NYSBA WINTER 2016 | VOL. 45 | NO. 1

Torts, Insurance & Compensation Law Section Journal

A publication of the Torts, Insurance & Compensation Law Section
of the New York State Bar Association

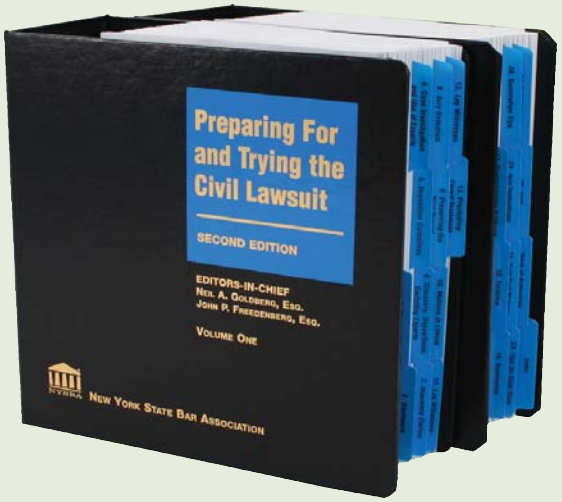
www.nysba.org/TICL

From the NYSBA Book Store

Preparing For and Trying the Civil Lawsuit, 2d Ed, 2016 Rev

More than 30 of New York State's leading trial practitioners and other experts reveal the techniques and tactics they have found most effective when trying a civil lawsuit. Expert commentary and numerous practice tips guide you through all aspects of a civil lawsuit, from discovery to appeals. A thorough discussion of pretrial preparation and investigation will aid the attorney in obtaining an advantageous settlement even if the case never goes to trial.

Especially helpful are the excerpts from actual trial transcripts, which illustrate the effectiveness of certain lines of questioning. Trial attorneys will benefit by using the book to supplement and reinforce their own methods of practice. The 2016 Revision includes updates to the previous edition, as well as a new chapter on Attorney-Client Privilege.



Section Members get 20% discount* with coupon code PUB8505N

EDITORS-IN-CHIEF
Neil A. Goldberg, Esq.; John P. Freedenberg, Esq.

PRODUCT INFO AND PRICES

Print: 41955 | 2016 | 1,528 pages | 2 vols. | **NYSBA Members $185** | Non-Members $235

E-book: 41955E | 2016 | 1,528 pages | 2 vols. | **NYSBA Members $185** | Non-Members $235

Free shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be added to your order. Prices do not include applicable sales tax.

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION

1.800.582.2452 www.nysba.org/pubs

Mention Code: PUB8505N

***Discount good until March 9, 2017.**

NYSBA

TICL Journal

Vol. 45, No. 1
Winter 2016 Issue

ISSN 1530-390X (print) ISSN 1933-8503 (online)

Torts, Insurance and Compensation Law Section Officers, Division Chairs and Committee Chairs

Officers

Chair
Kenneth A. Krajewski
Brown & Kelly, LLP
1500 Liberty Building
Buffalo, NY 14202-3663
kkrajewski@brownkelly.com

Vice-Chair
Elizabeth A. Fitzpatrick
Hurwitz & Fine PC
535 Broad Hollow Road, Suite B-7
Melville, NY 11747
eaf@hurwitzfine.com

Secretary
Timothy J. Fennell
Amdursky, Pelky, Fennell
and Wallen, PC
26 East Oneida Street
Oswego, NY 13126
tfennell@apfwlaw.com

Treasurer
Brendan F. Baynes
The Baynes Law Firm PLLC
130 Main Street
Ravena, NY 12143
bfb@bayneslawfirm.com

TICL *Journal* Editor
David A. Glazer
Shafer Glazer LLP
90 John Street, Ste. 701
New York, NY 10038
dglazer@shaferglazer.com

TICL *Journal* Editor Emeritus
Paul S. Edelman
57 Buena Vista Drive
Hastings on Hudson, NY 10706

Division Chairs

Construction and Surety Law Division
C. Allan Reeve
Reeve Brown PLLC
Suite 200
3380 Monroe Avenue
Rochester, NY 14618-4726
careeve@reevebrownlaw.com

Patricia A. Rooney
Patricia Rooney, PC
394 South 15th Street
Lindenhurst, NY 11757
prlaw@prlaw.pro

Workers' Compensation Law Division
John H. Snyder
Gitto & Niefer LLP
605 French Road
New Hartford, NY 13413
jsnyder@gittolaw.com

Committee Chairs

Alternative Dispute Resolution
Brian J. Rayhill
Epstein, Gialleonardo & Rayhill
565 Taxter Road, Suite 275
Elmsford, NY 10523
brianrayhill@gmail.com

Automobile Liability
Thomas P. Cunningham
Rupp Baase Pfalzgraf Cunningham
& Coppola LLC
1600 Liberty Building
Buffalo, NY 14202-3694
cunningham@ruppbaase.com

Business Torts and Employment Litigation
Heath J. Szymczak
Bond Schoeneck & King
Avant Building, Suite 900
200 Delaware Avenue
Buffalo, NY 14202
hszymczak@bsk.com

Class Action
Hon. Thomas A. Dickerson
Appellate Division
Second Judicial Department
Courthouse Square
140 Grand Street, 6th Floor
White Plains, NY 10601-4831
judgetad@aol.com

Community/Newsletter
A.G. Chancellor, III
Tromello, McDonnell & Kehoe
395 North Service Road, Suite 410
Melville, NY 11747-3143
A.G.ChancellorIII@cna.com

Diana Neyman
Cullen & Dykman LLP
44 Wall Street
New York, NY 10005-2401
snyder@gittolaw.com
dneyman@cullenanddykman.com

Continuing Legal Education
John H. Snyder
Gitto & Niefer LLP
605 French Road
New Hartford, NY 13413
jsnyder@gittolaw.com

Joanna M. Roberto
Goldberg Segalla LLP
200 Garden City Plaza, Suite 520
Garden City, NY 11530
jroberto@goldbergsegalla.com

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

Diversity
Joanna L. Young
Carroll, McNulty & Kull LLC
570 Lexington Avenue, 8th Floor
New York, NY 10022
jyoung@cmk.com

Gary A. Cusano
360 Underhill Avenue
Yorktown Heights, NY 10598-4558
gac@cusanolaw.com

Ethics and Professionalism
Douglas J. Hayden
Wright Risk Management
116 Carnation Avenue
Floral Park, NY 11001-2728
dhayden@wrightrisk.com

George J. Silver
New York State Supreme Court
New York County, Civil Branch
60 Centre Street
New York, NY 10007
gjsilver@nycourts.gov

A. Michael Furman
Furman Kornfeld & Brennan LLP
61 Broadway, 26th Floor
New York, NY 10006
mfurman@fkbllp.com

Future Sites
Jean F. Gerbini
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260
jgerbini@woh.com

General Awards
Dennis R. McCoy
Barclay Damon LLP
The Avant, 200 Delaware Avenue
Buffalo, NY 14202
DMcCoy@barclaydamon.com

Douglas J. Hayden
Wright Risk Management
116 Carnation Avenue
Floral Park, NY 11001-2728
dhayden@wrightrisk.com

Paul J. Suozzi
Hurwitz & Fine, PC
1300 Liberty Building
Buffalo, NY 14202-3670
pjs@hurwitzfine.com

Governmental Liability
Jeremy Brad Cantor
Gallo Vitucci & Klar LLP
90 Broad Street, 3rd Floor
New York, NY 10004
jcantor@gvlaw.com

Information Technology
Charles J. Siegel
Law Offices of Charles J. Siegel
125 Broad Street, 7th Floor
New York, NY 10004
charles.siegel@cna.com

