, such as the maintenance of its roads, the municipality remains vicariously liable for the negligence of the contractor, and cannot rely on CPLR 1601(1) to apportion liability with regard to its contractor.[16] Similarly, CPLR 1602(2)(iv) prohibits an employer from disclaiming *respondeat superior* liability by arguing that an employee was the actual tortfeasor.[17] However, "nothing in CPLR 1602(2)(iv) precludes a municipality, landowner or employer from seeking apportionment between itself and other tortfeasors for whose liability it is not answerable."[18]

Section 1602 contains several exceptions to the apportionment rule, which explicitly state that Article 16 shall "not apply" in certain circumstances.[19] The *Rangolan* court reasoned that CPLR 1602(2)(iv) specifically does not contain the "shall not apply" introductory language, but instead provides that the limitations on liability shall "not be construed" to impair, limit or modify any liability arising from a nondelegable duty or *respondeat superior*.[20] The court in *Rangolan* held that "the Legislature did not intend 1602(2)(iv) to establish a free-standing exception to the apportionment rule."[21] Section 1602(2)(iv) was simply intended to insure that the courts did not interpret Article 16 as altering established law regarding *respondeat superior* or non-delegable duties.[22] Where the legislature uses different terms within the same statute, courts may reasonably infer that distinct concepts are intended.[23] Accordingly, the court in *Rangolan* held that the absence of the exacting "shall not apply" language in 1602(2)(iv), which is employed by the Legislature to identify the exceptions, indicates that it was never the intention of the Legislature to promulgate an exception for liability based on a breach of a nondelegable duty.[24]

The fact that CPLR 1602(8), using the "shall not apply" language, creates a separate nondelegable duty exception, reinforces that CPLR 1602(2)(iv) was not intended as an exception to the apportionment rule.[25] "To construe CPLR 1602(2)(iv) as creating a blanket non-delegable duty exception would render CPLR 1602(8) meaningless and redundant."[26] A statutory construction that results in the nullification of one part of a statute by another is impermissible because the various elements of a statute must be compatible with each other and conform with the general intent of the statute.[27]

Giving effect to the precise language employed by the particular legislation, the court in *Rangolan* concluded that "1602(2)(iv) is not an exception to limited liability but a savings provision that preserves vicarious liability."[28] Given the breadth of responsibilities that may be considered nondelegable, each potentially requiring a specific inquiry, the Legislature could not have intended to exclude the breach of every nondelegable duty from possible apportionment.[29] Reading 1602(2)(iv) as an exception would impose joint and several liability on municipalities, the precise entities that the rule was designed to protect.[30]

Construing CPLR 1602(2)(iv) as a savings provision is supported by the governor's approval memorandum, which states that "[t]he crafting of these exceptions and savings provisions reflects careful deliberations over the appropriate situations for a modified joint and several liability rule and demonstrates the benefits of addressing this important reform through the legislative process."[31] The *Rangolan* court noted that previous decisions improperly assumed, without a meaningful analysis, that CPLR 1602(2)(iv) creates a nondelegable duty exception to Article 16.[32]

In *Faragiano*, *supra*, the plaintiff was a passenger injured in a motor vehicle accident who commenced an action against several parties, including the contractor that resurfaced the road and the town of Concord, alleging that the town negligently constructed and maintained the road and that the contractor negligently permitted a buildup of oil or tar on the road.[33] The town asserted as an affirmative defense that its liability for any non-economic losses should be apportioned among the other tortfeasors pursuant to CPLR 1602(2)(iv), while the plaintiffs argued that CPLR 1602(2)(iv) precluded apportionment.[34] The court in *Faragiano* held that the plaintiffs could not rely on CPLR 1602(2)(iv) to preclude the town from seeking apportionment between itself and other joint tortfeasors for whose liability it was not answerable.[35] However, the court went on to state that the town could not use CPLR 1602(2)(iv) to apportion liability to the agent for whom it was vicariously responsible.[36]

In *Maria E. v. 599 West Associates*,[37] the plaintiff was an assault victim who sued the apartment building she resided in for negligent maintenance, operation and control of the entrance to the premises.[38] The court in *Maria E.*, citing the *Rangolan* decision, held that the defendant was permitted to an apportionment of liability with the intentional tortfeasor.[39] The court in *Maria E.* further held that while the CPLR explicitly requires that a plaintiff plead an exception to Article 16 apportionment, a defendant need only plead an Article 16 apportionment defense if such a defense would inject a new factual issue into the case or likely surprise a plaintiff.[40]

Of note, recent decisions in *Morales v. County of Nassau*[41] and *Cole v. Mandell Food Stores*[42] did not recognize a nondelegable duty exception to limited liability under Article 16.[43] In *Morales* and *Cole*, the court held that the issue of whether an alleged nondelegable duty exception applied could not be reviewed because the plaintiff failed to affirmatively plead an exception to CPLR Article 16.[44]

First Department Issues Inconsistent Rulings Concerning Apportionment

Recently, three separate First Department Appellate Division panels have issued potentially inconsistent rulings concerning Article 16 apportionment. In all three cases, the named defendants were sued for simple negligence for failing to secure the premises against an assailant, not named as a party, that injured the plaintiff.

In *Concepcion v. The New York City Health and Hospitals Corp.*,[45] the plaintiff was stabbed by an out-patient while visiting North Central Bronx Hospital. Following a threatening confrontation with the out-patient, plaintiff informed a nurse about the incident, who assured the plaintiff that she would alert security.[46] The nurse failed to inform security and moments later the plaintiff was assaulted.[47] After a jury found defendant hospital completely liable for plaintiff's injuries, defendant challenged the trial court's refusal to provide an apportionment charge to the jury.[48]

The court in *Concepcion* held that when the intentional tortfeasor is not a named defendant, eliminating intent as a required element of the action, 1602 apportionment applies.[49] The appellate court held that

> [t]here is nothing in the exclusion that would indicate that it was intended to preclude a negligent tortfeasor from seeking apportionment from an intentional tortfeasor. Moreover, any further extension of the exclusion would defeat the purpose of Article 16, which is to protect low-fault, deep pocket defendants from being fully liable pursuant to joint and several liability rules.[50]

Similarly, in *Roseboro v. The New York City Transit Authority*,[51] the Appellate Division held that CPLR 1602 warranted apportionment against nonparty intentional tortfeasors. In *Roseboro*, the plaintiff was struck by a subway train as he descended onto the tracks in an attempt to avoid an assault by three men.[52] Although the jury found no negligence on the part of the motorman, they found the failure of the token booth clerk to summon assistance was a substantial contributing factor to the injury.[53] The defendant appealed the trial court's ruling that CPLR Article 16 apportionment was not applicable.[54] The Appellate Division held that an apportionment charge should have been given to the jury and remanded the case for a new trial to determine the extent of liability of the nonparty intentional tortfeasors.[55]

In *Chianese v. Meier*[56] the plaintiff assault victim sued an apartment building owner and manager for inadequate building security. The court held that CPLR 1602(5) excludes apportionment of liability for "actions requiring proof of intent."[57] The court ruled that in premises security cases, where the plaintiff must prove the intentional assault in order to demonstrate the landlord's negligence, the exemption created by CPLR 1602(5) precludes apportionment against the nonparty intentional tortfeasor.[58]

Conclusion

Aside from the unique ruling in *Chianese*, the unequivocal language of CPLR 1602(2)(iv) bespeaks that the Legislature did not intend to create an exception to the apportionment rule. Section 1602(2)(iv) does not contain the precise language, explicitly present in other areas of CPLR 1602, necessary to create an exception. CPLR 1602(2)(iv) was formulated to simply preserve the principles of vicarious liability.

Endnotes

1. *Rangolan v. County of Nassau*, 96 N.Y.2d 42, 46 (2001).
2. *Id.* (citing *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 556, 583 N.Y.S.2d 957 (1992)).
3. *Id.* at 46 (citations omitted).
4. *Id.*
5. *Id.*
6. *Id.* at 45.
7. *Id.*
8. *Id.*; *see Rangolan v. County of Nassau*, 51 F. Supp. 2d 233 (E.D.N.Y. 1999), *aff'd in part, question certified,* 216 F.3d 1073 (2d Cir. 2000).
9. *Rangolan*, 96 N.Y.2d 42.
10. *Id.*
11. *Id.*
12. *Id.* at 46.
13. *Id.* at 47-48.
14. *Id.* at 45, 47; *Grant v. City of N.Y.*, 2001 N.Y. App. Div. LEXIS 5586, *3 (2d Dep't 2001) (passenger injured in automobile accident when driver failed to see maintenance work site on bridge).
15. *Rangolan*, 96 N.Y.2d at 46-47 (citations omitted).
16. *Id.* at 47 (citing *Faragiano v. Town of Concord*, __ N.Y.2d __, 2001 N.Y. LEXIS 662.)
17. *Id.* at 47.
18. *Id.* (citing *Faragiano, supra).*

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* (citations omitted).
24. *Id.* at 47-48.
25. *Id.* at 48.
26. *Id.*
27. *Id.* (citations omitted).
28. *Id.* at 48 (citing *Ferrin v. New York State Dep't of Corr. Servs.*, 71 N.Y.2d 42, 47; 523 N.Y.S.2d 485 (1987)); *Faragiano, supra*.
29. *Rangolan*, 96 N.Y.2d at 48-49 (citing *Kleeman v. Rheingold*, 81 N.Y.2d 270, 275, 598 N.Y.S.2d 149 (1993)).
30. *Id.* at 48.
31. *Id.* at 49.
32. *Id.* at 49, citing *Nwaru v. Leeds Mgmt. Co.*, 236 A.D.2d 252, 654 N.Y.S.2d 338 (1st Dep't 1997); *Cortes v. Riverbridge Realty Co.*, 227 A.D.2d 430, 642 N.Y.S.2d 692 (2d Dep't 1996).
33. *Faragiano, supra* at *1-2.
34. *Id.* at *2-3.
35. *Id.*; *Grant, supra* at *3-4.
36. *Grant, supra.* at *4, citing *Rangolan, supra*.
37. 2001 N.Y. Misc. LEXIS 139, *2-3 (Sup. Ct., Bronx Co.).
38. *Id.* at *2.
39. *Id.* at *2-3.
40. *Id.* at *6-11.
41. 94 N.Y.2d 218, 703 N.Y.S.2d 61 (1999).
42. 93 N.Y.2d 34, 687 N.Y.S.2d 598 (1999).
43. *Rangolan, supra* at 49.
44. *Id.* (citing *Morales* at 223 and *Cole* at 38-39); *Denio v. State of N.Y.*, 2001 N.Y. App. Div. LEXIS 4615 (4th Dep't 2001).
45. 2001 N.Y. App. Div. LEXIS 7823 (1st Dep't 2001).
46. *Id.* at *2.
47. *Id.*
48. *Id.* *2-4.
49. *Id.* at *4-5.
50. *Id.* at *5.
51. 2001 N.Y. App. Div. LEXIS 7822 (1st Dep't 2001).
52. *Id.* at *1.
53. *Id.* at *1-2.
54. *Id.* at *2.
55. *Id.* at *5-6 (citing *Rangolan, supra*).
56. 2001 N.Y. App. Div. LEXIS 7824 (1st Dep't 2001).
57. *Id.* at *10-16.
58. *Id.* at *16-17.

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Municipal Law Seminar: Civil Rights, False Arrest and Excessive Use of Force

By Paul J. Suozzi

I. Introduction

In our discussion today we will address civil rights issues in general and false arrest and excessive use of force in particular.

The relevant statutory provision is 42 U.S.C. § 1983; and the relevant constitutional provisions are the Fourth, Eighth and Fourteenth Amendments to the U.S. Constitution.

Section 1983 provides in relevant part that:

> Every person who under any statute, ordinance, regulation, custom or usage, of any State . . . , subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 is a remedy for the deprivation of substantive rights found in the Constitution and in other federal laws. It does not create any substantive rights, but rather provides a remedy in case of violation of other substantive laws.

The relevant constitutional provisions are:

A. the Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause . . .

B. the Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

C. the Fourteenth Amendment:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

II. The Civil Rights Act

To recover damages under section 1983, a plaintiff must show that: (1) the person acting under color of state law committed conduct complained-of; and (2) such conduct must deprive a plaintiff of rights, privileges or immunities secured by the constitution or laws of the United States.[1]

To state a claim under section 1983 for violation of the due process clause, a plaintiff must assert a recognized liberty or property interest within the purview of the Fourteenth Amendment, that the plaintiff was intentionally or recklessly deprived of that interest, even temporarily, under color of state law. A prospective plaintiff must also show that the individual defendant caused the deprivation and that the plaintiff is entitled to damages or other relief.

A private person can be subject to section 1983 liability as long as he or she is acting under color of state law. A person acts under color of state law when his actions are attributable to the state. Factors found influencing the court to find that a private individual has been involved in state action include the following:

(1) The individual has become involved in a close and interwoven relationship with the state.[2]

(2) The individual is a joint participant in the activity with the state.[3]

(3) The private individual is performing an activity normally done by the government. This joint action would include a situation where a private physician, under contract with a state, provides medical services to inmates. Joint action requires a substantial degree of cooperative action.

(4) Participating in a conspiracy with state officials, individuals are acting under color of state law.

The potential liability of municipalities in section 1983 actions could not be based on the theory of *respondeat superior*. It is only when execution of a government policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under section 1983.[4]

Whether a supervisor is potentially exposed to liability through section 1983 will depend on whether there is personal participation and if so, to what extent, if not, a supervisor may be liable if the supervisor acts with deliberate indifference to wide-scale violations of constitutional rights which are shown to have contributed to the plaintiff's injuries. In *Carson*,[5] the court described four situations under which a supervisory official is personally involved in a constitutional violation: (1) when he directly participates in the violation; (2) when he fails to remedy the wrong after learning of the violation through a report or appeal; (3) when he creates a custom or policy fostering such violations, or allowed such a custom or practice to continue; or (4) he was grossly negligent in managing subordinates who caused the violation.

III. False Arrest

An individual commits a false arrest or false imprisonment if he intentionally and without the right to do so arrests or takes into custody a person who is aware of such arrest and does not consent to it. A police officer has the right to arrest an individual without a warrant if he has reasonable and probable cause for believing that a crime has been committed and that the individual committed it. The burden is on the police officer by a fair preponderance of the evidence to show that there was reasonable or probable cause for believing that a crime was or was about to be committed.

Reasonable or probable cause for the arrest exists if the facts and the circumstances known to the police officers, or the information supplied to him before making the arrest were such as to lead a reasonably prudent person to believe that a crime had been or was being committed.

The Second Circuit has identified three types of encounters that occur between law enforcement officers and individuals, each with different Fourth Amendment ramifications.

The first type is a consensual encounter during which the police casually approach an individual without any display of authority or force. This can be done even when the officers have no basis for suspecting the individual of any criminal behavior. During such an encounter, police may generally ask questions of that individual, ask to examine that individual's identification, and even request consent to search luggage, so long as the police do not convey a message that compliance with their request is required.[6]

The second type of encounter is an investigative stop. This is considered a seizure under the Fourth Amendment, and requires the officer's objective justification based on reasonable suspicion of criminal activity.[7] A seizure occurs when a citizen is physically subdued by law enforcement officers, or when he otherwise submits to a show of authority by the officers.[8]

The third type of encounter involves an arrest of the individual, which must be based on probable cause that a crime has been committed.[9]

In evaluating the reasonableness of police conduct under the Fourth Amendment, the objective circumstances must be viewed rather than an officer's subjective motivation.[10] Even when an arrest is made pursuant to an invalid warrant, there is no cause of action if the warrant was facially valid.[11]

The degree to which a seizure (which can mean an arrest or some other interference with a person that falls short of arrest) is unreasonable depends entirely on the level of information available to the police officer. The more intrusive the interference with an individual, the more information an officer must have to justify the intrusion.[12]

The following factors are relevant to determining probable cause: (1) the hour of the day or night; (2) unusual activity; (3) false or evasive answers to questions; (4) the detail of the description given by witnesses; (5) the proximity of the suspect to the crime scene in terms of time and space; (6) furtive behavior by the suspect; (7) evidence of flight; and (8) repetition of behavior.[13] No one factor is controlling, as courts tend to look at these factors in their totality.[14] Probable cause to arrest requires more than bare suspicion. However, it need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely to be true than false.