Insurance Coverage
Eileen E. Buholtz
Connors, Corcoran & Buholtz, PLLC
45 Exchange Blvd.
Times Square Building Suite 250
Rochester, NY 14614
ebuholtz@connorscorcoran.com

Laws and Practices
Jason L. Shaw
Whiteman Osterman and Hanna LLP
One Commerce Plaza
Albany, NY 12260
jshaw@woh.com

Membership
Timothy J. Fennell
Amdursky, Pelky, Fennell
and Wallen, PC
26 East Oneida Street
Oswego, NY 13126
tfennell@apfwlaw.com

Roderick John Coyne
McMahon, Martine & Gallagher, LLP
55 Washington Street, Suite 720
Brooklyn, NY 11210
Rcoyne@mmglawyers.com

Municipal Law
Melanie Slaughter Wolk
Trevett Cristo Salzer Andolina
2 State Street, Suite 1000
Rochester, NY 14614
mwolk@trevettlaw.com

No Fault
Richard W. Kokel
85 Broad Street
Suite 18-058
New York, NY 10004
rwk1998@aol.com

Premises Liability/Labor Law
Glenn A. Monk
Harrington Ocko & Monk LLP
81 Main Street
White Plains, NY 10601
gmonk@homlegal.com

Products Liability
Dennis J. Brady
Goldberg Segalla LLP
200 Garden City Plaza, Suite 520
Garden City, NY 11530-3341
dbrady@goldbergsegalla.com

Professional Liability
Lawton W. Squires
Herzfeld & Rubin, P.C.
125 Broad Street, 12th Floor
New York, NY 10004
lsquires@herzfeld-rubin.com

A. Michael Furman
Furman Kornfeld & Brennan LLP
61 Broadway, 26th Floor
New York, NY 10006
mfurman@fkbllp.com

Social Media
Kathleen Chetta
McElroy, Deutsch, Mulvaney & Carpenter, LLP
1300 Mt. Kemble Avenue
Morristown, NJ 07962-2075
kchetta@mdmc-law.com

Sponsorships
Maiaklovsky Preval
The Maiaklovsky Law Firm PLLC
305 Broadway, 14th Floor
New York, NY 10007
maiaklovsky@gmail.com

Toxic Tort
Richard L. Weber
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202
rweber@bsk.com

Table of Contents

Vol. 45, No. 1

Page

A View from the Chair

Happy holidays everyone! On behalf of our officers and the entire Executive Committee of the Torts, Insurance & Compensation Law Section, we wish you and your families a happy and healthy New Year.

I congratulate you all for contributing to a tremendous year for the Section. We had a wonderful time in New Orleans in October. It was good food and great fun for all. And a hearty thank you to Judge Pigott and Judge Garcia from the Court of Appeals for their very informative and entertaining program. Thanks also to our own Hon. Thomas Dickerson for his presentation on cruise ship liability. Charlie Siegel has posted pictures on the NYSBA website. You can view them at https://www.flickr.com/photos/nysba/sets/72157675338393925. Next fall, we're looking to go to Nashville under the guidance of the 2017 Chair, Beth Fitzpatrick.

Make your reservations now for our Annual Meeting in January at the New York Hilton Midtown. Our joint all-day CLE with the Trial Lawyers Section will be held on Thursday, January 26th at New York Hilton Midtown.

The topics are: "Keep Your Eye on the Ball: The Current State of Assumption of the Risk and Comparative Negligence"; "Everything You Wanted to Know About Motions *in Limine*, Opening Statements, Trial Objections and Summations, but Were Afraid to Ask"; "Trending Topics in Toxic Tort Litigation: Recent NY State Decisions of Note; Trending Substances (such as talc litigation); and Recent Changes to the Toxic Substances Control Act"; "Updates on Cyber Risk and Liability"; and the fabulous Professor David Paul Horowitz will speak about "Lies, Damn Lies & Errata Sheets: Deposition Shenanigans, Obstreperous Witnesses, and Problem Lawyers." We are very excited about this program.

I hope to see you all in New York City at the Annual Meeting!

Kenneth A. Krajewski

Premises Liability: An Update on Negligent Security and Liability for Criminal Acts of Third Parties

By Glenn A. Monk and Matthew R. Bremner

I. Introduction

Premises owners are under an affirmative duty to safeguard persons lawfully on their property from foreseeable harm. As with any premises liability case, the landlord's duty regarding criminal conduct by a third party is thus proscribed by whether the conduct was foreseeable. Foreseeability in this context turns on the circumstances of whether a criminal element had previously infiltrated the premises or whether the owner was otherwise on notice that a criminal act was likely to occur on the premises. Thus, any analysis of liability for criminal acts of third persons should commence by investigating whether and what type of criminal conduct had previously occurred on the premises.

"Although a premises owner is under an affirmative duty to safeguard persons lawfully on its property from harm resulting from foreseeable criminal acts, '[t]his duty is premised on the landowner's control over the premises.'"

A premises owner has a duty to take "minimal security precautions" to prevent foreseeable third-party criminal conduct on its premises. A defendant landlord can generally satisfy the "minimal security measures" standard by demonstrating that there were working locks and an intercom at the entrance to the building. Where the premises owner fails to install minimal security devices or installs them negligently in the face of the foreseeable risk of harm, he or she may be held liable to a plaintiff for injuries proximately caused by the absence or failure of such minimal security measures.

II. Duty

The threshold question in any negligence action is whether the defendant owes a legally recognized duty of care to the plaintiff. *Hamilton v. Beretta USA Corp.*, 96 N.Y.2d 222 (2001); *Moss v. New York Telephone Co.*, 196 A.D.2d 492 (2d Dep't 1993); *Iannelli v. Powers*, 114 A.D.2d 157 (2d Dep't 1986). Although "a possessor of land … is not an insurer of the visitor's safety," he is under an affirmative duty to maintain the property in reasonably safe condition for those who use it.[1] *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 519, 613 (1980); *Basso v. Miller*, 40 N.Y.2d 233, 241 (1976).

The Court of Appeals has repeatedly expressed "reluctance to extend liability to a defendant for failure to control the conduct of others," due to concerns it may create near limitless liability arising from the acts of third parties. *In re New York City Asbestos Litigation*, 5 N.Y.3d 486, 493 (2005) (citing *Hamilton v. Beretta U.S.A. Corp.* (96 N.Y.2d 222, 233 [2001]). Accordingly, the Court has reiterated that the duty of a defendant to control or protect against the acts of a third party is limited to instances "where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others." *Id.* at 494. It is well settled that this duty includes a landowner's obligation to take minimal precautions to protect a building's tenants or others reasonably expected to be on the premises against foreseeable criminal acts. *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544 (1998); *Miller v. State of New York*, 62 N.Y.2d 506, 513 (1984); *Nallan*, *supra*; *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33 (1983). Such duty does *not* extend, however, to a plaintiff who has no connection to the building injured by a third-party actor over whom the owner has no control. *Waters v. New York City Hous. Auth.*, 69 N.Y.2d 225, 230-31 (1987) (holding that the owner's duty did not extend to a passerby who was dragged into the building by an unknown third party, regardless if the ultimate harm was reasonably foreseeable, and even if there were no working locks on the building's doors); *see also Brown v. New York City Hous. Auth.*, 39 A.D.3d 744, 745 (2d Dep't 2007) (The duty of a landowner does not "embrace members of the public at large, with no connection to the premises, who might be victimized by street predators.").

"A landowner's duty does not extend so far as to impose an obligation to insure the safety of all persons who make use of public areas, particularly where public areas of the property are situated in large urban settings, and are necessarily open to the general public and society at large."

Assaults in Public Areas

Although a premises owner is under an affirmative duty to safeguard persons lawfully on its property from harm resulting from foreseeable criminal acts, "[t]his duty is premised on the landowner's control over the premises." *Daly v. City of New York*, 227 A.D.2d 432 (2d Dep't 1996) (citing *Johnson v. Slocum Realty Corp.*, 191 A.D.2d 613,

614; *Blatt v. New York City Hous. Auth.*, 123 A.D.2d 591, 592); *see also Bodaness v. Staten Island Aid, Inc.*, 170 A.D.2d 637 (2d Dep't 1991) (program's duty to participant did not extend outside of premises to incident occurring at nearby bus stop). The courts have held that a landowner's duty to provide "minimal security measures" does not necessarily encompass a duty to prevent criminal acts taking place in public areas on the premises. *Leyva v. Riverbay Corp.*, 206 A.D.2d 150, 155 (1st Dep't 1994) ("Strong public policy considerations militate against imposing liability upon owners for incidents of criminality which occur on public walkways and are committed by persons over whom they have no control."); *see also Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149 (2d Dep't 1999) (granting summary judgment for the defense where "the crime at issue occurred in the entrance vestibule to the building, which is by its nature necessarily accessible to the public"). A landowner is "obliged to provide reasonable security measures not optimal nor the most advanced security system available." *Leyva*, 206 A.D.2d at 155. A landowner's duty does not extend so far as to impose an obligation to insure the safety of all persons who make use of public areas, particularly where public areas of the property are situated in large urban settings, and are necessarily open to the general public and society at large. *Id.* at 154-55.

"Absent such notice, a criminal act perpetrated by a third person is considered an intervening or superseding cause of injury that absolves a defendant landowner from liability."

In *Daly v. City of New York*, *supra*, an action was brought by the estate of a man who was fatally wounded during a shootout involving three teenagers in a housing project in Red Hook, Brooklyn. The Appellate Division, Second Department held that since "the tragic shooting incident occurred in the outdoor common area of the housing project NYCHA had no duty to protect the decedent." *Id.*

In *Allen v. New York City Housing Authority*, 203 A.D.2d 313 (2d Dep't 1994), plaintiff was severely injured when she suffered multiple gunshot wounds as she left her apartment building and walked to the parking lot of the public housing project in which she resided. The Appellate Division affirmed the decision of the lower court which granted the Housing Authority's motion for summary judgment, holding that "[t]he causal connection between a criminal act in an essentially open-air, public area, and any negligence on the part of the defendant is too attenuated, as a matter of law, to serve as a basis for the plaintiff's recovery." Further, the Court held that "the mere fact that the plaintiff was a tenant did not, in and of itself, give rise to any special relationship or duty on the part of the defendant to provide adequate police protection."

Likewise, in *Martinez v. New York City Housing Authority*, 238 A.D.2d 167 (1st Dep't 1997), an infant was shot and killed when a stray bullet from a neighboring lot pierced through her bedroom window and struck her in the head. The infant's mother argued that the Housing Authority was on notice that dangerous criminal activity was taking place in the lot and had a duty to protect its tenants against that risk. The Appellate Division reversed the order of the lower court and granted summary judgment for the defendant Housing Authority, finding it "had no duty to protect the infant plaintiff from criminal acts of third parties committed on neighboring premises." Accordingly, the Housing Authority's lack of control over the neighboring lot was determinative as the Court found that there were no precautionary measures it could have undertaken on its own property to prevent plaintiff's injuries. *Id*. at 168; *see also Waters*, 69 N.Y.2d at 230-31.

III. Foreseeable Risk

In order to establish the existence of the premises owner's duty to take minimal protective measures, one must show that the owner "either knows or had reason to know from past experience that there is a likelihood of conduct on the part of third-persons…which is likely to endanger the safety of the visitor."[2] *Nallan*, *supra*, 50 N.Y.2d at 519; *M.D. v. Pasadena Realty Co.*, 300 A.D.2d 235 (1st Dep't 2002). "Lacking such notice, there is no duty on the part of the landowner to provide protective measures, as foreseeability of harm is the measure of a landowner's duty of care." *Adiutori v. Rabovsky Academy of Dance*, 149 A.D.2d 637 (2d Dep't 1989). Where there is little evidence of criminal activity in the building, there are insufficient facts to base a finding of foreseeability. *M.D. v. Pasadena Realty Co.*, *supra*.

"Where there are other grounds to infer that the owner was or should have been aware of a real risk that the alleged crime upon its property would occur, however, the law does not forbid an inference of notice and consequently arising duty."

Stated differently, a landowner has no duty protect visitors from the criminal acts of third parties unless it is shown that the landowner either knows or has reason to know that there is a likelihood of conduct dangerous to the safety of the visitor. Absent such notice, a criminal act perpetrated by a third person is considered an intervening or superseding cause of injury that absolves a defendant landowner from liability. *Kush*, *supra*. Thus, where a defendant can make a showing that the intentional act by a third party was not reasonably foreseeable—i.e., that

he had no notice of criminality connected to the property through historical data or otherwise—a motion for summary judgment may be granted.

Ambient Crime

"Ambient neighborhood crime alone is insufficient to establish foreseeability." *Novikova*, 258 A.D.2d at 153. "It is only insofar as the ambient crime has demonstrably infiltrated a landowner's premises or insofar as the landowner is otherwise on notice of a serious risk of such infiltration that its duty to provide protection against the acts of criminal intruders may be said to arise." *Todorovich v. Columbia University*, 245 A.D.2d 45, 46 (1st Dep't 1997). Although the past criminal activity need not be of exactly the same type or in the exact location, "the court should consider the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question." *Maheshwari v. City Of New York*, 2 N.Y.3d 288, 294 (2004); *Jacqueline S. v. City of New York*, 81 N.Y.2d 288 (1993); *Maria T. v. New York Holding Co. Assoc.*, 52 A.D.3d 356, 357 (1st Dep't 2008).

"Accordingly, as the subject criminal act was not reasonably foreseeable, defendant owed no duty to protect plaintiff's decedent, and the Court granted summary judgment to the defendant."

Where there are other grounds to infer that the owner was or should have been aware of a real risk that the alleged crime upon its property would occur, however, the law does not forbid an inference of notice and consequently arising duty. *Nash v. Port Authority of New York and New Jersey*, 51 A.D.3d 337 (1st Dep't 2008). The relevant requirement in premises liability actions is ultimately notice, not history. *Id*.

Cases Holding That the Risk of Harm Was Not Foreseeable

In *Maheshwari*, *supra*, plaintiff was attacked in the parking lot after a large outdoor concert. The Court of Appeals held that the attack was not foreseeable because the "types of crimes committed at past Lollapalooza concerts are of a lesser degree than a criminal assault, and would not lead defendants to predict that such an attack would occur or could be prevented." Moreover, it found that a "random criminal attack…is not a predictable result of the gathering of a large group of people."

In *Novikova*, *supra*, plaintiff's decedent, a visitor to a tenant in defendant's condominium, was shot and killed during a robbery in the entry hall of the building. Plaintiff's attempt to establish that the criminal conduct was foreseeable, thus requiring the landlord to provide minimum security measures, was rejected by the Court. It found that:

> of the 21 reported crimes relied upon by the plaintiffs, only three are reported as having occurred at or in front of the subject premises—two apartment burglaries and one theft of a car. None of these three crimes are similar to the crime at issue. Indeed, the burglaries do not even necessarily implicate street crime or a criminal intruder as these crimes might have been committed by a fellow tenant, a guest or a service provider. Of the remaining reported crimes, the vast majority concern the theft or vandalism to cars, or burglaries… and none concerned an ambush-style robbery as occurred here.