IV. Excessive Use of Force

The Fourth Amendment (unreasonable seizure) standard governs excessive use of force, the Eighth Amendment (cruel and unusual punishment) governs excessive force against convicted criminals. Between the two are pretrial detainees, whose primary source of protection is the Fourteenth Amendment's due process clause. But unlike the Fourth Amendment, which requires only that the plaintiff establish the objective unreasonableness of the defendant's use of force (without regard to the underlying motivation), the Fourteenth Amendment, like the Eighth, expects the plaintiff to show that excessive force was applied maliciously and sadistically to cause harm, and not in a good faith effort to maintain or restore discipline.

In *Graham v. Connor*,[15] the Supreme Court held that in order to determine whether law enforcement officers used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other seizure, should be

analyzed under the Fourth Amendment and its reasonableness standard, rather than under a substantive due process approach.[16] The due process clause protects a pretrial detainee from the use of excessive force that amounts to a punishment.[17] Pretrial detainees do not fall within the coverage of the Eighth Amendment.[18]

The Second Circuit reviewed a post-arrest, pre-arraignment excessive force claim under the Fourth Amendment.[19] On the other hand, the subjective test of the Fourteenth Amendment does apply to a pretrial detainee who was either arrested on a warrant (which means that a judicial determination on probable cause has already been made), or who has been through arraignment or a probable cause hearing, or who has been transferred from a police station to a jail to await release or trial.

The Supreme Court has opined that an Eighth Amendment claim consists of both an objective and subjective component.[20] To satisfy the objective part of the test, the plaintiff must prove that the deprivation alleged is sufficiently serious or harmful enough to reach constitutional dimensions.[21] The Eighth Amendment's prohibition of cruel and unusual punishment draws its meaning from the evolving standards of decency. For conditions-of-confinement, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation.[22] For excessive force, a serious injury is not required. But a *de minimus* use of force will seldom be sufficient to cross over the constitutional threshold.[23]

The subjective element of an Eighth Amendment claim involves inquiry into the defendant's state of mind. The plaintiff must persuade the jury that the defendant acted wantonly, however this is defined. Although wantonness in challenges to inadequate medical treatment and prison conditions is gauged by deliberate indifference, wantonness in a challenge to force used in a prison riot is malicious and sadistic behavior.[24]

The extent of injury suffered by an inmate is one factor that may suggest a violation. Others, are the need for the application of force, the relationship between the need and the amount of force used, the threat reasonably perceived by the responsible officials and any efforts made to temper the severity of a forced response. Objective severity may show malicious intent.[25]

An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.[26]

V. Defenses

Police officers have been afforded qualified immunity, in part, due to the tradition of common law. If in common law, a function or functionary was given the defense of absolute immunity, contemporary courts give deference to such traditions. To be protected under the doctrine, the officer must act in good faith and have probable cause for the action taken.

The immunity defense is an affirmative defense, to be interposed by a defendant at the earliest possible stage of the litigation for prompt resolution. The U.S. Supreme Court in *Mitchell v. Forsyth*,[27] held that the entitlement is an immunity from suit rather than a mere defense to liability and is designed to avoid subjecting government officials either to the cost of trial or to the burden of broad-reaching discovery.

In order to maintain an action in which immunity is raised, even if such immunity is qualified, the plaintiff bears a heavy burden. The bare statement of conclusory allegations of some constitutional violation will not suffice to discharge the plaintiff's burden. A plaintiff must show existence of a well-settled right or conduct which was clearly established in the law and which a reasonable person would have known.[28]

The reasonableness of police conduct in light of clearly established law is especially crucial when Fourth Amendment rights of individuals may be implicated by procedures such as police searches. The Supreme Court will examine the facts on a case-by-case basis to determine the reasonableness of an act and the existence of clearly established law.

In allegations of wrongful or illegal arrests, the standard of probable cause is still applicable. The issue is whether a reasonable police officer would have concluded that there was probable cause to arrest for the alleged violation. The same type of reasoning extends to claims of excessive force with regard to arrests or other like activities.

VI. Off-Duty Officer's Liability

Off-duty incidents generally fall into two categories. First, where the officer is working off-duty or moonlighting, and the second, where while off-duty an incident occurs that gives rise to a question of liability. The moonlighting scenarios range from officers working for large, established companies, such as department stores to occasional employment for specific events.

The employment situations are vastly different from other off-duty scenarios that also arise for law enforcement officers. For example, an incident may

arise while an officer is at a religious service, a bar, a dance, a grocery store, or merely walking along the street or driving a car.

Cases involving off-duty officers often turn on whether the officer's actions meet section 1983's color of state law requirements. Generally, a public employee acts under of color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law. Not every action by a state official or employee is to be deemed as occurring under color of state law. An official's purely private acts, not the product of state authority, are not under color of state law.

Courts consider the following factors to determine whether off-duty officers acted pursuant to state authority: (1) whether there is a policy requiring officers to be on duty at all times; (2) whether the officer displayed a badge or identification card, identified himself as a police officer, or carried or used a service revolver or other weapon or device issued by the police department; and (3) whether the officer purported to place the individual under arrest.

Conclusion

The centerpiece of any analysis of false arrest and excessive use of force is probable cause and objective reasonableness. For a defendant to prevail he must establish that both elements are present; and for a plaintiff to prevail he must prove that neither element is present.

Endnotes

1. *Parratt v. Testa*, 451 U.S. 527, 535 (1981); *Malatesta v. N.Y. State Div. of State Police*, 120 F. Supp. 2d 235, 239 (N.D.N.Y. 2000); *Mawhirt v. Ahmed*, 86 F. Supp. 2d 81, 87 (E.D.N.Y. 2000) (citing *Annis v. County of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998)).
2. *Burton v. Wilmington Parking Auth.* 365 U. S. 715 (1961).
3. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).
4. *Monell v. Department of Soc. Serv.*, 436 U.S. 658 (1978); *Carson v. Lewis*, 35 F. Supp. 2d 250, 266 (E.D.N.Y 1999).
5. *Id.*
6. *United States v. Glover*, 957 F.2d 1004, 1008 (2d Cir. 1992) (quoting *Florida v. Bostick*, 501 U.S. 429, 432-35 (1991)).
7. *Glover*, 957 F.2d at 1008-09.
8. *California v. Hodari D.*, 499 U.S. 621, 626 (1991).
9. *Glover*, 957 F.2d at 1008.
10. *Maletesta v. New York State Div. of State Police*, 120 F. Supp.2d 235, 241 (N.D.N.Y. 2000); *Broadway v. Gonzales*, 26 F.3d 313, 319 (2d Cir. 1994).
11. *Levinson-Roth v. Parries*, 872 F. Supp. 1439, 1448 (D. Md. 1995).
12. *Terry v. Ohio*, 392 U.S. 1 (1968).
13. *Id.*
14. *Illinois v. Gates*, 462 U.S. 213 (1982).
15. 490 U.S. 386 (1989).
16. *Id.* at 395.
17. *Id*.
18. *Bell v. Wolfish*, 441 U.S. 520 (1979).
19. *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989).
20. *Hudson v. McMillian*, 503 U.S. 1, 8 (1992); *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).
21. *Wilson,* 501 U.S. at 298, 303.
22. *Wilson*, 501 U.S. at 298; *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).
23. *Hudson*, 503 U.S. at 9-10; *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (not every push or shove, even if it may seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights).
24. *Estelle v. Gamble,* 429 U.S. 97, 104 (1976); *Wilson*, 501 U.S. at 303; *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986).
25. *Hudson*, 503 U.S. at 7; *Whitley*, 475 U.S. at 321; *Johnson IV v. City of Milwaukee*, 41 F. Supp. 2d 917, 924-25 (E.D. Wis. 1999).
26. *Boker v. Willet*, 42 F. Supp. 192, 196 (N.D.N.Y. 1999).
27. 472 U.S. 511 (1985).
28. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Municipal Law Seminar: Suing and Defending Municipalities: Law, Procedure and Ethics—Commencing Actions and Pleadings

By Lisa T. Sofferin and Paul J. Suozzi

I. Statutes of Limitations

A. General Municipal Law § 50-i(1)(c) (GML)

1. Applies to:

a. a city, county, town, village, fire district or school district.

b. in actions for personal injury, wrongful death or property damage.

c. to injuries allegedly sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firemen.

2. The action or special proceeding must be commenced within one year and 90 days after the happening of the event upon which the claim is based.

3. Wrongful death actions shall be commenced within two years after the happening of the death.

B. Computing the time period from the "happening of the event" upon which the claim is based.

1. Negligent issuance of building permit

Time period for homeowner's claim against town based upon town's negligent issuance of building permit and certificate of occupancy began to run upon town's issuance of building permit or certificate of occupancy.[1]

2. Failure to issue certificate of occupancy

Homeowner's claim against county arose when county informed homeowner that it would not issue a certificate of occupancy because of structural problems with property. Plaintiff alleged defendant was responsible for creating conditions which gave rise to those structural problems.[2]

3. Defect in sidewalk created by defendant

Where plaintiff claimed injury from crack in sidewalk caused by city when it removed a tree stump, the "happening of the event" which started the limitations period running was the accident to the plaintiff, not the stump removal.[3]

C. Different s/l for civil rights claims in federal or state court

1. Notice of claim provisions for tort claims against municipalities under New York law do not apply to 42 U.S.C. § 1983 claims brought against the city. This court also held that the relation back doctrine under FRCP did not operate to save the wrongful death claim asserted against the city under New York law, which was untimely for failure to comply with the statutory prerequisites for suits against municipalities, after city removed action to federal court following service of amended complaint.[4]

2. Plaintiff's cause of action alleging federal civil rights violations are not subject to the notice of claim requirements of GML § 50-i. The statute of limitations for actions under 42 U.S.C. § 1983 are characterized as personal injury actions which is three years pursuant to CPLR 214(5).[5]

D. Education Law provisions

1. Education Law § 3813 provides generally for claims against the governing body of school districts and certain state supported schools. Subdivision (1) refers to actions for "any cause whatsoever" and provides that a "written verified claim" be presented to the governing body within "three months after the accrual of such claim." Subdivision (2) refers specifically to "tort" claims and incorporates the provisions of GML §§ 50-e and 50-i. This appears to be a redundancy in the law since GML § 50-i itself refers to claims against school districts.

2. Education Law § 376-a refers to claims against the University Construction Fund and provides for similar 90-day notice of claim requirements and one year and 90 days statute of limitations and pleading requirements as are found in the GML. Wrongful death claims are excluded from these provisions. Such claims against the fund are governed by the notice of claim

and time limitations provisions of title 11 of article 9 of the Public Authorities Law (Pub. Auth. Law).

3. Education Law § 467 refers to actions against the NYC Educational Construction Fund and provides for similar 90-day notice of claim requirements and one year and 90 days statute of limitations for injuries to real or personal property or for personal injuries or death. It also refers to title 11 of article nine of the Pub. Auth. Law for the wrongful death statute of limitations.

E. Different s/l for public authorities

1. Generally.

Public authorities are entities that are created by statute. There is a specific statute for each entity. Those statutes generally contain special pleading requirements similar to those in GML § 50-i. However, the statutes of limitation and notice of claim provisions are not uniform for all public authorities. Whenever you wish to sue a public authority you must check its specific statute to find the applicable statute of limitations and other pleading provisions.

a. Example:

The Niagara Frontier Transportation Authority is title 11-A of the Pub. Auth. Law. Section 1299 is the short title. Sections 1299-a through 1299-u are the various provisions of the act. Section 1299-p governs actions against the authority. Subdivision (1) sets forth the requirement that you plead that 30 days have elapsed since notice of the claim was presented to the authority and that payment has been neglected or refused. Subdivision (2) requires compliance with the notice of claim provisions of GML § 50-e, but actions must be commenced within one year after the cause of action accrues, not one year and 90 days. Subdivision (5) provides that the rate of interest to be paid by the authority upon any judgment shall not exceed four percent per annum, not the usual nine percent.

b. Wrongful death claims.

Pub. Auth. Law § 2980 provides generally that wrongful death claims against public authorities or public benefit corporations shall not be commenced unless a notice of claim has been served pursuant to GML § 50-e. Pub. Auth. Law § 2981 provides that the statute of limitations for a wrongful death action against a public authority or public benefit corporation is two years from the date of death.

c. Various examples:

The index to the Pub. Auth. Law has a long list of statutes of limitation for public authorities. Following are some other examples:

(1) Hudson Parking Authority—Public Authorities Law § 1425-q(2) provides for a one-year statute of limitations and a six-month notice of intention to commence an action for damages for injuries to real or personal property, personal injuries or death. (this seems to conflict with Pub. Auth. Law § 2981 cited above, which provides for compliance with GML § 50-e and a two-year statute of limitations for wrongful death).

(2) Long Beach Parking Authority—Public Authorities Law § 1599-qqqq(2) provides that "except in an action for wrongful death" the statute of limitations is one year and the notice must be given within six months.

(3) New York City Transit Authority—Public Authorities Law § 1212(2) provides for a one year and 90 days statute of limitations for personal injury and property damage claims and refers to title 11 of article nine for wrongful death claims. Subdivision (4) requires compliance with GML § 50-e notice of claim provisions.

F. Identify proper municipal subdivision

It is also extremely important to identify the proper municipal subdivision to sue. In *Rosas v. Manhattan and Bronx Surface Transit Operating Authority*,[6] the plaintiff was injured while exiting a bus owned and operated by the New York City Transit Authority (NYCTA). Suit was later commenced against the Manhattan Bronx Surface Transit Operating Authority (MABSTOA). Although NYCTA representatives conducted a statutory hearing and communicated with

plaintiff on NYCTA stationery about no-fault payments no notice of claim was ever served on the NYCTA. Two years after the accident, MABSTOA moved to dismiss because it was not a proper party. At that time, Public Authorities Law § 1212 allowed one year and 120 days from date of accident in which to commence action or move for leave to serve late notice of claim. Since neither had been done, the complaint was dismissed.[7]

G. Tolling provisions

1. Infancy

The general tolling provisions found in New York practice apply to claims against municipalities.

a. The infancy tolling provisions of CPLR 208 are available to infants suing municipalities notwithstanding the provisions of GML § 50-i which provides for a one year and 90 days statute of limitations.[8]

b. In the case of *Henry v. City of New York*,[9] the court found that infants were not under a disability of infancy because they were represented by counsel who filed timely notices of claim on their behalf. The Court of Appeals in reversing found that the infancy toll applied despite the plaintiff's mother filing notices of claim and the representation of counsel. This decision has been followed.[10]

c. Please note that while the claim on behalf of an infant may be tolled, the parents derivative claim is not subject to the same tolling provisions.[11]

2. Continuous treatment

a. The continuous treatment doctrine also applies to toll the statute of limitations in medical malpractice claims.[12]

b. However, the continuous treatment doctrine did not apply in a proceeding for leave to serve a late notice of claim on a county medical center where the gap between the treatments exceeded the applicable statute of limitations.[13]

3. General Municipal Law § 50-h(5)

GML § 50-h(5) can toll the statute of limitations under certain circumstances.

a. In *Melendez v. New York City Housing Authority*,[14] the court determined that the statute of limitations was tolled pursuant to CPLR 204 and GML § 50-h(5) upon the serving of defendant's demand for an oral examination pursuant to Public Housing Law § 157 and remained tolled under the circumstances of that case for the ensuing 90 days because the defendant housing authority did not schedule the oral examination sooner.[15]

4. Insanity

Courts have also found that the insanity tolling provisions applied to claims against municipalities.[16]

5. Miscellaneous

There is no tolling of the statute of limitations with regard to an arrestee's civil rights claim based on alleged wrongful arrest and illegal search, since filing of a notice of claim is not a prerequisite to a federal court suit.[17]

II. Statutory prerequisites to suit and special pleading requirements

A. Notice of Claim

1. Requirements of GML § 50-i(1)(a) and (b)

a. Service of notice of claim pursuant to GML § 50-e.

b. Thirty days have lapsed since service of notice of claim; adjustment or payment has been neglected or refused.

c. Commencing action when section 50-h exam not held or need to commence within one year and 90 days when not enough time.

d. Late notice of claim. The court has discretion to grant leave to file a late notice of claim, but cannot extend the time beyond one year and 90 days from the date of injury.[18] Only New York State Supreme Court has jurisdiction to grant leave.[19]

e. Not all federal causes of actions are subject to 90-day claim provisions.[20]

B. Pleadings

1. Under New York Law, compliance with the 90-day notice of claim requirement is a condition precedent to a personal injury action against a municipal corporation.[21] GML § 50-i requires a plaintiff to plead three elements in complaint:

a. plaintiff has served notice of claim;

b. at least 30 days have lapsed since the notice of claim was filed; and

c. in that time the defendant has neglected, or refused, to adjust or satisfy the claim.

2. Failure to plead compliance with the GML mandates dismissal of the complaint.[22]

3. Service of a notice of claim is a condition precedent to a suit against a school district.[23]

C. Service of process

1. County, town, city, village, district (park, sewage, etc.): serve the clerk (or other designated employees).[24]

2. School district: serve a school officer, as defined in the Education Law.[25]

3. Commission or board;

a. chairperson or presiding officer.[26]

b. may also serve clerk of town or village.[27]

4. Mail service acceptable under CPLR 312-a.

D. Venue

1. A county may only be sued in such county;[28] towns, villages, school districts and cities (other than New York City) may only be sued in county in which located;[29] city of New York must be sued in the county within the city in which cause of action arose;[30] proceedings against New York City tax appeals tribunal are commenced in Appellate Division, First Department.[31]

2. Public authority shall be sued in county in which authority has principal office or where facilities involved in action are located;[32] note that CPLR 505(b) has special provisions for New York City Transit Authority.

3. Proceedings against body or officer shall be in county where respondent made determination or refused to perform duty.[33]

4. Proceedings against majority of state agencies shall be commenced in Supreme Court, Albany County.[34]

5. Conflict with federal venue statute 28 U.S.C. § 1391. Argue CPLR is not a merely a procedural rule, but effectuates substantive rights of municipality, ensuring that municipality is protected from inconvenience.[35]

E. Special duty

1. Liability will not be imposed upon a municipality in performing a public function absent a duty of due care for the benefit of particular persons or classes of persons. A simple failure to provide police protection is not sufficient.[36]

2. The same is true with respect to violation of a statute or ordinance. One must establish that the intent of statute is to protect an individual against an invasion of a property or personal interest; liability will not be predicated on a violation of the statute if the statute is designed to protect the public as a whole.[37]

3. There is a limited exception to rule where a municipality has voluntarily assumed a special relationship or duty. There are four elements of the special relationship: (a) assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of party who is injured; (b) knowledge on the part of the municipality's agents that inaction could lead to harm; (c) some form of direct contact between the municipality's agents and the injured party; and (d) the injured party's justifiable reliance on the municipality's affirmative undertaking.[38]

4. You must affirmatively plead the "special relationship" in the complaint.[39]

F. Municipal planning doctrine

1. If a claim is based upon the performance, or failure to perform, a discretionary function or duty the municipality is immune from liability.[40]

2. The doctrine insulates the municipality from liability when it exercises its discretion according to an adequate study or other rational basis; liability may only be predicated on proof that the plan was evolved without adequate study or lacked a reasonable basis.[41]

3. The study or other basis asserted by the municipality must itself be based upon due care and routinely updated to remain current.[42]

4. The issue or condition involved in the litigation must have been specifically considered by the municipality and have been the subject of the deliberations.

5. The court may determine whether the discretionary exercise of power has a rational

basis by analyzing whether the municipality considered objective factors such as traffic conditions, the nature of highway, physical practicability, the allocation of budgetary resources and fiscal priorities.[43]

6. The doctrine is not a defense to a claim of negligence arising out of routine maintenance or repairs.
7. It is unclear whether the municipal planning doctrine must be pled as an affirmative defense.

G. Municipal employees under Vehicle and Traffic Law

1. Vehicle and Traffic Law § 1103(b).

   Municipal employees actually engaged in work on a highway are excused from strict compliance with traffic laws. Employees are not relieved from their duty to proceed with due regard for the safety of others, but shall not be held liable except in the cases of *reckless disregard*.[44]

2. Vehicle and Traffic Law § 1104(e).

   A municipality cannot be held liable for an injury arising out of the operation of an authorized emergency vehicle unless the officer acted with *reckless disregard*.[45]

H. CPLR 3017(c)

1. General

   CPLR 3017(c) was added in 1976 to prevent plaintiffs from stating exaggerated money demands in medical malpractice cases. In 1980 the protection of the section was extended to municipal corporations. It provides, in pertinent part:

> In an action . . . against a municipal corporation, as defined in section two of the general municipal law, the complaint, counterclaim, cross-claim, interpleader complaint, and third-party complaint shall contain a prayer for general relief but shall not state the amount of damages to which the pleader deems himself entitled. If the action is brought in supreme court, the pleading shall also state whether or not the amount of damages sought exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction.

GML § 2 provides as follows, in pertinent part: "The term 'municipal corporation,' as used in this chapter, includes only a county, town, city, and village."

2. Inconsistency with GML § 50-i.

   The first anomaly is the inconsistency of the definition in GML § 2 with the provisions of section 50-i. The latter governs actions against a "city, county, town, village, fire district or school district." School districts and fire districts are not included in the definition of municipal corporation in section 2, and, therefore, are not entitled to the protection of CPLR 3017(c).

3. Suggesting damage amount to jury.

   Another issue raised by this section is whether a plaintiff may suggest a specific monetary figure to the jury during summation. The Third Department in *Bechard v. Eisinger*[46] held that it is "highly improper" and that "such conduct emasculates the purpose of CPLR 3017(c), which at least in part was enacted to curb the effect of exaggerated demands for damages which could be read to the jury and thereby bias them toward making excessive awards."

   On the other hand, the Second Department in *Braun v. Ahmed*[47] explored the legislative history of the 1976 amendment and found that it was silent regarding the purpose of eliminating the specific sum in the medical malpractice *ad damnum* and suggested that it was to appease doctors who then were complaining of a medical malpractice crisis. Its holding, from which there were two dissents, was that it was permissible for a reasonable figure to be mentioned, and that the trial court would be in a position to adequately determine a reasonable figure upon which counsel could comment.

I. Prior written notice

   Compliance with prior written notice statutes, such as Second Class Cities Law § 244, Town Law § 65-a and Village Law § 6-628 (also CPLR 9804), must be alleged in the complaint.[48]

III. CPLR article 16

A. Generally

   Article 16 of the CPLR was adopted as part of the 1986 Tort Reform Legislation. It was designed to modify the traditional rule that each tortfeasor is jointly and severally liable for the full amount of a plaintiff's damages regard-

less of that tortfeasor's degree of culpability. With joint and several liability, a plaintiff has an incentive to sue "deep pocket" defendants event if they are only minimally involved. Article 16 was passed to give some relief to these "deep pocket" defendants, including municipalities.

1. Statutory language

   CPLR 1601 provides:

   > When a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable . . . and the liability of a defendant is found to be 50 percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share.

2. Exceptions:

   CPLR 1602 sets forth exceptions to the general rule in CPLR 1601.

   a. Motor vehicle. For example, the limitations do not apply to persons who are held liable by reason of the "use, operation, or ownership of a motor vehicle or motorcycle, as those terms are defined respectively in §§ 311 and 125 of the Vehicle & Traffic Law." The definition of "motor vehicle" in § 311 of the Vehicle & Traffic Law excludes fire and police vehicles. Therefore, municipalities are still entitled to the protection of article 16 for accidents involving police and fire vehicles.

   b. Nondelegable duty. While the above subdivision of CPLR 1602 provides a benefit to municipalities, another subdivision has the opposite effect. CPLR 1602(2) excludes the benefits of article 16 for "any liability arising by reason of a non-delegable duty." Originally, it was thought that this section applied to claims such as those found under Labor Law §§ 240, 241(6) where the "non-delegable duty" was well known. However, it has been construed by the courts to also apply to the following:

      (1) A county and its sheriff's department's nondelegable duty to protect an informant for a foreseeable risk of harm that he would be assaulted by another inmate.[49]

      (2) The courts have found that the protection of article 16 is not available to municipalities for claims arising out of their nondelegable duty to maintain its roads in a reasonably safe condition.[50] The court noted that while the Legislature, in adopting article 16 in 1986, intended to limit the liability of municipalities, it was noted that the nondelegable duty exception "was apparently inserted towards the end of the frantic behind the scenes maneuverings that produced article 16 [and] may not have been appreciated at the time"[51] The court also noted that decisions construing CPLR 1602(2)(4) are several years old and the Legislature "has not seen fit to alter the law in this area as formulated by the courts."[52]

IV. Administrative proceedings

   A. "Special proceeding" under CPLR articles 4 and 78 for review where a commission, board or officer: (1) failed to perform a duty; (2) exceeded its jurisdiction; (3) made a determination contrary to law, arbitrary and capricious or abused its discretion; also where there is a question of "substantial evidence" to support a determination.[53]

   B. You cannot use a special proceeding to challenge the constitutionality of a rule, ordinance or statute.

   C. Pleadings.

      1. Notice of claim is not required.

      2. Commence by service of a notice of petition and a verified petition, *not* a summons and complaint. CPLR 402, 403, 7804(c)(d).

      3. The notice of petition must include the hearing date and time when *served* upon respondent. It is a jurisdictional defect if the hearing date and time are lacking, which requires dismissal.[54] Practice note: If local practice permits, purchase an index number and RJI a few days before filing the notice of petition. When advised by the clerk of the judicial assignment and return date,

you can then insert the hearing date and time on the original notice of petition before filing the original papers with the court. Otherwise, obtain the hearing date and time concurrently with filing of the original papers and then insert that information on the copy to be served on the respondent. You cannot assert as a defense to a dismissal motion, based on the absence of a hearing date and time on the copy served on respondent, that the clerk refused to provide, or local practice does permit, immediate assignment of a hearing date and time. Also, do not insert a fictitious return date and time just to satisfy the pleading requirement.

4. Service of the notice and petition is done in the same manner as summons and complaint. The time for service before the return date depends on the proceeding: Only eight days are required under the general provisions of CPLR 403(b). A longer period applies under article 78 (20 days) (always check the specific statutes involved).

5. The respondent must serve a verified answer. The time to serve the answer varies.[55]

D. Other concerns

1. The statute of limitations is only four months.[56]

2. Discovery requires leave of court;[57] CPLR article 31 applies when leave of court is granted.

3. Trial vs. appellate review

   a. If there is a triable issue of fact, or no issue of substantial evidence, then the matter is disposed of in the supreme court.[58]

   b. If there is a question of whether there is substantial evidence to support the determination, supreme court reviews all other matters such as jurisdiction, *res judicata* and statute of limitations and then transfers to Appellate Division for disposition of substantial evidence.[59]

Endnotes

1. *Magaldino v. Town of Hurley,* 177 A.D.2d 906, 576 N.Y.S.2d 664 (3d Dep't 1991).
2. *Augustyn v. County of Wyoming*, 275 A.D.2d 1003, 716 N.Y.S.2d 341 (4th Dep't 2000).
3. *Kiernan v. Thompson*, 134 A.D.2d 27, 522 N.Y.S.2d 719, (3d Dep't 1987), *aff'd*, 73 N.Y.2d 840, 537 N.Y.S.2d 122 (1988).
4. *Mroz v. City of Tonawanda*, 999 F. Supp. 436 (W.D.N.Y. 1998).
5. *Lopez v. Shaughnessy,* 260 A.D.2d 551, 688 N.Y.S.2d 614 (2d Dep't 1999).
6. 109 A.D.2d 647, 486 N.Y.S.2d 235 (1st Dep't 1985)
7. *See also Buffalo and Erie County Pub. Library v. County of Erie,* 171 A.D.2d 369, 577 N.Y.S.2d 993 (4th Dep't 1991), *aff'd,* 80 N.Y.2d 938, 591 N.Y.S.2d 131 (1992) (confirming that the public library system is distinct from the county in which it is located, despite funding from the county and the fact that its employees are treated as county employees); Education Law §§ 255, 260 (regarding establishment of public libraries); *Paz v. City of N.Y.,* 157 A.D.2d 562, 550 N.Y.S.2d 304 (1st Dep't 1990); *New York Pub. Library v. New York State PERB,* 45 A.D.2d 271, 357 N.Y.S.2d 522 (1st Dep't 1974) (holding that a public library is an entity separate and distinct from the municipality which created it and in which it is located).
8. *Corbett v. Fayetteville-Manlius Cent. Sch. Dist.*, 34 A.D.2d 379, 311 N.Y.S.2d 540 (4th Dep't 1970).
9. 244 A.D.2d 93, 676 N.Y.S.2d 616 (2d Dep't 1998), *rev'd,* 94 N.Y.2d 275, 724 N.E.2d 372 (1999).
10. *See, e.g.*, *O'Donnell v. Troy Hous. Auth.*, 271 A.D.2d 731, 706 N.Y.S.2d 736 (3d Dep't 2000); *Blackburn v. Three Vill. Cent. Sch. Dist.*, 270 A.D.2d 298, 705 N.Y.S.2d 53 (2d Dep't 2000).
11. *Berment v. Erie County*, 53 Misc. 2d 366, 278 N.Y.S.2d 551 (Sup. Ct. Erie Co.1967).
12. *JaJoute v. New York City Health & Hosp. Corp.*, 242 A.D.2d 674, 662 N.Y.S.2d 786 (2d Dep't 1997), *appeal dismissed*, 91 N.Y.2d 887, 668 N.Y.S.2d 565 (1998).
13. *Bulger v. Nassau Co. Med. Ctr.*, 266 A.D.2d 212, 697 N.Y.S.2d 345 (2d Dep't 1999).
14. 252 A.D.2d 437, 675 N.Y.S.2d 353 (1st Dep't 1998).
15. *See also Wilder v. City of N.Y.*, 193 A.D.2d 420, 520 N.Y.S.2d 352 (1st Dep't 1993); *McCormack v. Port Washington Union Free Sch. Dist.* 214 A.D.2d 546, 625 N.Y.S.2d 57 (2d Dep't 1995); *Herrera v. New York City Transit Auth.* 234 A.D.2d 207, 651 N.Y.S.2d 50 (1st Dep't 1996). *But see Cruz v. City of N.Y.*, 232 A.D.2d 446, 648 N.Y.S.2d 467 (2d Dep't 1996) *and Simon v. Capital District Transp. Auth.*, 95 A.D.2d 902, 463 N.Y.S.2d 913 (3d Dep't 1983).
16. *Hurd v. Allegany County*, 39 A.D.2d 499, 336 N.Y.S.2d 952 (4th Dep't 1972). *But see Eisenbach v. Metro. Transp. Auth.,* 62 N.Y.2d 973, 479 N.Y.S.2d 338 (1984); *McCarthy v. Volkswagen of America,* 55 N.Y.2d 543, 450 N.Y.S.2d 457 (1980), which both question the particular standard for insanity applied by the Fourth Department in *Hurd, supra.*
17. *Day v. Moscow*, 955 F.2d 807 (2d Cir.), *cert denied*, 506 U.S. 821 (1992).
18. *Pierson v. City of N.Y.*, 56 N.Y.2d 950, 453 N.Y.S.2d 615(1982).
19. *Tarquinio v. City of N.Y.*, 84 A.D.2d 265, 445 N.Y.S.2d 732 (1st Dep't 1982), *aff'd*, 56 N.Y.2d 950, 453 N.Y.S.2d 615 (1982); *Brown v. Metropolitan Trans. Auth.*, 717 F. Supp 257 (S.D.N.Y. 1989).