In addition, the Court found that the reported crimes were not close in proximity to the subject area, and did not occur at the same time of day as in the instant case [2:30 a.m.]. Accordingly, as the subject criminal act was not reasonably foreseeable, defendant owed no duty to protect plaintiff's decedent, and the Court granted summary judgment to the defendant.

"Absent prior notice, the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults."

In *Kranenberg v. TKRS Pub, Inc.*, 99 A.D.3d 767 (2d Dep't 2012), a bar's regular patron was attacked by another customer during a dispute, and brought an action against the bar alleging that it was negligent and evinced a reckless disregard for his safety in failing to protect him from the assault. The Court dismissed these causes of actions, holding that "an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such conduct, and is reasonably aware of the need for such control." Absent prior notice, the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults. *See also*, *Milton v. I.B.P.O.E. of World Forest City Lodge, No. 180*, 121 A.D.3d 1391 (3rd Dep't 2014) (evidence of recurring minor scuffles on premises insufficient to establish the foreseeability of a spontaneous knife attack occurring outside lodge); *Weisbecker v. West Islip Union Free School Dist.*, 109 A.D.3d 657 (2d Dep't 2013) (assault of student after school hours during an unpermitted gathering on school's athletic field was not foreseeable and was not proximately caused by school's failure to lock access gates).

Cases Holding That the Need for Security Was Foreseeable or at Least That the Facts Adduced Raised a Question of Fact for Trial

In *Miller*, *supra*, plaintiff satisfied the required threshold showing by offering evidence that with respect to her own dormitory "there had been reports to campus security of men being present in the women's bathroom. Claimant herself had complained twice to the Assistant Quad Manager of her dormitory area about nonresidents loitering in the dormitory lounges and hallways when they were not accompanied by resident students." *Id*. at 509. Furthermore, all of the dormitory doors were equipped with locks which the State, as a matter of policy, did not lock. The Court held that the defendant breached its "duty to take the rather minimal security measure of keeping the dormitory doors locked." *Id.* at 513-14.

"It held that a genuine issue of fact existed as to whether the murder had been foreseeable given the criminal activity on campus, thereby giving rise to Cornell's duty to provide security."

In *Jacqueline S.*, *supra*, plaintiff, a 14-year-old resident of a New York City housing project, was abducted in the lobby of her building and taken to a room on the roof and raped. Plaintiff produced evidence that other violent criminal activity including rape and robbery had occurred in the complex, and indeed in her building. Although the police could not recall whether the criminal activity had occurred in plaintiff's building, the Court of Appeals held that the evidence produced by plaintiff was sufficient to raise a triable issue of fact as to whether the crime had been foreseeable, thus requiring the Housing Authority to have taken security measures.

In *Nieswand v. Cornell University*, 692 F. Supp. 1464, at 1468-69 (N.D.N.Y. 1988), plaintiff's decedent was shot in her dormitory room by the rejected boyfriend of her roommate. It was never determined how the intruder gained entrance to the dormitory, and the University's security department had no records of any problem with the assailant. Moreover, no murder or attempted murder had ever occurred on campus prior to the tragedy. Nonetheless, on plaintiff's showing that in the three years prior to the shooting, Cornell experienced 4 rapes, 8 robberies, and 51 total assaults, as well as over 3,200 other burglaries and larcenies, the District Court denied Cornell's motion for summary judgment. It held that a genuine issue of fact existed as to whether the murder had been foreseeable given the criminal activity on campus, thereby giving rise to Cornell's duty to provide security.

In Kahane v. Marriott Hotel Corp., 249 A.D.2d 164 (1st Dep't 1998), a Rabbi who held controversial opinions was shot and killed at the hotel while giving a speech to his followers. The Court held that given the Rabbi's notoriety, there was a question of fact as to whether it was reasonably foreseeable that additional security measures were required to be taken when he addressed an audience in the banquet room.

"Where an employee acts for purely personal reasons unrelated to the furtherance of the employer's business, an employer cannot be held responsible."

In *Nash*, *supra*, plaintiff sued for injury occasioned by the 1993 bombing in the parking garage of the World Trade Center. Plaintiff produced documentary evidence that as early as 1983, the Port Authority had received several reports warning of possible bombs in the building, and reports and inter-office memoranda regarding "target-hardening" security measures that should be taken, including in the under-building garage, which were not taken. Upholding the trial court order denying defendants' motion to set aside the jury verdict, the First Department held that the documentary evidence in the case permitted the inference that defendant was on notice that a devastating car-bombing in the subgrade garage of its complex was a very real possibility, and thus defendants had a duty to take the appropriate security measures under the circumstances.

Act Unfolding or in Progress

It also must be noted that evidence of prior similar criminal acts may not be necessary in instances where the property owner has knowledge of specific unfolding circumstances that render the criminal act foreseeable, yet the owner fails to take action to prevent the criminal act from occurring. For example, in *Matz v. Nettles*, 137 A.D.3d 667 (1st Dep't 2016), the Court found that issues of fact remained where a restaurant patron was acting aggressively throughout the evening and it was reasonably foreseeable that his continued presence on the premises might lead to the physical injury of other restaurant patrons.

"For the most part, employer liability will turn on the above doctrine, and the question of safeguarding the premises from foreseeable acts of third persons does not arise."

Similarly, in *Rivera v. 21st Century Rest., Inc.*, 199 A.D.2d 14 (1st Dep't 1993), the Court held a restaurant

owner was not entitled to summary judgment where the owner had notice of criminal activity on the premises 20 minutes prior to a resulting assault on plaintiff, yet failed to promptly contact police.

a. Vicarious Liability

Respondeat Superior

An employer is only liable under the doctrine of respondeat superior for torts committed by an employee where the conduct is of the kind which he is authorized to perform…and which is 'actuated at least in part, by a desire to serve the master.'" *Massey v. Starbucks Corp.*, 2004 WL 1562737, 2004 U.S. Dist Lexis 12993 (S.D.N.Y. 2004). Where an employee acts for purely personal reasons unrelated to the furtherance of the employer's business, an employer cannot be held responsible. *Doe v. Guthrie Clinic, Ltd.*, 22 N.Y.3d 480 (2014) (holding that defendant medical clinic was not vicariously liable for breach of patient confidentiality where nurse acted solely for personal reasons by revealing that her friend's boyfriend was receiving treatment for a sexually transmitted disease); *Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932, 933 (1999); *Sandra M. v. St. Luke's Roosevelt Medical* Center, 33 A.D.3d 875 (2d Dep't 2006).

"At times, however, the question of whether an employee acted within the scope of his or her duties falls into a fact-intensive gray area that does not lend itself to resolution upon motion for summary judgment."

For the most part, employer liability will turn on the above doctrine, and the question of safeguarding the premises from foreseeable acts of third persons does not arise. Often the issue of vicarious liability under the doctrine of respondeat superior is straightforward, such as where an employee commits a crime involving an act of violence or sexual depravity for which no legitimate business purpose can exist. *See, e.g.*, *Mayo v. New York City Transit Authority*, 124 A.D.3d 606 (2d Dep't 2015) (holding that Transit Authority was not vicariously liable for employee's rape of a child, but finding that issues of fact remained on separate negligent supervision cause of action); *Rodriguez v. Judge*, 132 A.D.3d 966 (2d Dep't 2015) (church was not vicariously liable for assault and battery of a pedestrian involving the church's treasurer and her husband); *DeJesus v. DeJesus*, 132 A.D.3d 721 (2d Dep't 2015) (building owner was not vicariously liable for superintendent's intentional assault of tenants with a chemical drain unclogging agent); *Vicuna v. Empire Today, LLC*, 128 A.D.3d 578 (2015) (warehouse operator not vicariously liable for employee's assault of carpet installer arising from a work dispute); *Gui Ying Shi v. McDonald's Corp.*, 110 A.D.3d 678 (2d Dep't 2013) (McDonald's not vicariously liable for employee's assault of customer arising from dispute over whether customer's child had ordered a hamburger or cheeseburger). Accordingly, where an employee's violent act is not in furtherance of the employer's business, such as in cases involving sexual or other assault, the employer/premises owner cannot be held liable to the plaintiff for injuries caused by the employee under the doctrine of respondeat superior liability (although claims for negligent hiring, retention or supervision may still be viable).