20. *See Felder v. Case* 487 U.S. 131 (1988) (holding that § 1983 claims are not subject to notice of claim). *But see Hardy v. New York City Health & Hosp. Corp.*, 164 F.3d 789 (2d Cir. 1999) (affirming a dismissal for failure to serve a notice of claim, finding a federal legislative intent under the Emergency Medical Treatment and Active Labor Act to adopt state procedural requirements).
21. GML §§ 50-e, 50-i.
22. *Davidson v. Bronx Mun. Hosp.*, 64 N.Y.2d 59, 484 N.Y.S.2d 533 (1984); *Melito v. Canastota Cent. Sch. Sys.*, 192 A.D.2d 754, 596 N.Y.S.2d 182 (3d Dep't 1993).
23. Education Law §§ 3813(1), (2); *Parochial Bus Sys. v. Board of Educ.*, 60 N.Y.2d 539, 470 N.Y.S.2d 564 (1983).
24. CPLR 311(a)(2)-(6).
25. CPLR 311(a)(7); Education Law §§ 2(13), 3813(1), (2).
26. CPLR 312.
27. *Id*.
28. CPLR 504(i).
29. CPLR 504(2).
30. CPLR 504(3).
31. CPLR 506(4).
32. CPLR 505(a).
33. CPLR 506(b).
34. CPLR 506(2).
35. *See Babylon Assoc. v. Suffolk County*, 89 A.D.2d 57, 451 N.Y.S.2d 713 (1st Dep't 1982). Also, argue FRCP 82 which makes provisions where venue is otherwise provided by law and/or argue doctrine of *forum non conveniens*.
36. *Lauer v. City of N.Y.*, 95 N.Y.2d 95, 711 N.Y.S.2d 112 (2000); *Cuffy v. City of New N.Y.*, 69 N.Y.2d 255, 513 N.Y.S.2d 372 (1987); *Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d 175, 448 N.Y.S.2d 141 (1982).
37. *Steitz v. City of Bacon*, 295 N.Y. 51, 64 N.E. 2d 704 (1945); *Dewick v. Village of Penn Yan*, 275 A.D .2d 1011, 713 N.Y.S.2d 592 (4th Dep't 2000), *appeal denied,* 2000 N.Y. App. Div. Lexis *13692 (* 4th Dep't 2000).
38. *Cuffy v. City of N.Y.*, 69 N.Y.2d, 255, 513 N.Y.S.2d 372 (1987); *See also*, *Tarnaras v. County of Nassau*, 264 A.D.2d 390, 694 N.Y.S.2d 414 (2d Dep't 1999) (holding that material questions of fact existed as to whether a special relationship existed).
39. *Burger v. County of Onondaga*, 272 A.D.2d 965, 708 N.Y.S.2d 660 (4th Dep't 2000), *appeal denied*, 95 N.Y.2d 760, 714 N.Y.S.2d 710 (2000) (excellent review of the law in opinion of Appellate Division).
40. *Weiss v. Fote*, 7 N.Y.2d 579, 200 N.Y.S.2d 409 (1960).
41. *Id.* at 589.
42. *Cangemi v. Pickard*, 270 A.D.2d 802, 705 N.Y.S.2d 148 (4th Dep't 2000), *appeal denied*, __ A.D.2d __, 710 N.Y.S.2d 237 (4th Dep't 2000).
43. *Friedman v. New York*, 67 N.Y.2d 271, 502 N.Y.S.2d 669 (1986); *Puliatti v. New York*, 91 A.D.2d 1192, 459 N.Y.S.2d 176 (4th Dep't 1983); *appeal denied,* 59 N.Y.2d 603 (1983); *Van de Bogart v. New York*, 133 A.D.2d 974, 521 N.Y.S.2d 125 (3d Dep't 1987).
44. *Kearns v. Piatt*, __ A.D.2d __, 716 N.Y.S.2d 418 (3d Dep't 2000).
45. Vehicle & Traffic Law § 1104(e); *Saarineu v. Kerr*, 84 N.Y.2d 494, 620 N.Y.S.2d 297 (1994); *Campbell v. City of Elmira*, 84 N.Y.2d 505, 620 N.Y.S.2d 302 (1994).
46. *Bechard v. Eisinger,* 105 A.D.2d 939, 481 N.Y.S.2d 906 (3d Dep't 1984); *Bagailuk v. Weiss*, 110 A.D.2d 284, 494 N.Y.S.2d 205 (3d Dep't 1985).
47. *Braun v. Ahmed*, 127 A.D.2d 418, 515 N.Y.S.2d 473 (2d Dep't 1987).
48. *Doremus v. Incorporated Vill. of Lynbrook,* 18 N.Y.2d 362, 275 N.Y.S.2d 505 (1966); *Abbatecola v. Town of Islip,* 97 A.D.2d 780, 468 N.Y.S.2d 518 (2d Dep't 1983); *Keeler v. City of Syracuse,* 143 A.D.2d 518, 533 N.Y.S.2d 505 (4th Dep't 1988*).*
49. *Rangolan v. County of Nassau*, 51 F. Supp. 2d 233 (E.D.N.Y. 1999), *aff'd,* 216 F.3d 1073 (2d Cir. 2000); *certified to N.Y. Ct. of Appeals on interpretation of CPLR 1601 and 1602(2)(iv),* 2000 U.S. App. LEXIS 14163; 216 F.3d 1073, 2000 U.S.App. LEXIS 20502; *certified question accepted for briefing and argument,* 95 N.Y.2d 873, 714 N.Y.S.2d 706, 2000 N.Y. LEXIS 3935; *Motion for leave to appear as amicus curiae granted to* City of New York (2000 N.Y. LEXIS 2882, Oct. 19, 2000) and New York State Trial Lawyers Association (2000 N.Y. LEXIS 132, Feb. 8, 2001). At time of submission of this outline, the case had been argued, but not decided.
50. *Faragiano v. Town of Concord*, 272 A.D.2d 975, 708 N.Y.S.2d 661 (4th Dep't 2000).
51. Siegel, *New York Practice* § 168(c), at 271 (3d ed. 1999).
52. *In re Briggins v. McGuire*, 67 N.Y.2d 965, 967-968, 502 N.Y.S.2d 985, *cert. denied,* 479 U.S. 930.
53. CPLR 7803.
54. CPLR 403, 7804(c)(d); *Vetrone v. Mackin*, 216 A.D.2d 839, 628 N.Y.S.2d 866 (3d Dep't 1995); *Krenzer v. Town of Caledonia*, 233 A.D.2d 882, 649 N.Y.S.2d 863 (4th Dep't 1996).
55. CPLR 403(b); 7804(c).
56. CPLR 217(1).
57. *Id.*
58. CPLR 7804(g).
59. *Id.*

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Municipal law Seminar: Suing and Defending Municipalities: Law, Procedure and Ethics—Premises Liability

By Sam A. Elbadawi

I. Prior Written Notice

Unlike private property owners, municipalities can and usually do shield themselves from premises liability claims by enacting laws which require prior written notice of a defect as a condition precedent to liability. Where these statutes are applicable, lack of prior written notice is fatal. In fact, in a complaint filed for damages in a situation where prior notice is applicable, compliance with the statute must be alleged in the complaint.[1]

A. Statutory Authority:

1. Village Law § 6-628 reads as follows:

> No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed or for damages or injuries to person or property sustained solely in consequence of the existence of the snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice of the defective, unsafe, dangerous or obstructed condition or of the existence of the snow or ice, relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or to cause the snow or ice to be removed, or the place otherwise made reasonably safe.

2. Town Law § 65-a provides similar but not identical conditions precedent to liability:

> (1) No civil action shall be maintained against any town or town superintendent of highways for damages or injuries to person or property sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition of such highway, bridge or culvert was actually given to the town clerk or town superintendent of highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, or, in the absence of such notice, unless such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence; but no such action shall be maintained for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any highway, bridge or culvert, unless written notice thereof, specifying the particular place, was actually given to the town clerk or town superintendent of highways and there was a failure or neglect to cause such snow or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.
>
> (2) No civil action shall be maintained against any town or town superintendent of highways for damages or injuries to person or property sustained by reason of any defect in its sidewalks or in consequence of the existence of snow or ice upon any of its sidewalks, unless such sidewalks have been constructed or are maintained by the town or the superintendent of highways of the town pursuant to statute, nor shall any

action be maintained for damages or injuries to person or property sustained by reason of such defect or in consequence of such existence of snow or ice unless written notice thereof, specifying the particular place, was actually given to the town clerk or to the town superintendent of highways, and there was a failure or neglect to cause such defect to be remedied, such snow or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after receipt of such notice.

(3) The town superintendent of highways shall transmit in writing to the town clerk within ten days after the receipt thereof all written notices received by him pursuant to this section.

(4) The town clerk of each town shall keep an indexed record, in a separate book, of all written notices which he shall receive of the existence of a defective, unsafe, dangerous or obstructed condition in or upon, or of an accumulation of ice or snow upon any town highway, bridge, culvert or sidewalk, which record shall state the date of receipt of the notice, the nature and location of the condition stated to exist, and the name and address of the person from whom the notice is received. All such written notices shall be indexed according to the location of the alleged defective, unsafe, dangerous or obstructed condition, or the location of accumulated snow or ice. The record of each notice shall be preserved for a period of five years after the date it is received.

Note the differences between subdivisions (1) and (2).

Subdivision (1) applies to defects in highways, bridges or culverts. As to defects other than those caused by "the existence of snow or ice," there is a **constructive notice exception.**

Subdivision (2) refers to sidewalks and it contains no constructive notice exception.

3. Local Ordinances:

   Towns may (and often do) adopt local laws more restrictive than section 65-a of the Town Law.[2] For example Highway Law § 139 provides that a county may adopt similar, more restrictive provisions. Therefore, more restrictive provisions in local laws may supersede the general provisions of the Town Law.[3]

4. Second Class Cities Law § 244:

   While similar protection of cities is afforded under § 244 of the Second Class Cities Law, cities nevertheless adopt local laws addressing prior notice of defect to ensure insulation from such claims. A copy of the city of Rochester prior notice provisions contained within the city charter are attached to these materials as an example.

5. GML § 50-e Notice of Claim:

   GML § 50-e(4) permits localities to condition liability for defects upon prior receipt of written notice thereof, but restricts the requirement to streets, highways, sidewalks, bridges, culverts and crosswalks. *Walker v. Town of Hempstead*[4] (paddleball court not subject to prior written notice requirement). While prior written notice laws generally refer to streets, highways, sidewalks, bridges, culverts and crosswalks, the Court of Appeals has held that a protruding sign post does constitute the type of dangerous defect encompassed by prior written notice laws.[5]

B. Constructive or Actual Notice:

1. Constructive Notice:

   In *Amabile v. City of Buffalo*,[6] no prior written notice was provided to the city clerk as required by the city charter. However, the plaintiff produced business records showing that a city worker had been employed exclusively to drive through the city in search of damaged and missing street signs (defect was a stop sign post protruding from the ground with severely cracked and broken concrete around the base). Further, the records showed that the individual had driven past or near the intersection many times and could not have possibly missed observing the defect. Despite these facts, the court held that the protection provided to municipalities under prior notice statutes would not be ignored.[7]

2. Actual Notice:

   Even where a municipal official has actual notice of the claimed defect, prior written notice is still required.[8]

3. Failure to Maintain Records:

   Where the municipality fails to maintain the statutorily required record of prior written notices, the prior written notice requirement still applies but the burden shifts to the municipality to show that it made a diligent and good-faith search of its internal records.[9]

4. Scope of Written Notice:

   The prior written notice actually filed must "reasonably encompass" the particular defect complained of in the subsequent action.[10]

5. Failure to Trim Trees Adjacent to Roadways:

   Village's planting of and subsequent failure to prune low overhanging branches of a tree did not render prior written notice statute inapplicable.[11]

6. Pre-accident Repairs to Allegedly Defective Sidewalks:

   Prior repairs to a sidewalk which failed to permanently cure the defect does not render the prior written notice requirement inapplicable.[12]

   a. EXCEPTION: Some courts have excused compliance with a statutory written notice requirement when the appropriate officers of the municipality had personally inspected the subject site or had directly performed work on the subject area shortly before the accident.[13]

7. When Opposing a Municipality's Motion to Dismiss:

   Plaintiff must submit evidence in admissible form to controvert municipality's affidavits that no prior written notice was given and that no action by municipality's employees created allegedly dangerous condition.[14]

C. Arguments to Get Around Prior Written Notice Requirement:

1. Compliance with the statute is unnecessary where the municipality created the allegedly defective condition.[15]
2. The prior written notice statute, when strictly construed, does not purport to cover or include "latent" defects.[16]
3. Whether or not within the reach of the prior written notice law, the defect in question was one which would normally come to the municipality's attention even absent affirmative appraisal thereof.[17]
4. The municipality is estopped from relying upon the prior written notice defense.[18]
5. Municipality's actions constitute affirmative negligence (as opposed to an omission).[19]

II. Recreational and Athletic Activities on Municipally-Owned or Operated Land

A. Generally:

Municipal landowners owe the same duty of care as nonmunicipal landowners with respect to the safe maintenance of their property. In *Mesick v. State*,[20] the court stated as follows: "*As a landowner, the State owes the same duty of care as that of a private individual; the duty to exercise reasonable care under the circumstances in maintaining its property in a safe condition*" (citations omitted).

Notwithstanding this well-established rule, courts often factor in public policy considerations when a municipal landowner is involved.[21] Some courts have taken such considerations one step further and justify a more restrictive analysis on the grounds that it is needed to place "controllable limits" on municipal liability.[22]

B. General Obligations Law § 9-103:

GOL § 9-103 provides landowners (municipal and nonmunicipal alike) protection from liability to encourage them to make their property available for public use to pursue certain activities.[23]

When determining whether section 9-103 applies in a matter involving a government landowner, the character of the land and the role of the landowner in relation to the public's use of the property must be examined."[24] Keep in mind that GOL § 9-103 does not immunize the landowner from his affirmative negligence.[25]

C. Assumption of Risk:

1. Generally:

   Notwithstanding the enactment of the "contributory negligence" rule contained in CPLR article 14-A, New York's Court of Appeals continues to apply the assumption of risk doctrine as a complete bar to claims in their entirety in certain cases. For example, in *Turcotte v. Fell*,[26] the court applied the doctrine to bar an experienced jockey's claim against a race track. The reasoning behind the court's decision was that, as a matter of law, the race track did not breach any duty to Mr. Turcotte. "*By participating in the race, plaintiff consented that the duty of care*

owed him by defendants was no more than a duty to avoid reckless or intentionally harmful conduct."[27] *"The question of whether the consent was an informed one includes consideration of the participant's knowledge and experience in the activity generally."*[28] *"If a participant makes an informed estimate of the risks involved in the activity and willingly undertakes them, then there can be no liability if he is injured as a result of those risks."*[29] The court's decision in *Turcotte* established the following test for determining whether the assumption of risk doctrine should act as a complete bar to recovery:

> *In such circumstances, the defendant's duty is to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended, perfectly obvious, well known, reasonably foreseeable or apparent, plaintiff has consented to them and defendant has performed its duty.*[30]

In both *Cardozo v. Village of Freeport* and *Sykes v. County of Erie*,[31] the Appellate Division dismissed a claim by a claimant who was playing basketball and injured his knee when he stepped into a recessed drain on defendant's outdoor court deemed "perfectly obvious."[32]

The court's rationale in *Turcotte* has been applied in subsequent Appellate Division decisions which have held that where a particular injury is caused by a condition or practice common to a particular sport, summary judgment is warranted.[33] Risks normally associated with a sport are foreseeable consequences of a person's participation.[34]

The court recently revisited and analyzed the assumption of risk doctrine in four separate cases collectively cited as *Morgan v. State of New York*,[35] all of which involved sports-related injuries. In three out of the four cases, the court applied the doctrine to bar the injured plaintiff's claim in its entirety on motion. Since the fourth case involved a risk which was not inherent in the sport as a matter of law, summary judgment was denied. "[A] premises owner continues to owe 'a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty.'"[36]

Judge Bellacosa, writing on behalf of the court in *Morgan*, stated the rule as follows:

> Relieving an owner or operator of a sporting venue from liability for inherent risks of engaging in a sport is justified when a consenting participant is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks. . . . Thus, to be sure, a premises owner continues to owe "a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty."[37]

2. Assumption of Risk Cases Involving Participants
   a. Rulings for Municipality:
      (1) *Geffen v. City of New York*[38] (plaintiff chose to wear ill-fitting skates—complaint dismissed).
      (2) *Gibbs v. New York City Housing Authority*[39] (plaintiff, who slipped and fell on sand that had blown onto an outdoor basketball court was deemed to have assumed the risk of his injury).
      (3) *Engstrom v. City of New York*[40] (plaintiff, an experienced skater who was skating in crowded conditions that were readily apparent, assumed risk of collision with other skaters).
      (4) *Peters v. City of New York*[41] (16-year-old plaintiff football player voluntarily chose to play on Astroturf surface, the condition of which was open and obvious—plaintiff deemed to have assumed the risk of injury from tripping over a seam in the turf). Compare this case to *Rivera v. Jack LaLanne Fitness Centers, Inc.*[42] ("There is no merit to defen-

dant's contention that the assumption of risk doctrine bars plaintiff's claim for personal injuries caused by his tripping on a carpeted indoor running track").

(5) *Sykes v. County of Erie*[43] (the Appellate Division dismissed a claim by an claimant who was playing basketball and injured his knee when he stepped into a recessed drain on defendant's outdoor court).

(6) *Perrott v. City of Troy*[44] (passively allowing sledding in park which led to fatal accident does not result in liability.)[45]

b. Rulings Denying Municipality's Motion to Dismiss

(1) *Swan v. City of New York*[46] (plaintiff sustained injuries after stepping in hole while playing basketball on a court—because hole was concealed by vegetation, plaintiff could not have assumed the risk of injury as a matter of law—verdict in plaintiff's favor affirmed); *Simmons v. Smithtown Central School District*[47] (defect in question—metal spike in base path of softball field concealed which plaintiff was not aware of, motion to dismiss denied); *Torres v. City of New York*[48] (defect in question—gap in pavement not apparent to rider; court held that injured bike rider did not assume risk).

(2) *Sauray v. City of New York*[49] (chain across trail in park was found not to be a reasonably foreseeable or inherent danger associated with mountain biking, municipality's motion to dismiss denied).

(3) *Rios v. Town of Colonie*[50] (defect in question—sharp jagged edge of pipe in obstacle course created a question of fact whether said pipe posed an open and obvious risk to plaintiff or whether it constituted an unassumed, concealed or unreasonably increased risk).

(4) *Blanco v. Elmont Union Free School District*[51] (organized relay race involving 11-year-olds during recess—court held that risk arising from placement of course too close to fixed object are different than the risks inherent to the sport of running—motion to dismiss denied).

(5) *Brown v. City of New York*[52] (court held that divers who dove from a pier into the ocean at a bathing beach did not assume the risk of injury as a matter of law where there was no evidence that a reasonable person in the plaintiffs' position should have known the depth of the water at that location); *Taylor v. Village Of Illion*[53] (plaintiff, who was told that the water was "deep enough," dove into a creek that was used as a swimming hole—court held that plaintiff's conduct was not reckless as a matter of law).

(6) Risk in issue was not inherent to the activity, *Greenburg v. Peekskill City School District*[54] (dimensions of out-of-bounds area around basketball court and lack of padding).[55]

(7) Participants will not be deemed to have assumed the risks of concealed or unreasonably increased risks.[56]

D. Decisions Involving Spectators and Bystanders:

1. *Cannavale v. City of New York*[57] (danger of being trampled by onrushing players when standing on the sidelines of a football game was obvious and accordingly the court held that the infant plaintiffs assumed the risk of their injuries; court additionally held that the claim by the rescuer who attempted to push the children out of the way was barred as well).

2. School district as owner of baseball field must provide screening for the area of the field behind home plate of sufficient extent to provide adequate protection for as many spectators as might reasonably desire such protection during the course of an ordinary game.[58]

3. *Iosue v. Loughlin*[59] ("The Supreme Court properly determined that there were issues of fact as to whether the plaintiff-teacher assumed the risk of being hit by a bat during a softball game in which she participated.")

4. *Sammis v. Nassau/Suffolk Football League*[60] (plaintiff assistant football coach injured while helping move a box in equipment shed; Court of Appeals reversed Appellate Division's dismissal ruling and held that the assumption of risk doctrine did not apply and that the Appellate Division erred in concluding that plaintiff's actions relieved defendant of any duty to plaintiff).

E. Stadium Accidents:

1. *Uzadavines v. Metropolitan Baseball Club, Inc.*[61] Plaintiff, who was attending a Mets game at Shea Stadium, was seated behind home plate behind a screen with a hole in it. The Mets brought a third party action against the city of New York, the owner of Shea Stadium. After analyzing the lease agreement in question, the court held that both the city and the Mets had a duty to provide protective screening.

> The law requires that such repairs [to protective screening] be done in a non-negligent manner. Thus the court finds that the "Mets" had a duty to provide protected seating, consonant to its duty to use reasonable care; and to keep the people seated in the area behind home plate free from foreseeable danger, because the duty imposed upon it as a primary user of the ball field, the benefits obtained from it by its use, and the reliance of the public on the safety of seats behind home plate, generally.[62]

Note that since there was no evidence of actual notice to the Mets, the court held that there was an insufficient basis to dismiss the jury's finding that the Mets were not negligent under a common law theory. However, the court declined to disturb the jury's finding that the Mets were liable pursuant to the doctrine of *res ipsa loquitur*.

2. *Gilchrist v. City of Troy*[63] ("The owner's duty owed to spectators is discharged by providing screening around the area behind the hockey goals, where the danger of being struck by a puck is the greatest, as long as the screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire to view the game from behind such screening." City's motion to dismiss granted).[64]

III. Premises Security

A. Generally

The plaintiff is under an affirmative duty to establish each of the following elements to maintain an inadequate premises security claim:

1. *The defendant owed a duty to the plaintiff*; see *Wright v. City of New York Housing Authority*[65] (landlord is under no duty to safeguard a tenant against attack by another tenant unless there is reasonable opportunity to control the assailant); *Waters v. New York City Housing Authority.*[66] (Appellate Division held that it is against public policy to expand a landowner's orbit of duty to include those individuals who are victims of outdoor assaults).

2. *That the crime was foreseeable by defendant*; see *Jacqueline S. v. City of New York*[67] (proof of prior similar crimes is not necessary for the crime in question to be deemed foreseeable; even proof of prior crimes in surrounding buildings may be sufficient to establish foreseeability); See also *Dyer v. Norstar Bank, NA*[68] ("The fact that a person using an ATM might be subject to robbery is conceivable, but conceivability is not the equivalent of foreseeability.").

3. *That the defendant breached its duty to provide protective measures*; *Miller v. State*[69] (inadequate security devices at dormitory where student was raped). See also *Perez v. New York City Housing Authority*[70] (plaintiff non-tenant was assaulted by an unidentified person in an elevator in an unlocked building owned and maintained by defendant. Appellate Division held that the lower court erred in granting the housing authority summary judgment on the grounds that the alleged facts made it "more likely or more reasonable than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance"). Compare this case to *Chattergoon v. New York City Housing Authority*[71] (where defendant made a prima facie "showing of entitlement to judgment as a matter of law" and where plaintiff "failed to present evidence sufficient to raise an issue as to whether the assailant of plaintiff's decedent was, in fact, an intruder who gained access to the decedent's apartment by reason of inadequate building security . . . summary

judgment dismissing the complaint was properly granted").

4. *That the defendant's breach of that duty was the proximate cause of the crime committed*. See *Dawson v. New York City Housing Authority*[72] ("The failure to provide locks on outer doors is only pertinent as an alleged proximate cause if there is evidence to support a finding that the assailant was an intruder." Complaint dismissed); see also *Kistoo v. City of New York*[73] ("Without any proof as to the manner in which [plaintiff's] assailant gained access to the building, plaintiff cannot prove that defendant's negligence, if any, was a proximate cause of her injuries.").

Sample City Charter Provision

Prior notice of snow or ice; liability of city.

> The city is not liable, and no action is maintainable against it, for an injury to person or property caused by the existence of snow and ice, or either, upon any roadway, public street, sidewalk, highway or place, bridge, including pedestrian bridges and tunnels and walkways whether open-air or enclosed, culvert or crosswalk, boardwalk, underpass, pedestrian walk or path, step or stairway, unless written notice thereof relating to the particular place has been given to the City Engineer a reasonable time before the happening of any such injury.

Prior notice of defects; liability of city.

> The city is not liable, and no action is maintainable against it for damages or injuries to person or property sustained in consequence of any street, highway, parkway, bridge, including pedestrian bridges and tunnels and walkways whether open-air or enclosed, culvert, sidewalk, crosswalk or wharf, boardwalk, underpass, pedestrian walk or path, step or stairway, above-surface and subsurface street-lighting facilities or water and sewer lines or mains, pipes, vaults, tunnels or other underground facilities situated beneath any street, sidewalk or right-of-way, being defective, out of repair, unsafe, dangerous or obstructive, unless written notice of the defective, dangerous, unsafe, obstructive or unrepaired condition, specifying the particular place has been given to the City Engineer and there was a failure or neglect within a reasonable time after the giving of such notice to remedy, repair or remove the defect, danger or obstruction complained of.

Endnotes

1. *Doremus v. Incorporated Vill. of Lynbrook,* 18 N.Y.2d 362, 275 N.Y.S.2d 505 (1966); *Abbatecola v. Town of Islip*, 97 A.D.2d 780, 468 N.Y.S.2d 518 (2nd Dep't 1983); *Keeler v. City of Syracuse*, 143 A.D.2d 518, 533 N.Y.S.2d 36 (4th Dep't 1988).
2. *Cazano v. Town of Gates*, 85 A.D.2d 878, 416 N.Y.S.2d 746 (4th Dep't 1981).
3. *Holt v. County of Tioga*, 56 N.Y.2d 414, 452 N.Y.S.2d 383 (1982); *Zigman v. Town of Hempstead*, 120 A.D.2d 520, 501 N.Y.S.2d 718 (2d Dep't 1986).
4. 84 N.Y.2d 360, 618 N.Y.S.2d 758 (1994).
5. *Poirier v. City of Schenectady*, 85 N.Y.2d 310, 648 N.E.2d 1318 (1995).
6. 93 N.Y.2d 471, 693 N.Y.S.2d 77 (1999).
7. *See also Zimmerman v. City of Niagara Falls*, 112 A.D.2d 17, 490 N.Y.S.2d 380 (4th Dep't 1985); *Piscione v. County of Oneida*, 159 A.D.2d 982, 552 N.Y.S.2d 759 (4th Dep't 1990).
8. *Del Camp v. Village of Brocton*, 270 A.D.2d 842, 705 N.Y.S.2d 150 (4th Dep't 2000).
9. *Caramanica v. City of New Rochelle*, 268 A.D.2d 496, 702 N.Y.S.2d 351 (2d Dep't 2000).
10. *Brooks v. City of Binghamton*, 55 A.D.2d 482, 390 N.Y.S.2d 693 (3d Dep't 1977); *Leary v. City of Rochester*, 115 A.D.2d 260, 496 N.Y.S.2d 169 (4th Dep't 1985), *aff'd,* 67 N.Y.2d 866, 501 N.Y.S.2d 663 (1986) (prior written notice of broken sidewalk at 146 Rossiter Road insufficient basis for civil claim alleging defect 30 feet away at 150 Rossiter Road) *See also David v. City of New York*, 267 A.D.2d 419, 700 N.Y.S.2d 235 (2d Dep't 1999).
11. *Monteleone v. Incorporated Vill. of Floral Park*, 74 N.Y.2d 917, 550 N.Y.S.2d 257 (1989).
12. *Waring v. City of Saratoga Springs*, 92 A.D.2d 1080, 461 N.Y.S.2d 580 (3d Dep't 1983); *Capobianco v. Mari*, 272 A.D.2d 497, 708 N.Y.S.2d 428 (2d Dep't 2000) (plaintiff tripped on defective sidewalk which was allegedly inadequately repaired by the municipality—court held that plaintiff's failure to prove prior written notice was fatal).
13. *Klimek v. Town of Ghent*, 114 A.D.2d 614, 494 N.Y.S.2d 453 (3d Dep't 1985); *Blake v. City of Albany*, 63 A.D.2d 1075, 405 N.Y.S.2d 832 (3d Dep't 1979), *aff'd,* 48 N.Y.2d 875, 424 N.Y.S.2d 358 (1979); *Adam v. Town of Oneonta*, 217 A.D.2d 894, 629 N.Y.S.2d 857 (3d Dep't 1995).
14. *Lyndaker v. Sherwin Williams, Inc.*, 140 A.D.2d 979, 530 N.Y.S.2d 348 (4th Dep't 1988); *Stewart v. Town of Waterford*, 152 A.D.2d 837, 543 N.Y.S.2d 770 (3d Dep't 1989).
15. *Kiernan v. Thompson*, 73 N.Y.2d 840, 537 N.Y.S.2d 122 (1988); *Gonzalez v. City of New York*, 268 A.D.2d 214, 700 N.Y.S.2d 462 (1st Dep't 2000) (city resurfaced roadway and failed to install guard rails); *Mayer v. Town of Brookhaven,* 266 A.D.2d 360, 698 N.Y.S.2d 312 (2d Dep't 1999) (Town performed repair work in exact location of accident weeks before occurrence); *Rector v. City of New York* 259 A.D.2d 319, 686 N.Y.S.2d 426 (1999) (creating defect argument successfully applied in negligent snow removal claim).