"The Court found that the evidence presented at trial was sufficient to establish that the bouncers were acting within the scope of their employment when they used excessive physical force to remove the two patrons from the premises."

At times, however, the question of whether an employee acted within the scope of his or her duties falls into a fact-intensive gray area that does not lend itself to resolution upon motion for summary judgment. For example, in *Hormigas v. Village East Towers, Inc.*, 137 A.D.3d 406 (1st Dep't 2016), the Court addressed the question of whether a security company was subject to vicarious liability for injuries caused by its security guard while operating a resident's motor vehicle, where evidence suggested that the vehicle was driven outside of the building by the security guard for personal use without the owner's permission. The owner denied ever giving permission to the security guard to operate his vehicle outside of the building's garage, and testified that he had only given the guard the keys to move the car within the garage at certain times when the facility was being repaired. The lower court had held the security guard had essentially stolen the car, and the record showed the security guard was in plainclothes and not actually on duty at the time he drove the vehicle from the building.

Nonetheless, the security guard testified that the vehicle owner asked him to "look after" and "take care" of the vehicle earlier that day. The security guard also testified that he believed the request to "take care of" the vehicle constituted permission to operate it to perform tasks such as washing the vehicle, charging its battery, and changing its oil, which he claimed to have done prior to the accident. Further, the record showed that the employer security company issued written directives to its security guards that they should perform "reasonable special requests by clients," such as taking packages to the post office upon request. Ultimately, the Court considered the conflicting testimony and was unwilling to decide as a matter of law whether the security guard was a criminal

joyrider or diligent employee, and held that there were triable issues of fact as to whether he was acting within the scope of his employment in operating the vehicle when the accident occurred.[3]

Violent Acts Committed by Security Personnel

Under certain circumstances violent acts of an employee may give rise to vicarious liability chargeable to the employer where the conduct at issue flows from the employee's scope of duties in providing security for the employer's business. Where the employee's duties inherently involve the risk of physical confrontation, the Court is less likely to find that an employee's use of force, even if arguably excessive, falls outside the scope of his or her employment. For example, in *Giambruno v. Crazy Donkey Bar and Grill*, 65 A.D.3d 1190 (2d Dep't 2009), a patron was suddenly attacked by an unknown assailant. When his girlfriend and uncle came to his aid, bouncers forcibly removed the three, beating the uncle and throwing the girlfriend over a retaining wall. The Court found that the evidence presented at trial was sufficient to establish that the bouncers were acting within the scope of their employment when they used excessive physical force to remove the two patrons from the premises. Hence, it upheld the jury's verdict which found the bar's owner liable for plaintiffs' injuries under the doctrine of respondeat superior. *See also Jones v. Hiro Cocktail Lounge*, 139 A.D.3d 608 (1st Dep't 2016) (issue of fact existed where security guard's assault on patron arguably occurred within the scope of security guard's employment). *Fauntleroy v. EMM Group Holdings LLC*, 133 A.D.3d 452 (1st Dep't 2015) (holding that bouncer who punched plaintiff in the face may have acted within scope of employment, providing proper basis for claim of respondeat superior liability against nightclub); *but see Randolph v. Rite Aid of New York, Inc.*, 121 A.D.3d 599 (1st Dep't 2014) (holding that store owner was not vicariously liable and had no duty to protect shoplifter from assault by security guard armed with a baseball bat).

"Knowledge of types of behavior that are dissimilar to the act that caused the injury is not *sufficient to constitute prior notice regarding the employee's propensity to commit the act complained of."*

b. Negligent Hiring, Retention, Supervision

Employers can also be held liable for criminal activity of an employee under the theories of negligent hiring, retention or supervision. A plaintiff asserting a negligent hiring cause of action must demonstrate that the defendant had specific prior knowledge of the employee's propensity to commit the act alleged, which cannot be inferred from the mere happening of the complained of incident. *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542 (2002); *Santamarina v. Citrynell*, 203 A.D.2d 57 (1st Dep't 1994); *Sheila C. v. Povich*, 11 A.D.3d 120, (1st Dep't 2004). Moreover, "[t]here is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee." *Yildiz v. PJ Food Serv., Inc.*, 82 A.D.3d 971, 972 (2d Dep't 2011).

"The court found that the contracting company bore no vicarious liability where the employee committed the tort for personal motives unrelated to the furtherance of the employer's business."

Knowledge of types of behavior that are dissimilar to the act that caused the injury is *not* sufficient to constitute prior notice regarding the employee's propensity to commit the act complained of. Thus, "[e]ven assuming defendants were aware of [a scout leader's] alleged improper use of alcohol and cigarettes, [such knowledge is] insufficient as a matter of law to constitute notice to defendants" that there was a danger of sexual assault. *Steinborn v. Himmel*, 9 A.D.3d 531 (3d Dep't 2004); *Glover v. Augustine*, 38 A.D.3d 364 (1st Dep't 2007). (However, the court found a question for the jury as to whether the rape was foreseeable, as a routine background check would have revealed that the scout leader had a lengthy criminal record, including convictions for sexual abuse in the first degree, and that he was a registered sex offender).

To defeat a claim of negligent hiring or retention, a defendant only need to demonstrate that it acted with reasonable care in hiring, retaining, and supervising the employee by, for example, submitting evidence that during the six years the employee had worked for the enterprise prior to the incident, he received positive reviews. *G.G. v. Yonkers General Hosp.*, 50 A.D.3d 472 (1st Dep't 2008).

In *Ostroy v. Six Square LLC*, 100 A.D.3d 493 (1st Dep't 2012),[4] an apartment complex tenant was murdered by undocumented immigrant who worked for a contracting company retained by the owner of the apartment below decedent's to make renovations. The immigrant confessed to murder during the course of a robbery and was found guilty at a bench trial. The estate brought suit against the contractor's company, the apartment's owner, and the landlord alleging, among other things, respondeat superior, negligent hiring, retention, training, and supervision, and negligent security. The court found that the contracting company bore no vicarious liability where the employee committed the tort for personal motives unrelated to the furtherance of the employer's business. The contractor was also absolved of liability for negligent hiring, etc., as there was no evidence that it was on notice

of any violent propensity on the part of its employee. Rather, the employee was always happy and agreeable. Lastly, the Court held that the landlord was not liable under a theory of negligent security because there was no evidence demonstrating that the owner knew or had reason to know of conduct on part of construction workers in the building that would likely endanger a tenant, as required to support plaintiff's action for negligent security. *See also*, *Saint Robert v. BHAP Housing Development Fund Co.*, 124 A.D.3d 752 (2d Dep't 2015) (owner of home for elderly not liable for assault by security guard where he showed no prior violent propensity); *Doe v. Madison Third Bldg. Companies, LLC*, 121 A.D.3d 631 (1st Dep't 2014) (employer not liable for negligent hiring of security guard who assaulted and raped a tenant where there was "no notice" to the employer he would commit the assault);

c. Assumption of Duty

In the absence of a legal obligation to protect tenants from criminal conduct by third parties, a landlord can nevertheless be held liable under the theory of "assumed duty" where he voluntarily provides security but fails to do so carefully and omits to do what an ordinary prudent person would do in accomplishing the task. *Wolf v. City of N.Y.*, 39 N.Y.2d 568 (1976). Merely assuming a duty to provide some form of security, however, does not create automatic liability. Rather, an assumed duty arises where the failure to exercise due care *increases* the risk of harm to the plaintiff or where the harm suffered was due to plaintiff's reasonable *reliance* on the voluntary undertaking and that he tailored his own conduct accordingly. *Nallan*, *supra,* 50 N.Y.2d at 522.

"The Appellate Division affirmed the decision of the lower Court that held questions of fact exist as to whether, by calling for a cab, defendants assumed a duty to plaintiff, such that defendants' conduct placed plaintiff in a more vulnerable position than plaintiff would otherwise have been had they called 911."

In *Nallan*, *supra*, plaintiff was shot while in lobby of defendants' building at time when lobby attendant employed by defendants was away from his desk. The Court of Appeals stated [in dicta, after ordering a second trial due to an inconsistent jury verdict] that at the second trial, plaintiff could support a theory of "assumed duty" upon a showing that plaintiff was familiar with the building's after-hours procedures and expected that an attendant would be present, and that he was therefore lulled into a false sense of security and neglected to take the precautions he might otherwise have taken upon entering the building.

In *Jacobs v. Helmsley-Spear, Inc.*, plaintiff was robbed at gunpoint while walking to the garage of her apartment. The electronic garage door, which the landlord had voluntarily undertaken to install, was broken at the time of the incident. Plaintiff testified that she would have entered the garage to safety "but for the fact that the locking mechanism was inoperable." Thus, the Court held that because the landlord "installed a security system which by its very nature would induce tenants to use that entrance to the garage as readily as the entrance within the building" plaintiff was "lulled into a false sense of security," thereby demonstrating reasonable reliance. 121 Misc.2d 910, 469 N.Y.S.2d 555 (N.Y. Civ. Ct. 1983) (citing *Nallan*, *supra*).

"What safety precautions may reasonably be required of landowner, who holds his land open to public, to make his premises safe for public is almost always question of fact for jury."

In *Kranenberg v. TKRS Pub, Inc.*, 99 A.D.3d 767 (2d Dep't 2012), an altercation arose between a regular patron and another customer in a bar. The regular patron suffered a blow to the head and was knocked unconscious. Instead of calling 911, the bar owner directed his staff to call a cab to take the injured customer home, where he lived alone. In the ensuing days, the customer's injury worsened. The customer brought an action against the bar alleging, among other things, the negligent performance of an assumed duty of care. The Appellate Division affirmed the decision of the lower Court that held questions of fact exist as to whether, by calling for a cab, defendants assumed a duty to plaintiff, such that defendants' conduct placed plaintiff in a more vulnerable position than plaintiff would otherwise have been had they called 911.

d. Statutory or Regulatory Duty

The duty of a premises owner to provide minimal security may also arise under city or state building and administrative codes. For instance, New York Multiple Dwelling Law section 50-a(1) provides that "[every] entrance from the street, passageway, court, yard, cellar" of a multiple dwelling erected or converted after January 1, 1968 "must be equipped with one or more automatic self-locking doors." And, New York Administrative Code section 27-371(j)(b)(2), provides that "[d]oors to dwelling units shall be equipped with a heavy duty latch set and a heavy duty dead bolt operable by a key from the outside and a thumb turn from the inside."

However, a "breach of [a] landlord's general statutory duty to maintain [a] leased premises in safe condi-

tion does not impose liability without fault, but rather requires showing of elements comprising common-law negligence." *Juarez v. Wavecrest Management Team Ltd.*, 88 N.Y.2d 628 (1996). Stated differently, a violation of a building or administrative code does not give rise to strict liability but rather is only some evidence of negligence. Moreover, a plaintiff will still have to demonstrate proximate causation.

"The First Department reversed the jury's verdict, holding that under the circumstances, the one locked door was sufficient to discharge defendant's duty to the plaintiff."

In *Williams v. Citibank, N.A.*, 247 A.D.2d 49 (1st Dep't 1998), liability was not imposed on a bank for the attack on a customer using the ATM machine inside its vestibule because plaintiff could not show any history of crimes in the vestibule. The Court specifically rejected plaintiff's theory that ATM machines attracts criminal activity, and thus extra precautions should have been taken. Moreover, the Court held that even if Citibank had a duty to plaintiff, it had fully complied with Administrative Code of the City of New York § 10-160 with respect to the security requirements that an ATM be equipped the entry doors with an operative locking device that permitted ingress only by use of an ATM card, adequate lighting, an unobstructed view of the ATMs, video surveillance cameras, and a free telephone service that automatically connects the caller to a customer-service person.

IV. Breach of Duty

Once a duty on the part of the premises owner has been established, plaintiff must show that defendants breached their duty by failing to maintain "minimal security measures." *Miller*, *supra*, 62 N.Y.2d at 513. What safety precautions may reasonably be required of landowner, who holds his land open to public, to make his premises safe for public is almost always question of fact for a jury. In assessing reasonableness of landowner's conduct, the jury may take into account such variables as seriousness of risk of harm and the cost of various safety measures. *Nallan*, *supra*, 50 N.Y.2d at 519. The law does not require that a landlord provide state of the art or perfect security, but "only reasonable security measures." *James v. Jamie Towers Housing Co.*, 99 N.Y.2d 639(2003); *Tarter v. Schildkraut*, 151 A.D.2d 414, 415 (1st Dep't 1989); *Iannelli*, *supra*. Generally, the threshold requirement of minimal security measures is one functional lock and a functional intercom system.

In *Tarter*, *supra*, the inner vestibule door, which plaintiff was entering when she was shot, had a functioning lock and working intercom system. The First Department reversed the jury's verdict, holding that under the circumstances, the one locked door was sufficient to discharge defendant's duty to the plaintiff.

In *Novikova*, *supra*, the court held that by providing an inner door lock, an intercom, surveillance camera, and evening doorman the landlord "satisfied their duty to provide minimal precautions against the foreseeable criminal acts of third parties." 258 A.D.2d at 152-53. Moreover, the failure to provide a doorman 24 hours per day did not raise a triable issue of fact that defendant breached the duty of care.

If a security guard is provided, it is not a breach of duty where the guard is not present at his post one-hundred percent of the time. In *James*, *supra*, the Court of Appeals held that defendant landlord discharged its duty to take minimal security precautions by providing locking doors, an intercom service, and 24-hour security, notwithstanding the fact that the security guard was not at his post at the time of the attack.

In *Iannelli v. Powers*, *supra*, where the decedent was killed by an assailant who gained access to the locked building when another tenant opened the door, the Court reversed the jury verdict that defendant's had breached its duty to provide greater security than a locked entrance. Specifically, the Court held that even assuming that the defendants had a duty to adopt security measures in the first place, the plaintiff failed to "adduce testimony from a qualified expert in the field of building security…regarding the deficiencies in security, if any,… and what additional safety measures, if any, could reasonably have been undertaken…." *Id*. at 163.

V. Proximate Cause

As with all negligence claims, it is plaintiff's burden to show that defendants' conduct in allegedly failing in their obligation to take reasonable precautionary measures to make premises safe for visiting public was a substantial causative factor in the sequence of events that led to plaintiff's injuries. *Nallan*, *supra*, 50 N.Y.2d at 519.

Intruder Status

"In premises security cases…the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in the building can be established only if the assailant gained access to the premises through a negligently maintained entrance. Since even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant, ***plaintiff can recover only if the assailant was an intruder.***" *Burgos, supra*, 92 N.Y.2d at 550-551 (emphasis added).