16. *McKinnis v. City of Schenectady*, 234 A.D.2d 760, 650 N.Y.S.2d 910 (3d Dep't 1996).
17. *Hughes v. Jahonda*, 75 N.Y.2d 881, 553 N.E.2d 1015 (1990); *Kiamie v. Town of Huntington*, 166 A.D.2d 634, 561 N.Y.S.2d 62 (2d Dep't 1990); *Cruz v. City of New York*, 218 A.D.2d 546, 630 N.Y.S.2d 523 (1st Dep't 1995).
18. *Shepardson v. Town of Schodack*, 83 N.Y.2d 894, 613 N.Y.S.2d 850 (1994).
19. *Monteleone v. Village of Floral Park*, 74 N.Y.2d 917, 550 N.Y.S.2d 257 (1989); *Gormley v. County of Nassau*, 150 A.D.2d 342, 540 N.Y.S.2d 867 (2d Dep't 1989).
20. *Mesick v. State*, 118 A.D.2d 214, 504 N.Y.S.2d 279 (3d Dep't 1986), *lv. den.*, 68 N.Y.2d 611, 510 N.Y.S.2d 1025 (1986).
21. *See generally Ali Abdur-Rashid v. Conrail*, 135 A.D.2d 208, 524 N.Y.S.2d 716 (1st Dep't 1988); *Snyder v. Morristown Ctl. Sch. Dist.*, 167 A.D.2d 678, 563 N.Y.S.2d 258 (3d Dep't 1990).
22. *Kircher v. City of Jamestown*, 74 N.Y.2d 251, 544 N.Y.S.2d 995 (1989).
23. *Sena v. Town of Greenfield*, 91 N.Y.2d 611, 673 N.Y.S.2d 984 (1998); *Ferres v. City of New Rochelle*, 68 N.Y.2d 446, 510 N.Y.S.2d 57 (1986) ("*Such a statute will not, however, limit liability of a government landowner who negligently operates or maintains a supervised recreational facility since such landowner needs no incentive to open such land to the public use . . .*").
24. *Keppler v. Town of Schroon*, 267 A.D.2d 745, 699 N.Y.S.2d 792 (3d Dep't 1999) (plaintiff's leg became trapped between two sections of floating dock, court held that defendant was not entitled to summary judgment since it did not prove that plaintiff disregarded a commonly appreciated risk and there was proof that the dock in question was negligently constructed and designed).
25. *Olson v. Brunner*, 261 A.D.2d 922, 689 N.Y.S.2d 833 (4th Dep't 1999), *lv. den.*, 94 N.Y.2d 759, 705 N.Y.S.2d 6 (2000).
26. *Turcotte v. Fell*, 68 N.Y.2d 432, 510 N.Y.S.2d 49 (1986).
27. *Id.* at 437.
28. *Id.* at 440.
29. *Id.* at 437.
30. *Id.* at 439.
31. *See* 205 A.D.2d 571 (2d Dep't 1994) (risk of injury was "perfectly obvious"—complaint dismissed), 94 N.Y.2d 912 (2000), *aff'g*, 263 A.D.2d 947 (4th Dep't 1999).
32. *See also Donahue v. Copiague Sch. Dist.*, 64 A.D.2d 29 (2d Dep't 1978), *aff'd*, 47 N.Y.2d 440 (1979).
33. *Totino v. Nassau City Council*, 213 A.D.2d 710, 711, 625 N.Y.S.2d 51 (2d Dep't 1995).
34. *Robinson v. Town of Babylon*, 166 A.D.2d 434, 560 N.Y.S.2d 507 (2d Dep't 1990).
35. 90 N.Y.2d 471, 662 N.Y.S.2d 421 (1997).
36. *Id. at* 484.
37. *Id.* at 437 (citations omitted).
38. 271 A.D.2d 487, 705 N.Y.S.2d 683 (2d Dep't 2000).
39. 276 A.D.2d 743, 715 N.Y.S.2d 708 (2d Dep't 2000).
40. 270 A.D.2d 35, 704 N.Y.S.2d 224 (1st Dep't 2000).
41. 269 A.D.2d 581, 702 N.Y.S.2d 842 (2d Dep't 2000).
42. 269 A.D.2d 228, 702 N.Y.S.2d 302 (1st Dep't 2000).
43. 94 N.Y.2d 912, 707 N.Y.S.2d 374 (2000), *aff'g*, 263 A.D.2d 947, 695 N.Y.S.2d 454 (4th Dep't 1999).
44. 261 A.D.2d 29, 699 N.Y.S.2d 783 (3d Dep't, 1999).
45. *See also Sena v. Greenfield*, 91 NY 2d 611, 673 N.Y.S.2d 984 (1998).
46. 272 A.D.2d 394, 707 N.Y.S.2d 480 (2d Dep't 2000).
47. 272 A.D.2d 391, 707 N.Y.S.2d 646 (2d Dep't 2000).
48. 235 A.D.2d 416, 652 N.Y.S.2d 105 (2d Dep't 2000).
49. 261 A.D.2d 601, 690 N.Y.S.2d 716 (2d Dep't 1999).
50. 256 A.D.2d 900, 682 N.Y.S.2d 272 (3d Dep't 1998).
51. 179 Misc. 2d 918, 687 N.Y.S.2d 235 (Sup. Ct., Nassau Co., 1999).
52. 246 A.D.2d 568, 667 N.Y.S.2d 286 (2d Dep't 1998).
53. 265 A.D.2d 841, 695 N.Y.S.2d 467 (4th Dep't 1999).
54. 255 A.D.2d 487, 680 N.Y.S.2d 622 (2d Dep't 1998).
55. *Roska v. Town of Cheektowaga*, 251 A.D.2d 984, 674 N.Y.S.2d 545 (4th Dep't 1998) (softball player slid into spike); *Clark v. State of N.Y.*, 245 A.D.2d 413, 666 N.Y.S.2d 209 (2d Dep't 1997) (steep drop-off alongside basketball court).
56. *Benitez v. New York City Bd. Educ.*, 73 N.Y.2d 650, 543 N.Y.S.2d 29 (1989), *reversing*, 141 A.D.2d 457, 530 N.Y.S.2d 825 (1st Dep't 1988).
57. 257 A.D.2d 462, 683 N.Y.S.2d 528 (1st Dep't 1999).
58. *Akins v. Glens Falls City Sch. Dist.*, 53 N.Y.2d 325, 441 N.Y.S.2d 644 (1981).
59. 262 A.D.2d 532, 692 N.Y.S.2d 664 (2d Dep't 1999).
60. 95 N.Y.2d 809, 710 N.Y.S.2d 834 (2000).
61. 115 Misc. 2d 343, 454 N.Y.S.2d 238 (N.Y. City Civ. Ct. 1982).
62. *Id.* at 354.
63. 113 A.D.2d 271, 495 N.Y.S.2d 781 (3d Dep't 1985).
64. *See Akins v. Glens Falls City Sch. Dist.*, 53 N.Y.2d 325, 441 N.Y.S.2d 644 (1981).
65. 208 A.D.2d 327, 624 N.Y.S.2d 144 (1st Dep't 1995).
66. 116 A.D.2d 384, 501 N.Y.S.2d 385 (2d Dep't 1986), *aff'd*, 69 N.Y.2d 225 (1987).
67. 81 N.Y.2d 288, 598 N.Y.S.2d 160 (1993).
68. 186 A.D.2d 1083, 588 N.Y.S.2d 499 (4th Dep't 1992).
69. 62 N.Y.2d 506, 478 N.Y.S.2d 829 (1984).
70. 267 A.D.2d 52, 699 N.Y.S.2d 390 (1st Dep't 1999).
71. 268 A.D.2d 251, 701 N.Y.S.2d 375 (1st Dep't 2000).
72. 203 A.D.2d 55, 610 N.Y.S.2d 28 (1st Dep't 1994).
73. 195 A.D.2d 403, 600 N.Y.S.2d 693 (1st Dep't 1993).

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Municipal Law Seminar: Police and Fire Cases

By Bert Bauman

I. Special Duty Rule

A. Defined

The special duty rule relates to a municipality's duty, or more aptly, the lack thereof, to protect plaintiff from third parties or from harmful forces (e.g., fires). It is an exception to ordinary tort rules which apply to non-governmental defendants. In a nutshell, the municipal defendant has no duty to act unless it assumes a special duty to do so.

Notwithstanding the fact and law that the municipal corporation is a creation of the Legislature, is the fact that lurking underneath almost all discussions of municipal liability is the separation of powers, i.e., the reluctance of the courts to encroach on the administration or rule-making authority of the municipality as it administers its police, fire, and line functions of organizing, representing and protecting the public.

Two different legal issues must be determined. The first legal issue is of a special duty, the second is whether the act or omission was primarily "proprietary" in nature (and thus governed by ordinary tort rules).[1] But one discrete exception is also in place, although not usually phrased that way: highway maintenance, although more by nature governmental, is treated as proprietary, and ordinary tort rules apply. Judge Bellacosa wrote in *Sebastian v. State of New York*[2] that the governmental, proprietary distinction is really a "continuum" that begins at one end with the purest proprietary matter and eventually extends to governmental matters. The issue in *Sebastian* was whether the state would be held liable in negligence for injuries inflicted by a juvenile delinquent who escaped from a Vision For Youth facility.[3] The Court held that this activity was a "quintessential governmental activity."

The factors as to whether an act or omission is governmental and whether the special duty rule applies is set forth in the seminal case of *Cuffy v. City of New York*.[4] In that case, the Court of Appeals held four elements must be present to form a special relationship, as follows: (1) An assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some direct contact between the municipality's agents and the injured plaintiff; and (4) that party's justifiable reliance upon the municipality's affirmative undertaking.

The newest special duty case is *Grieshaber v. City of Albany*.[5] In that case, the decedent was murdered in her basement apartment in Albany. Decedent's estate alleged that a 911 telephone call was made by the decedent at 6:47 p.m. and was not responded to promptly. The police officers arrived five minutes later but had to wait for the arrival of an animal control officer to subdue the decedent's dog, and thus didn't enter her apartment until 7:45 p.m., at which time they found her lying on the floor with the post of a heavy bed on her neck. The cause of death was asphyxiation due to compression of her neck. The defendant moved for summary judgment because of no special relationship, and the plaintiff interposed an affidavit of the police officer receiving the call that the decedent made 911 calls on two or three prior occasions, had been promised that help was on the way, and the officer heard screams, scuffling noises, and the words "Get out, get out" yelled by the decedent. Further, they interposed an affidavit of a forensic psychologist who opined that decedent placed the call with a reasonable expectation that assistance would be prompt (thus the reliance). The supreme court denied the motion, but the Third Department reversed, citing the four *Cuffy* elements. Plaintiff has satisfied the first three, but not the fourth: the decedent's justifiable reliance on the municipality's affirmative undertaking. It held that decedent's reliance must have placed her in a worse condition then she would have been had the municipality never assumed the duty. Plaintiff urged that decedent was in a worse position because it is assumed that once decedent called she relaxed her vigilance and was not engaged in fighting off her assailant. The Court rejected this argument. The proof showed that when she made her call she was already at the mercy of her attacker and was offering earnest resistance to the attack, but was subdued by him. The struggle was ongoing when she made her call. The Court rejected the comparison with the facts in *DeLong v. County of Erie*[6] because there, the assailant was outside the decedent's home at the time she made her 911 call, and 13 minutes elapsed between the call and the time she was seen running from the house unclothed and bleeding profusely. The further assurances of the 911 operator in that case was that the station house was only one and one-half blocks away, and that they would be there immediately. Here, the decedent was already undergoing the assault when she called, and there is no basis for a finding that she forewent any avenue of escape on the basis of the assurances of the 911 operator.

B. Police Protection

Some examples of special duty or lack thereof or a little of each.[7] Police gave chase to a drunk driver who

ended up crashing into a mobile home in which plaintiffs were passengers. The city's police officers had encountered the driver 15 minutes earlier exiting a parked auto and had directed him not to drive because of his intoxicated condition. Obviously, the direction was ignored. Plaintiff argued that the police acted negligently in failing to detain the intoxicated driver. It was held that there was no liability for such passive failure to provide police protection absent the municipality's assumption of a special duty of care.

Balsam v. Delma Engineering Corp.[8] Liability can be imposed for a municipality's negligent failure to timely remove snow and ice from a roadway, highway maintenance being a proprietary function.[9] On the other hand, a municipality has no duty to provide police protection unless it assumes a special duty to do so.[10]

Rios v. New York City Transit Authority.[11] TA liability is determined according to *Weiner* by analyzing the specific act or omission out of which the injury occurred, and the capacity in which that action or failure to act occurred which governs liability, not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred. So if the activities for which plaintiff seeks to hold (TA or PA) involves an allocation of police resources, i.e., absence of police surveillance at an entrance or failure to warn of criminal activity or close an entrance (e.g., to a subway), no liability arises. *Weiner v. MTA*[12] referred to the "crushing burden that would otherwise be imposed" if the police and common carrier activity are vested in the same entity.[13] But, where a token clerk failed to call for help while a passenger was being assaulted in the clerk's presence, the Court of Appeals again reiterated that allegedly negligent allocation of police personnel was not actionable, but that the defendant could be held liable for other conduct causative of an assault.[14] "Watching someone being beaten from a vantage point offering both safety and the means to summon help without danger is within the narrow range of circumstances which could be found actionable."

Over the course of years, the courts have extended *Weiner* to beyond allocation of police resources to virtually everything that could contribute to an assault by a third party, e.g., poor lighting in *Rivera v. New York City Transit Authority*.[15] So now the TA has virtually no duty to prevent an assault unless it assumes a duty (which it virtually never does).[16] Similarly, as to towns, where a private party rented a building owned by defendant town to use for a graduation party and guests wound up in an altercation, the town assumes no duty, neither as landlord nor governmental entity.[17]

C. Police and Fire Protection

In *Bernardo v. City of Mount Vernon,*[18] the 81-year-old decedent sustained fatal injuries when she was pushed to the ground by a group of unidentified youths. Plaintiff claimed that the city knew that youths were typically released from middle school in the afternoon, that it knew that the youths would frequently engage in pushing, shoving and other reckless behavior on public sidewalks, and that the city had, in fact, focused extra attention on the area where the incident occurred in order to combat problems created when large numbers of youths were released from school. The appellate court held that the city had not assumed a special duty toward the decedent simply by targeting the area where the incident occurred for extra police attention.[19]

Similarly, in *Levy v. State of New York,*[20] where city police responded to a celebrity basketball game held at City College (a state institution) and where the police's alleged failure to appropriately control the crowd led to a number of injuries and deaths, liability could not be imposed on the defendant city as municipality unless plaintiffs demonstrated "that the police in some way assumed responsibility for the planning and management of the security for the celebrity basketball game."

Also in *Akinwande v. City of New York,*[21] the city won an expansion of the "special duty" rule immunizing it from the consequences of its negligence. Plaintiffs were workers at a homeless shelter and were attacked by third parties at the shelter. The plaintiffs' theory of recovery was premised upon the defendant's failure to provide adequate and proper security forces to prevent attacks by third parties. Had the defendant been a non-governmental defendant, *Jacqueline S. v. City of New York,*[22] the claim would have been actionable. The shelter is much like an apartment building and there should be liability. Nevertheless, the Court, citing the subway and school cases, pronounced that it was "well settled that such a claim implicates a governmental function, liability for the performance of which is barred absent the breach of duty owed to the injured party." Regarding municipal schools, the cities have successfully avoided legal responsibility.[23]

Special duty was found in the case of *Johnson City Central School District v. Fidelity and Deposition Co. of Maryland*.[24] The defendant village's fire department was assisting plaintiff in the removal of snow and ice from the roofs of two of plaintiff's vehicle maintenance buildings. During the snow and ice removal operation, which included the fire department's participation in spraying high pressure water onto the roofs, one of the buildings partially collapsed and the other building completely collapsed. The village argued, of course, that it had not assumed any special duty. However, the

Court held that this activity was not undertaken for the protection and safety of the public, but was undertaken pursuant to the village's agreement with the plaintiff to assist in maintaining its buildings by providing fire department equipment and personnel to remove snow and ice from the roofs. As such, the defense was rejected and the village assumed a special duty.

A special duty was also found in *Persaud v. City of New York*,[25] where the plaintiff left her 19-year-old daughter sitting in the passenger seat of her car which was parked in a no standing zone. The daughter did not have a driver's license and did not know how to drive. Defendant police officer saw the car, waved the plaintiff's daughter to move it, and, according to the daughter, "kept waving" until such point as the daughter felt compelled to slip into the driver's seat, start the engine and move the car. When she did so, she struck her mother. It was held that once the police officer undertook to direct the daughter to move the car, he was obligated to do so with due care. Accordingly, the plaintiffs were not required to demonstrate a special relationship.[26] The Court further held that "liability can be imposed upon a police officer for negligently directing a citizen to move a vehicle" and plaintiff here "submitted an affidavit from an expert stating that the defendant police officer deviated from standard police practice in directing a person sitting in the passenger seat to move the car, without inquiring as to whether she was licensed to drive." Therefore, there was an issue of fact which precluded summary judgment.

In *Ohdan v. City of New York*,[27] another case involving negligence in directing traffic, the facts were that defendant Rodriguez was sitting in a car that was illegally parked in a no standing zone when New York City Traffic Enforcement Agent Jolly told Mr. Rodriguez to move the car or else a ticket would be issued. Rodriguez was not licensed to drive and did not know how to do so. He was merely waiting for the driver to return. There was a dispute as to whether or not this was brought to Jolly's attention.

Unfortunately for plaintiff, when he did move the car he struck plaintiff Ohdan. On trial, the jury concluded that Jolly was negligent, but that such negligence was not a substantial factor in causing the accident. On appeal, the First Department held that the verdict was not inconsistent and was adequately supported by the evidence reasoning that the jury need not have found it foreseeable that an unlicensed driver who had no knowledge of how to operate an automobile would foolishly attempt to drive the car despite his complete lack of skill or experience. The Court distinguished a prior case, *Maloney v. Scarfone*,[28] in which an unskilled individual had attempted to obey the orders of a traffic agent and liability was imposed.

Special plaintiffs are protected. In *Mark G. v. Sabol*,[29] the appeal involved 12 children, one of whom was now deceased, who claimed to have been abused in their foster homes. Plaintiffs sued the city contending negligence in improperly selecting the home, failing to properly monitor the children after they were placed, and in failing to promptly respond to signs and claims of abuse. Plaintiff claimed that there was a violation of the N.Y. Social Services Law and that the city's violation of the state's standards created a private statutory cause of action under the Fourteenth Amendment in that the alleged conduct constituted "deliberate indifference" of a constitutional dimension to the well-being of persons under governmental control and under common law negligence. The question of whether the plaintiffs' claims were legally viable split the Appellate Division and with the majority ruling for the city on all grounds holding that the state statute did not create a private cause of action in the absence of a legislative intent, found lacking in this case. Further, merely negligent conduct does not constitute a deprivation under the due process clause (separation of powers again), only recklessness or greater can give rise to a substantive due process violation, and that under common law, municipalities can be held responsible for their negligence in supervising or placing foster children only where the plaintiff can establish a special relationship as defined in *Cuffy*.