In *Hierro v. New York City Housing Authority*, 123 A.D.3d 508 (1st Dep't 2014), the Court held that a tenant opposing a motion for summary judgment to dismiss a negligent security claim must raise triable issues of fact as to whether "it was more likely than not that the assail-

ants were intruders who gained access to the premises through the negligently maintained entrance." *Id*. at 508. Accordingly, no issues of fact will be found where "there is no evidence from which a jury could conclude, without pure speculation, that the assailants were intruders, as opposed to tenants or invitees." *Id*. at 508-09.

Similarly, in *Smith v. New York City Housing Authority*, 130 A.D.3d 427 (1st Dep't 2015), the Housing Authority established its prima facie entitlement to summary judgment by submitting proof that it remained unknown whether plaintiff's assailant was an intruder, as opposed to another tenant or guest lawfully on the premises. In opposition, plaintiff failed to present evidence from which the "intruder status" of the assailant could be reasonably inferred.

Plaintiff's Conduct as an Intervening/Superseding Cause

A plaintiff's own conduct of responding to a knock or a ring by opening a locked apartment door that contains a peephole without first looking through the peephole to ascertain who is on the other side may constitute an intervening and superseding event that breaks the causal chain and severs the landlord's liability. This is true even where a plaintiff can demonstrate that the landlord's security measures were not reasonable. *S.M.R.K., Inc. v. 25 West 43rd Street Co.*, 250 A.D.2d 487 (1st Dep't 1998); *Benitez v. Paxton Realty Corp.*, 223 A.D.2d 431 (1st Dep't 1996).

"Similar to the cases where a plaintiff cannot provide sufficient proof that the assailant was an intruder to the building, and not a tenant or visitor, the evidence that a victim was targeted by the assailant has been held to be an intervening cause of injury, and severs the landlord's liability."

In *Elie v. Kraus*, 218 A.D.2d 629 (1st Dep't 1995) plaintiff lived in a garden apartment complex where the individual tenant's own apartment doors were the main line of defense against intruders. The Court held that the fact that plaintiff buzzed open his door without first checking who was at the door, after dark, despite the fact that he had a peephole in his front door, to be an intervening cause of the attack, thus insulating the landlord from liability.

A contrary result was reached in *Mason v. U.E.S.S. Leasing Corp.*, 96 N.Y.2d 875 (2001). There, the Court of Appeals upheld lower court decisions, finding that plaintiff's action of opening the door to her attacker, thinking that it was her boyfriend, without first looking through the peephole was *not* an intervening cause of the attack as a matter of law. The Court reasoned that the complex's security could be found negligent under the circumstances in allowing entrance to the attacker, because security knew that the assailant "had…been involved in several criminal acts in the complex, including robbery, attempted rape and the beating of a security guard; that he had been arrested on the premises; and that defendants kept an arrest photo of him." *Id*. at 878. *Mason* is distinguishable from *Elie*, however, because in *Mason* plaintiff's locked apartment door was not the primary security measure to keep intruders from entering her apartment.

Targeted Victims

Similar to the cases where a plaintiff cannot provide sufficient proof that the assailant was an intruder to the building, and not a tenant or visitor, the evidence that a victim was targeted by the assailant has been held to be an intervening cause of injury, and severs the landlord's liability. Thus, where a clearly articulated motivation for an assault is shown, the "truly extraordinary and unforeseeable" actions of the assailant "serve to break the causal connection' between any negligence on the part of the defendants and the plaintiff's injuries. *Simmons v. Kingston Hgts. Apartments, L.P.*, 39 Misc 3d 1228(A) (Sup. Ct. 2013) (citing *Tarter*, *supra)*.

"Accordingly, the court held that such intentional conduct was, as a matter of law, the sole proximate cause of decedent's death."

In *Tarter*, *supra*, in addition to finding that the defendants did not breach their duty because they provided reasonable security, the Court reversed a jury verdict, holding that "the conclusion is inescapable that plaintiff's ex-lover was intent on harming plaintiff. He had stalked her for that purpose. Given the motivation for the assault, his acts were truly extraordinary and unforeseeable and served to breach the causal connection between any negligence on the part of defendants and the plaintiff's injuries." *Tarter*, 151 A.D.2d at 416.

In *Flores v. Dearborne Management, Inc.*, 24 A.D.3d 101 (1st Dep't 2005), the estate of a woman who was the victim of home invasion, resulting in her execution-style murder and that of five other people, brought a negligent security action against the owner of the building in which the murders took place. Subsequent to the killings, but before the civil trial against the landowner, the perpetrators of the crime were arrested and convicted of second degree murder. In reversing the order of the lower court and nullifying a $4.2 million jury verdict, the Appellate Division found that the murders were the result of a premeditated criminal plot of the perpetrators to "seize a particular woman to gain entry to an apartment, execute

one of the residents of that apartment, and leave with any money they could find." Accordingly, the court held that such intentional conduct was, as a matter of law, the sole proximate cause of decedent's death. *Id.*

"However, the owner or possessor of land can contractually transfer the risk to its security contractor through indemnification provisions."

Similarly, in *Rivera v New York City Housing Auth.*, 239 A.D.2d at 115 (1st Dep't 1997) the argument that defendant's failure to repair the front door lock was a proximate cause of a tenant's assault, during which she was stabbed multiple times, was "undermined by the clear evidence that [the] attack was motivated by a preconceived criminal conspiracy to murder plaintiff's stepbrother who lived with her…[and thus] it was most unlikely that any reasonable security measures would have deterred the criminal participants."

Likewise, in *Flynn v. Esplanade Gardens, Inc.*, 76 A.D.3d 490, 492 (1st Dep't 2010), the assault of plaintiff in his apartment by his former girlfriend and a male companion was held to be a targeted attack that was not proximately caused by any breach of duty by security personnel since there was no showing of anything which would have put the guard on notice that plaintiff's former girlfriend and her companion were entering the building with the intention of causing harm to plaintiff. Moreover, the evidence demonstrated that during the preceding year, plaintiff had never objected when, almost daily, the girlfriend was allowed to proceed to plaintiff's apartment without being announced. Further, plaintiff failed to tell security to deny his former girlfriend entry into the building once he had terminated the relationship.

"The ability of the landowner to transfer his duty to a tenant is set forth in lease provisions, and general contract principles of indemnity will apply."

In the aforementioned cases it is the assailant's predetermined motivation to gain access to the premises to commit an unforeseeable crime against a specific victim that severs the causal connection between property owner's security measures and the occurrence of the criminal act. *See also Cerda v. 2962 Decatur Ave. Owners Corp.*, 306 A.D.2d 169 (1st Dep't 2003) (where plaintiff was the target of a murder conspiracy, his allegation of negligent security was properly dismissed). In other words, where an assailant is motivated to commit a crime against a specific victim, the security measures on the premises will not be deemed a proximate cause of the crime's commission absent some additional element of foreseeability (e.g., if the victim previously advised security that he or she may be the target of a crime, or if the notoriety of the victim makes the possibility reasonably foreseeable).