D. Failure to Enforce Municipal Codes

In *Shahin v. City of Yonkers*,[30] the plaintiff suffered the loss of his right hand when it became caught in a wood chipper he was operating while working for a private tree care service. Plaintiff alleged that an arborist for the city of Yonkers had visited the scene and informed the plaintiff's employer that work was being performed without the necessary permit, but that the city had nonetheless allowed the work to proceed. Plaintiff sued the municipality, alleging that it had acted negligently in allowing the work to proceed. It was held that absent the city's assumption of a special duty to the plaintiff, it could not be held liable for allegedly negligent enforcement of its municipal regulations. Similarly in *Weiss v. City of New York*,[31] the city of New York was negligent in failing to require the building owner to fix the elevator, but liability could not be imposed because the city owed no tort duty, absent its assumption of a special duty of care, to the individual plaintiff or to enforce the building codes, citing the seminal case of *O'Connor v. City of New York*.[32] Nevertheless, in *Garrett v. Holiday Inn*,[33] the municipality could be held liable to the land owner for negligent issuance of a certificate of occupancy (an affirmative act) despite code violations.

In *Josyln v. Village of Sylvan Beach*,[34] plaintiff alleged that the defendant village owned a sandy beach; that the village failed to comply with the state regulation

governing bathing beaches;[35] and that defendant county was negligent in failing to compel the defendant village to comply. It was held that absent the defendant municipality's assumption of a special duty to the plaintiff, the municipality's failure as municipality to compel a land owner to comply with the applicable regulations, does not give rise to liability. Defendant county was, therefore, awarded summary judgment, but the supreme court erred in granting summary judgment to the village (which owned the beach) inasmuch as the village failed to sustain its initial burden on its motion to demonstrate its entitlement to judgment as a matter of law.[36]

1. Other Examples of Failure to Enforce Municipal Codes

Gonzalez v. Barbieri,[37] where the city of New York was allegedly negligent in granting a permit to a Coney Island Amusement Park ride known as "The Hellhole." Plaintiff alleged that the city violated a section of the Labor Law governing permits and inspections for such rides. The Court held that in the absence of a special duty owed to a particular plaintiff, a municipality cannot be held liable for its failure to enforce a specific statute or regulation.[38] In *Rickson v. Town of Schuyler Falls*,[39] the defendant town granted Earth Waste Systems, Inc. (EWS) permission in the form of a building permit to "remove and reuse" a 40 by 90 foot metal building to a different site on their property. There was, however, a problem with granting the permit. The building was actually owned by the plaintiff, who also owned a trailer. After the issuance of the building permit, EWS destroyed the metal building and removed the trailer. It was held that the defendant town could not be held responsible since it had not authorized either of the actions in issue. That is, while the permit authorized relocation of the building, it had not authorized destruction of the building nor any conduct at all vis-à-vis the trailer. Defendant town could not be held liable for "its failure to confirm such ownership or from protecting against unauthorized alterations to another's property" absent some special relationship creating a special duty to exercise care.

In *Ubiera v. Housing Now Company Inc.*,[40] the plaintiffs were provided shelter after their apartment burned down. The shelter was owned by Housing Now Co. and managed by South Bronx Community Management Co. The infant plaintiffs were diagnosed within 15 days of moving with elevated blood levels as a result of lead poisoning. A Department of Health inspection conducted four months later found lead contamination. It was held that the city was not an "owner" of the shelter in issue. Absent ownership and absent facts giving rise to a special duty of care, the city could not be held liable for negligence in the "performance of governmental functions to give assistance to burned out and homeless families." Further, because the city's monitoring of the infants' condition was mandatory and not voluntary, the city did not by its action assume a special duty of care. See also *Cardona v. 642-652 Willoughby Avenue Corp.*,[41] where the issue was whether the city, as defendant municipality administers Section 8 payments providing federal subsidies to assist states and political subdivisions in providing housing for low income families, but does not own or operate the housing property in issue was in violation of the federal law regarding lead paint. It was held that it did not trigger a statutory cause of action against the city.

Similarly, in *Missouri v. Boyce*,[42] a property owner's violation of the same lead-based paint poisoning act does not give rise to a private cause of action against the Housing Authority where the authority did not own or control the property and where its relationship to plaintiffs and the subject apartment arose solely pursuant to the Section 8 statute and regulations.

II. Firefighter's Rule (Police and Firefighters as Plaintiffs)

A. Introduction

Police officers and firefighters who are injured during the course of duty potentially have two causes of action: A common law negligence cause of action, and a special statutory cause of action (General Municipal Law § 205-a for firefighters and General Municipal Law § 205-e for police officers). Until 1996, the common law cause of action was greatly restricted by the firefighter's defense, known also as the *Santangelo* defense, named after the Court of Appeals decision.[43] It was also more clearly defined in *Kenavan v. City of New York.*[44]

The firefighter's defense is, broadly speaking, that police and firefighters assume the ordinary, inherent risks of their highly dangerous employment, and may not sue in common law when such dangers result in an injury. Simply put, the common law claim will be barred only if "the performance of his or her duties increase the risk of the injury happening and did not merely furnish the occasion for the injury." For instance, where a police officer "is injured by a suspect who struggles to avoid an arrest, the rule precludes recovery because the officer is specially trained and generously compensated to confront such dangers."[45] But, "if a police officer who is simply walking on foot patrol is injured by a flowerpot that fortuitously falls from an apartment window, the officer can recover damages because nothing in the action undertaken placed him or her at increased risk for that accident to happen" (*Zanghi*). Because recovery at common law was so restrictive, the Legislature enacted, mostly for political reasons, special statutory causes of action for firefighters and police officers. GML § 205-a for fire-

fighters (enacted in 1935, and amended in 1996) and GML § 205-e for police officers (enacted in 1989, and amended in 1992 and 1996). Unlike the common law cause of action, recovery under sections 205-a and 205-e is not subject to or circumscribed by the so called firefighter's defense. In fact, not even comparative negligence is a defense in such action.

However, under these two statutes there are threshold requirements for statutory liability. Common law negligence is not enough to create liability. The plaintiff still has to prove as per the statutes that the defendant violated some specific statute, regulation or rule, and that such violation, directly or indirectly, caused the plaintiff's injury.

The second restriction is one of judicial interpretation. Although sections 205-a and 205-e explicitly say that violation of any federal, state, or local statute, ordinance, rule, or requirement suffices, many courts have construed the word "any" in strange ways. For instance, the seminal case of *St. Jacques v. City of New York*[46] held that the Legislature really meant that the imposed duties were not also owed at common law. So that if a duty imposed by statute replicated the common law, that would not suffice as a threshold for the cause of action. Thereafter, in *Desmond v. City of New York*,[47] the city successfully argued that the statutory reference to "any of the statutes, ordinances, rules" really means only "well developed bodies of law and regulations which impose clear duties."[48] These two cases and their progeny have, in fact, meant that far from applying "any" statutory/regulatory violations, the statutes would apply to "hardly any," if any, violations. That situation existed until October 1996 when the governor signed into a law a new statute, General Obligations Law § 11-106, that effectively invalidated the firefighter's defense in almost all future and pending actions, thus according police officers and firefighters the same common law rights as are enjoyed by all other plaintiffs. The one exception is that the statute does not apply in actions against plaintiff's employer, meaning that common law causes of action by New York City police officers and firefighters against the city itself, actions which are permitted by virtue of a quirk in the Workers' Compensation Law, continue to be governed by the same common law standards as formerly governed such actions. For this reason, the firefighter's defense remains meaningful for some plaintiffs.

But the Legislature did more in 1996 than merely disallow the firefighter's defense except in actions against the plaintiff's employer. Whereas the police officers statutory cause of action (GML § 205-e) was, by virtue of a 1992 amendment, no longer limited to "premises defects" which caused the injury, such limitations still apply to the firefighter's cause of action (GML § 205-a), since the firefighter's statute has not been similarly amended to apply to violations "at any time or place" (effective October 9, 1996 and retroactive not only to all pending actions but also as to any actions pending or dismissed after January 1, 1987, the firefighter's statute GML § 205-a now also applies to violations "at any time or place").

In addition to extending the scope of GML §§ 205-a and 205-e, the Legislature added new subdivisions that expressly rejected two of the Court created limitations upon the statutory causes of action. Specifically, the new subdivision clearly states that GML §§ 205-a and 205-e provide a cause of action regardless of whether the statute or regulation that was violated posed a duty also owed at common law and regardless of whether the danger in issue was one inherent to police work or fire fighting.

B. The Common Law Cause of Action and the Firefighter's Defense—Notable Cases

GOL § 11-106, now provides:

> Compensation for injury or death to police officers and firefighters or their estates
>
> 1. In addition to any other right of action or recovery otherwise available under law, whenever any police officer or firefighter suffers an injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that police officer's or firefighter's employer or co-employee, the police officer or firefighter suffering that injury or disease, or, in the case of death, a representative of that police officer or firefighter may seek recovery and damages from the person or entity whose neglect, willful omission, or intentional, willful or culpable conduct resulted in that injury, disease or death.
>
> 2. Nothing in this section shall be deemed to expand or restrict the existing liability of an employer or co-employee at common-law or under sections two hundred five-a and two hundred five-e of the general municipal law for injuries or death sustained in the line-of-duty by any police officer or firefighter.

The section applies to all actions which were commenced after or were pending on October 9, 1996.

1. Firefighter's Defense Cases

Jackson v. City of New York.[49] In actions against the employer, recovery under common law is still barred "where some act taken in furtherance of a specific police or fire fighting function exposed the officer to a heightened risk of sustaining the particular injury." *Zanghi v. Niagara Frontier Transportation Commission.*[50] General Obligations Law § 11-106, which partially abrogated the firefighter's rule, applies only where the police officer's or firefighter's injury, disease, or death is caused by a person or entity other than that police officer's or firefighter's employer or co-employee. Here, plaintiff was injured when he tripped and fell while attempting to apprehend a suspect and sued his employer, the municipality, and therefore, recovery under common law was barred by the firefighter's rule.

In *Simons v. City of New York,*[51] the police officer tripped over a pavement defect while escorting a complainant to the subway. The performance of duty in this case, even though an undramatic one, was the connection between the hazard of police work and the injury, and therefore the firefighter's rule provided a complete defense to the city and summary judgment dismissing the common law negligence claim was granted. Plaintiff, however, should have been granted leave to amend his complaint to assert a claim under GML § 205-e. Plaintiff should have been allowed to plead that the violation of New York City Charter § 2903 (b), requiring the city to maintain streets and sidewalks in a reasonably safe condition, gave rise to GML § 205-e liability.

Ciervo v. City of New York.[52] This case held that the so-called firefighter's rule or firefighter's defense does not extend to sanitation workers injured on the job. The plaintiff-sanitation worker tripped over a sidewalk defect during the course of his duties. The city of New York, largely relying on *Santangelo,* argued that New York City sanitation workers are like police officers and firefighters and are specially trained to confront risks and hazards on behalf of the public and receive added job benefits, including sick leave, line-of-duty injury status and corresponding benefits, and therefore, should be held to the same defense as policemen and firefighters. The lower court held for the city; that was affirmed by the Appellate Division, but the Court of Appeals, happily for plaintiffs, reversed. The Court held that the firefighter's rule does not apply to sanitation workers because sanitation workers are not expected or trained to assume the hazards routinely encountered by police officers and firefighters.

Plunkett v. Emergency Medical Services Corp. of New York City.[53] Plaintiff, a Housing Authority police officer, was injured by virtue of the negligence of an EMS employee. Although EMS employees and Housing Authority police officers were not city of New York employees as of the date of the injury, both agencies merged with the city prior to the effective date of GOL § 11-106. The issue was whether the statute was applicable on the ground that neither plaintiff nor the alleged negligent party was a city employee as of the time of the incident, nor was the statute applicable on the ground that both were city employees as of the statute's effective date. The Court held that the statute was inapplicable, and the plaintiff could maintain his action.

Grogan v. City of New York.[54] In *Grogan*, the plaintiff, a New York City police officer, while pursuing a suspect tripped and fell on an icy and broken sidewalk abutting city-owned property. He argued that he could still recover from the city in its capacity as owner of the premises abutting the sidewalk. The Court rejected this interpretation holding that GOL § 11-106 precludes all claims against the employer in whatever capacity. Because plaintiff tripped while pursuing a suspect, the case is consistent with prior case law to hold that the injury arose from a danger and that suit could, therefore, not be brought at common law.

Carter v. City of New York.[55] Plaintiff police officer tripped over a sidewalk defect while issuing a parking citation to an illegally parked car. The Court held that the common law recovery was barred since the injury occurred while she was performing an act taken "in furtherance of a specific police function which exposed her to a heighten risk of sustaining the injury."[56]

Church v. City of New York.[57] A police van driven by a civilian operator, in which plaintiff, a police officer, was a passenger, was transporting prisoners from a precinct to central booking when it was rear-ended by another car. The jury returned a verdict in plaintiff's favor. The Court held under the firefighter's rule that the plaintiff's status as a police officer precluded suit against his employer, the city, under the common law. Plaintiff was limited to his cause of action under GML § 205-e.

Flynn v. City of New York.[58] The plaintiff police officer suffered line-of-duty injuries during a riot in Tompkin's Square Park in Manhattan and brought suit under common law and under GML § 205-e. There was a political demonstration in the park; the officer in charge of the police response tried to utilize a low-key strategy; and the officers were ordered not to use "hats and bats" (helmets and nightsticks). The strategy did not succeed and, by the end of the evening, 275 police officers, 11 lieutenants, and 35 sergeants had responded. The plaintiff sustained some head injuries and other injuries during the conflagration and didn't have on his helmet and sued the city. The Court held that GOL § 11-106 does not apply to actions involving the neglect, etc., of a co-employee and there was a compelling case for the application of the firefighter's rule inasmuch as the

police officers were performing a police function that put them at a heightened risk of injury and therefore, the common law claim was barred. Regarding the GML § 205-e cause of action, the Court noted that the statute was limited to "non-compliance with well developed bodies of law and regulations" which "imposed clear duties" (citing *Desmond*) and neither the patrol guide nor the training manual (requiring helmets) constituted a well-developed body of law or regulation and thus could not premise a lawsuit under GML § 205-e. Similarly, in *Gervasi v. Pateay*,[59] the patrol guide sections cited by the plaintiff could not support a GML § 205-e claim since the "sections cited by the plaintiff were not part of a well developed body of law and regulation."

C. The Statutory Cause of Action—Pleading and Amendment of the Pleadings

Melendez v. City of New York.[60] The Second Department effectively overruled *Gibbons v. Ostrow*,[61] which had held that the predicate violation triggering GML § 205-e had to be pleaded in the complaint. Here, the Court ruled that amendment of the complaint could be effected pursuant to CPLR 3025(b), and because plaintiff was here suing her employer (rendering GOL § 11-106 inapplicable) and because the accident occurred while the plaintiff police officer was performing the function of the recorder in a patrol car and while she was at increased risk of being injured in a motor vehicle accident, her common law claims were barred by the firefighter's defense.

Similarly in *Sclafani v. City of New York*,[62] the Court held: "in an action to recover damages under GML § 205-a, the pleadings must specify or identify the statutes, ordinances, rules, orders, or requirements with which the defendant allegedly failed to comply, describe the manner in which the plaintiff's injuries occurred, and must set forth the facts on which it may be inferred that the defendant's negligence directly or indirectly caused harm to the plaintiff."[63] The Court further held that plaintiff should have been permitted to amend since the proposed complaint stated a viable claim and the defendant city "cannot make the requisite showing of significant prejudice."[64]

Reilly v. City of New York.[65] Here, the Court held that the trial court improvidently exercised its discretion in refusing to allow the plaintiff to amend the complaint so as to assert a cause of action under GML § 205-a where "defendant did not oppose the cross-motion for leave to amend on the ground relied upon by the court." Leave to amend the complaint should be granted even though the cause of action was not specifically mentioned in the notice of claim.[66]

D. The Meaning and Scope of These Statutes

Gonzalez v. Iocovello.[67] The Court held: (1) It would not read a "fellow officer" exception into GML § 205-a or 205-e, and these statutes could apply even when the wrong was committed by a fellow employee of the plaintiff; (2) that liability could be premised on a violation of the "reckless disregard" provision regarding emergency operation of authorized vehicles;[68] (3) that liability could also be premised upon the defendant city of New York's failure to comply with the sidewalk/maintenance requirements of its own administrative code.

As we know, sections 205-a and 205-e provide firefighters and police officers with that special statutory cause of action where such persons are killed or injured during the course of their duties as a direct or indirect result of the defendant's violation of any of "the requirements of the federal, state, county, village, town, or city governments, or any and all their departments, divisions and bureaus." When the statute applies, recovery cannot be diminished by the plaintiff's own comparative fault. The sections have been repeatedly diminished by the courts over the last years and then repeatedly enlarged by the Legislature, the most recent sequence resulting in the Laws of 1996. In this case, the city argued that GML § 205-a and e should not apply where the predicate violation was committed by a fellow employee of the plaintiff, and neither statute, of course, expressly included any such limitation. The city argued that such limitation was implied. The Court, by Justice Bellacosa, unanimously rejected that argument stating:

> Despite these consistent legislative actions and developments, the city urges this court to clamp down on General Municipal Law 205-e applications so as to preclude lawsuits derived from fellow officer conduct. GML 205-e contains no such categorical exemption in favor of the City. Indeed, had the Legislature chosen to assert a fellow officer lawsuit block, it had many opportunities to do so over the course of its virtual biennial amendments to the statute—all designed, notably, to benefit officers and to preserve their opportunities for redress in the courts.

And further:

> Courts cannot be oblivious to the fact that the Legislature had considered all of the competing angles, advantage, and disadvantage and that it has left the fellow officer lawsuit opportunity untouched in General Municipal Law

205-e—the section that drives and governs these actions.

The Court specifically rejected the city's claim that the "reckless disregard" standard of Vehicle and Traffic Law § 1104(e) was too amorphous to trigger GML § 205-e liability. The Court referred to *Desmond v. City of New York*,[69] which stated that "a statute can serve as a predicate when it contains either a particularized mandate or a clear legal duty—either of these objective standards can suffice, so as long as the governmental standard is a well developed body of law and regulation." The Court held that the "reckless disregard" standard was sufficiently clear to serve as a section 205-e predicate.

In regard to the city's claim that the city charter provisions requiring the city to keep its sidewalks in good repair were not a sufficient predicate for a GML § 205-e cause of action, the Court rejected that argument. Even though the provisions at issue placed the burden of paying for repairs on the property owner, New York City Charter § 2903(b)(2), places the ultimate duty to direct or effect repairs squarely on the city. These provisions are a part of a well-developed body of law and impose a clear duty on the city to take appropriate steps to keep sidewalks in safe repair.

What about MDL § 78 violations as a predicate for GML § 205-a liability? In *Hayes v. City of New York*,[70] the Appellate Division rejected defendant's claim that MDL § 78 requiring multiple dwelling owners to keep their buildings in good repair was "too general" to serve as a predicate for GML § 205-a liability.

What about VTL violations as a predicate? In *Schiavone v. City of New York*,[71] it was held that VTL violations can provided sufficient statutory predicates for a cause of action pursuant to GML § 205-e.

What about administrative code violations? In *Maiello v. City of New York*,[72] the plaintiff had a viable cause of action pursuant to GML § 205-e based upon violation of the Administrative Code of the City of New York §§ 27-127, 27-128.

But what about a police patrol guide? In *Galaro v. City of New York*,[73] the Court held, without extended discussion, that violation of a New York City police patrol guide relating to the use of firearms could not serve as a predicate for a cause of action under GML § 205-e. This was also followed in *Malenczak v. City of New York*,[74] where the alleged violation of a city police patrol guide procedure could not serve as a predicate to amend the complaint to add a cause of action to allege a GML § 205-e violation.

What if a condition is alleged to have been breached in an administrative rule and notice is required? In *Bongiovanni v. KMO-361 Realty Associates*,[75] plaintiff firefighter tripped over a discarded piece of pipe in a building that was undergoing renovation. The Court impliedly held that notice was required but since the deposition testimony was that the defendants' key personnel were at the site almost daily during the time around the fire, there was an issue of fact as to whether defendants had notice of the debris in the stairwell that they neglected to clear in violation of a N.Y.C.R.R. provision (23-1.7(e)(1)). Similarly in *Infante v. City of New York*,[76] claims involving the violation of N.Y.C. Admin. Code §§ 27-127 and 27-128 were dismissed because there was no evidence to show that the city had any notice of the accumulation of water on the stairs where the claimant allegedly slipped.

Is causation required between the predicate violation and injury or death? Of course. In *Johnson v. Fuller*,[77] plaintiff, a New York City police detective, was injured at a construction site as he attempted to rescue two homeless men from a fire that the men themselves had started, allegedly by setting fire to construction debris that had been left at the site. It was undisputed that except for the security contractor left to oversee the area, the site workers were not working over the weekend. Plaintiff brought suit under GML § 205-e on the grounds of a violation of N.Y.C. Admin. Code § 27-1019 requiring that construction site debris be secured and removed, and plaintiff further alleged that the debris used to fuel the fire most probably had come from the site where a particular subcontractor had generated the debris, and that the general contractor failed to remove the debris. There was thus proof raised of triable issues of fact as to whether there was enough proof of knowledge or notice to go to a jury. Notice was discussed in *Moore v. Eyzenberg*,[78] where the Court held that liability is imposed under section 205-a in any case where there is a practical or reasonable connection between the statutory or code violation and the injury to the plaintiff.

In *Kenavan v. City of New York*,[79] the same *Kenavan* case which had been dismissed in 1987 but re-commenced after the revival statute of 1996, the Appellate Division again dismissed this time on proximate cause grounds.

Again, in *Abbadessa v. City of New York*,[80] the Court held as to proximate cause that the plaintiff must "establish a practical or reasonable connection between

the (predicate) violation and the injury or death of the police officer." It did not in this case.

As in all areas of municipal liability, care must be taken that the applicable law be researched at the inception of the claim and that the claims and defenses be explored by careful discovery and deposition questions.

Endnotes

1. *Miller v. State of N.Y.*, 62 N.Y.2d 506, 478 N.Y.S.2d 829 (1984) (proprietary); or (2) governmental (no liability unless a "special duty"); *Weiner v. MTA*, 55 N.Y.2d 175, 448 N.Y.S.2d 141 (1982); *Riss v. City of New York*, 22 N.Y.2d 579, 293 N.Y.S.2d 897 (governmental).
2. 93 N.Y.2d 790, 698 N.Y.S.2d 601 (1999).
3. 93 N.Y.2d at 792.
4. 69 N.Y.2d 255, 513 N.Y.S.2d 372 (1987).
5. 2001 N.Y. App. Div. LEXIS 705 (3d Dep't 2001).
6. *DeLong v. County of Erie*, 60 N.Y.2d 296.
7. *Jessop v. City of Niagara Falls*, 247A.D.2d 902, 669 N.Y.S.2d 110 (4th Dep't).
8. 90 N.Y.2d 966, 665 N.Y.S.2d 613 (1997).
9. *Janota v. City of N.Y,.* 297 N.Y. 942 (1948).
10. *Cuffy,* 69 N.Y.2d 255.
11. 251 A.D.2d 484, 673 N.Y.S.2d 1020 (2d Dep't 1998).
12. *Weiner v. MTA*, 55 N.Y.2d 175, 448 N.Y.S.2d 141 (1982).
13. *See id.*, *Steitz v. City of Beacon*, 295 N.Y. 51, 55, 64 N.E.2d 704 (1945), also citing *Motyka v. City of Amsterdam*, 15 N.Y.2d 134, 138, 256 N.Y.S.2d 595 (1965).
14. *Crossland v. New York City Trans. Auth.*, 68 N.Y.2d 165, 506 N.Y.S.2d 670 (1986).
15. *Rivera v. New York City Trans. Auth.*, 184 A.D.2d 417, 585 N.Y.S.2d 367 (1st Dep't 1992).
16. *Diaz v. City*, 672 N.Y.S.2d 747 (2d Dep't 1998).
17. *Bilotta v. Storino*, 672 N.Y.S.2d 421 (2d Dep't 1998).
18. 259 A.D.2d 574, 686 N.Y.S.2d 498 (2d Dep't 1999).
19. 686 N.Y.S.2d at 499.
20. 262 A.D.2d 230, 692 N.Y.S.2d 354, (1st Dep't 1999), *appeal denied*, 95 N.Y.2d 751 (2000).
21. 260 A.D.2d 581, 93 N.Y.S.2d 1030, (2d Dep't 1999).
22. 81 N.Y.2d 288, 598 N.Y.S.2d 160 (1993).
23. *Vitale v. City of N.Y.*, 60 N.Y.2d 861, 470 N.Y.S.2d 358 (1983). But regarding victims who are student-children, the city can be held liable, *Mirand v. City of N.Y.*, 84 N.Y.2d 44, 614 N.Y.S.2d 372 (1994).
24. *Johnson City Cent. Sch. Dist. v. Fidelity & Deposit Co. of Md.*, 272 A.D.2d 818, 709 N.Y.S.2d 225 (3d Dep't 2000).
25. *Persaud v. City of N.Y.*, 267 A.D.2d 220, 699 N.Y.S.2d 481 (2d Dep't 1999).
26. 699 N.Y.S.2d 482.
27. *Ohdan v. City of N.Y.*, 268 A.D.2d 86, 706 N.Y.S.2d 419 (1st Dep't 2000).
28. *Maloney v. Scarfone*, 25 A.D.2d 630, 267 N.Y.S.2d 929 (1st Dep't 1966).
29. *Mark G v. Sabol*, 93 N.Y.2d 710, 695 N.Y.S.2d 730 (1999).
30. 254 A.D.2d 346, 678 N.Y.S.2d 668 (2d Dep't, 1998), *lv. denied*, 92 N.Y.2d 820, 685 N.Y.S.2d 421 (1999).
31. 260 A.D.2d 249, 688 N.Y.S.2d 533 (1st Dep't 1999).
32. 58 N.Y.2d 184, 460 N.Y.S.2d 485 (1983).
33. 58 N.Y.2d 253, 460 N.Y.S.2d 774 (1983).
34. 256 A.D.2d 1166, 682 N.Y.S.2d 781 (4th Dep't 1999).
35. 10 N.Y.C.R.R. § 6-2.1, *et. seq.*
36. 682 N.Y.S.2d 782.
37. 271 A.D.2d 407, 705 N.Y.S.2d 399 (2d Dep't 2000).
38. 705 N.Y.S.2d 400.
39. 263 A.D.2d 863, 694 N.Y.S.2d 213 (3d Dep't 1999).
40. 184 Misc. 2d 846, 709 N.Y.S.2d 910 (Sup. Ct. 2000).
41. 182 Misc. 2d 223, 697 N.Y.S.2d 231 (Sup. Ct., Kings Co. 1999).
42. 182 Misc. 2d 312, 696 N.Y.S.2d 649 (Sup. Ct., Kings Co. 1999).
43. 71 N.Y.2d 393, 526 N.Y.S.2d 812.
44. 70 N.Y.2d 558, 523 N.Y.S.2d 60 (1987).
45. *Zanghi v. Niagara Frontier Transp. Comm'n*, 85 N.Y.2d at 440, 626 N.Y.S.2d 28.
46. 215 A.D.2d 75, 633 N.Y.S.2d 97 (1st Dep't 1995).
47. 88 N.Y.2d 455, 646 N.Y.S.2d 492 (1996).
48. 88 N.Y.2d 464, 646 N.Y.S.2d 496.
49. 251 A.D.2d 457, 674 N.Y.S.2d 721 (2d Dep't 1998).
50. *Zanghi*, 85 N.Y.2d 423, 439.
51. 252 A.D.2d, 451, 675 N.Y.S.2d 597 (1st Dep't 1998).
52. 93 N.Y.2d 465, 693 N.Y.S.2d 63 (1999), *rev'g*, 637 N.Y.S.2d 918, 167 Misc. 2d 170, *aff'd.*, 240 A.D.2d 693.
53. 260 A.D.2d 193, 687 N.Y.S.2d 375 (1st Dep't 1999).
54. 259 A.D.2d 240, 699 N.Y.S.2d 12 (1st Dep't 1999).
55. 272 A.D.2d 498, 708 N.Y.S.2d 426 (2d Dep't 2000).
56. 708 N.Y.2d 427, quoting from *Zanghi*.
57. 268 A.D.2d 382, 702 N.Y.S.2d 274 (1st Dep't 2000).
58. __ A.D.2d __, __ N.Y.S.2d __ WL 517393 (1st Dep't 1999).
59. 254 A.D.2d 172, 679 N.Y.S.2d 45 (1st Dep't 1998).
60. 271 A.D.2d 416, 706 N.Y.S.2d 132 (2d Dep't 2000).
61. 234 A.D.2d 415, 651 N.Y.S.2d 168 (2d Dep't 1996).
62. 271 A.D.2d 430, 706 N.Y.S.2d 129 (2d Dep't 2000).
63. 706 N.Y.S.2d 130.
64. *Id.*
65. 271 A.D.2d. 455, 706 N.Y.S.2d 123 (2d Dep't 2000).
66. 706 N.Y.S.2d at 125.
67. 93 N.Y.2d 539, 693 N.Y.S.2d 486 (1999).
68. VTL § 1104(e).
69. 88 N.Y.2d 455.
70. 264 A.D.2d 610, 695 N.Y.S.2d 328 (1st Dep't 1999).
71. 271 A.D.2d 430, 706 N.Y.S.2d 895 (2d Dep't 2000).
72. 273 A.D.2d 284 709 N.Y.S.2d 855 (2d Dep't 2000).
73. 267 A.D.2d 349, 699 N.Y.S.2d 924 (2d Dep't 1999), *lv. granted*, 95 N.Y.2d 753 (2000).
74. 265 A.D.2d 532, 697 N.Y.S.2d 138 (2d Dep't 1999).
75. 268 A.D.2d 365, 702 N.Y.S.2d 263 (1st Dep't 2000).
76. 266 A.D.2d 230, 690 N.Y.S.2d 484 (1st Dep't 1999).
77. 268 A.D.2d 158, 699 N.Y.S.2d 348 (1st Dep't 1999).

Scenes from the TICL Section Annual Meeting
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Program Chair Alan Kaminsky at the Afternoon Program, January 25.

Hon. Richard T. Andrias, Appellate Div., 1st Dept. at the Afternoon Program, January 25.

James D. Gauthier receiving the John Leach Award at Windows on the World, January 24.

Judge Richard C. Wesley, N.Y. Court of Appeals speaking at Windows on the World, January 24.

Edward S. Reich and Saul Wilensky at the Executive Board Meeting, January 25.

Hon. Justice Gerald Esposito at the Afternoon Program, January 25.

Louis B. Cristo (outgoing Chairperson), Saul Wilensky (incoming Chairperson) at Windows on the World reception, January 24.

Edward S. Reich, Alan Kaminsky and Hon. Justice Gerald Esposito at the Afternoon Program, January 25.

Speaker Mark K. Anesh at the Afternoon Program, January 25.

Kenneth L. Bobrow, Franklin F. Bass, Paul S. Edelman and Robert J. Spragg at the Executive Committee Meeting, January 24.

Robert A. Glick, Saul Wilensky, Paul S. Edelman, Eric Dranoff and Louis B. Cristo at the Executive Board Meeting, January 25.

Edward S. Reich, William N. Cloonan, Frederick J. Pomerantz, Louis B. Cristo, Paul J. Suozzi and Saul Wilensky at the Executive Committee Meeting, January 24.

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