Risk Transfer Considerations

a. Security Contracts—Indemnity

A contracting security company owes no duty of care to a non-contracting third party arising out of its contractual obligation or the performance thereof unless: it increases the risk; plaintiff reasonably relies on the performance of the contract; or where the contractor entirely replaces the landowner's duties to maintain the premises safely. *Church v. Callanan Indus.*, 99 N.Y.2d 104, 752 N.Y.S.2d 254, 782 N.E.2d 50 (2002); *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579 (1994);

However, the owner or possessor of land can contractually transfer the risk to its security contractor through indemnification provisions. *McFall v. Compagnie Maritime Belge S.A.*, 304 N.Y. 314, 327–28 (1952). Such a determination must be made after review of the security contract scope of work and its indemnification clause. *See Stora v. City of New York*, 117 A.D.3d 557 (1st Dep't 2014) (in a case where the indemnification clause was triggered by an 'arising out of an act or omission' by the security contractor, the court held that questions of fact existed regarding whether security contractor was at least partly responsible for failure of perimeter security that led to men's shelter resident's being shot on shelter premises).

b. Out-of-Possession Landlord

An out-of-possession property owner is not liable for injuries that occur on the property unless the owner has retained control over the premises or is contractually obligated to perform maintenance and repairs. *Kranenberg v TKRS Pub, Inc.*, 99 A.D.3d 767 (2d Dep't 2012) (an owner of a premises which was leased to a bar did not voluntarily assume duty of care to bar patron who was injured in altercation with another customer); *Hepburn v. Getty Petroleum Corp.*, 258 A.D.2d 504, 684 N.Y.S.2d 624 (2d Dep't 1999) (out of possession landlord not liable for shooting during robbery of gas station).

"The doctrine of comparative negligence serves to diminish the amount of damages otherwise recoverable by the plaintiff where plaintiff's own conduct contributes to the cause of the injury."

The ability of the landowner to transfer his duty to a tenant is set forth in lease provisions, and general contract principles of indemnity will apply. The reservation of a right to enter the premises for purposes of inspection and repair constitutes sufficient retention of control to impose

liability for injuries caused by a dangerous condition *only* where the condition violates a specific statutory provision and there is a significant structural or design defect. *Id.* A landlord retains control over the premises where he is involved in the daily operations of the business in possession. For example, where landlord is principal shareholder of the corporation that owns the building and also owns and operates the business leasing the premises, he would not be considered an out-of-possession landlord. *See also Ahmad v. Getty Petroleum Corp.*, 217 A.D.2d 600, 629 N.Y.S.2d 779 (2d Dep't 1995); *Decorato v. Cozzoli Bros., LLC*, 825, 16 Misc.3d 1108(A) (Sup.Ct. Kings Co. 2007) (grocery store shooting).

VI. Affirmative Defenses

a. CPLR 1411—Comparative Negligence

The doctrine of comparative negligence serves to diminish the amount of damages otherwise recoverable by the plaintiff where plaintiff's own conduct contributes to the cause of the injury. Comparative negligence is an affirmative defense that must be pleaded and proved by the party asserting the defense. CPLR 1412. Apportioning liability among plaintiff and defendant is usually a question to be resolved by a jury.

"While it is clear that plaintiff must plead and prove an exception to Article 16, there is a division between New York Appellate Departments as to whether a defendant must plead and prove the Article 16 defense."

In order for premises owner to avail herself of the doctrine of comparative negligence, the plaintiff's own conduct must be a cause in fact of his or her own injury. *Arbegast v. Board of Educ. of South New Berlin Central School*, 65 N.Y.2d 161 (1985). As a practical matter, the circumstances that might arise where plaintiff could be held comparatively negligent are few and delicate to argue at trial, as they raise the ire of the jury if perceived as blaming or attacking the victim. However, a plaintiff could be assessed comparative negligence if, for example, he left open or unlocked the apartment window giving on the fire escape or invited the assailant into the premises, especially with some knowledge of an unsavory background.

b. CPLR Article 16—Joint and Several Liability

Under Article 16, the rule of joint and several liability, a defendant found 50% or less culpable is entitled to several liability status, and cannot be compelled to pay more than its equitable share of any judgment awarded to the claimant for *noneconomic* loss (i.e., pain and suffering). Pursuant to Section 1602(5), an intentional tortfeasor may *not* benefit from Article 16, nor may a multiple intentional tortfeasors apportion liability amongst themselves. Thus, where there are multiple tortfeasors and only one has acted intentionally, noneconomic loss *may* be apportioned against him, even if the criminal perpetrator is not a party to the action. *See Chianese v. Meier*, 98 N.Y.2d 270 (2002); PJI 2:275; *see also Roseboro v. NewYork City Transit Authority*, 286 A.D.2d 222(1st Dep't 2001); *Concepcion v. New York City Health and Hospitals Corp.*, 284 A.D.2d 37 (1st Dep't 2001); *Siler v. 146 Montague Associates*, 228 A.D.2d 33 (2d Dep't 1997) (landlord could seek apportionment of liability of non-party assailant over whom jurisdiction could have been obtained). *Cardenas v. Alexander Wolfe & Co.*, 303 A.D.2d 313 (1st Dep't 2003).

"It is worth noting that insurance policies often contain exclusions for intentional torts, such as assault and battery."

A plaintiff can avoid the application of apportionment to the non-party perpetrator only if he can show that he failed, using all due diligence, to obtain jurisdiction over the assailant. However, often the non-party perpetrator, having been successfully prosecuted, can be served at a correctional facility, making it difficult for the plaintiff to gain this exception.

While it is clear that plaintiff must plead and prove an exception to Article 16, there is a division between New York Appellate Departments as to whether a defendant must plead and prove the Article 16 defense. The Second Department holds that where plaintiff sues multiple defendants, Article 16 applies *unless* plaintiff establishes an exception and, therefore, defendants are not required to assert Article 16 as an affirmative defense. *Marsala v. Weinraub*, 208 A.D.2d 689 (2d Dep't 1994). Moreover, as defendants do not carry the burden of proof, they may not be required to supply a bill of particulars regarding the identity of possible additional tortfeasors. The First Department holds that an Article 16 defense must be pleaded only if it would likely surprise plaintiff or apportionment injects new factual issue into case. *Maria E. v. 599 West Associates*, 188 Misc. 2d 119 (Sup. Ct. Bronx County 2001). On the other hand, the Fourth Department holds that defendants, as parties seeking to limit their liability under CPLR 1603 have the burden of proof and must, therefore, plead Article 16 as an affirmative defense, see CPLR 3018(b), *and* provide a bill of particulars as to that defense, *Ryan v. Beavers*, 170 A.D.2d 1045 (4th Dep't 1991).

Reckless Disregard and Apportionment

CPLR 1602(7), entitled "Reckless Disregard," disallows the application of apportionment of non-economic recovery where a plaintiff can show that the defendant acted in reckless disregard of a risk, which action caused plaintiff's injury. To demonstrate defendants are not entitled to apportionment requires that plaintiff demon-

strate, by a preponderance of evidence, that "the actor has intentionally done an act of an unreasonable character in disregard of a *known or obvious risk* that was so great as to make it highly probable that harm would follow, and has done so with conscious indifference to the outcome." *Matter of NY City Asbestos Litigation*, 89 N.Y.2d 955 (1997). This is a very high standard for a plaintiff to prove at trial, and not many fact patterns permit application of this theory.

VII. Insurance Considerations

It is worth noting that insurance policies often contain exclusions for intentional torts, such as assault and battery. Thus, it has been held that insurers have no duty to defend and indemnify an employer for an employee's intentional acts, criminal or not. *Penn-America Group, Inc. v. Zoobar, Inc.*, 305 A.D.2d 1116 (4th Dep't 2003) (holding that due to the assault and battery exclusion, insurer had no duty to defend and indemnify bar owner for the bar bouncer's assault). However, where bodily injury caused by an occurrence, which is defined as "an accident," the incident will be deemed "unexpected, unusual, or unforeseen." Courts have found in such circumstances that an assault falls within the policy's coverage for claims of bodily injury arising out of an accidental occurrence, and that the assault and battery exclusion, which applies to intentional, known conduct, does not apply. *Essex Ins. Co. v. Zwick*, 27 A.D.3d 1092 (4th Dep't 2006); *Agoado Realty Corp. v. United Intern. Ins. Co.*, 95 N.Y.2d 141 (2000)(holding that pursuant to the policy, "murder" was an accident from the point of view of the policy holder, and thus was a covered occurrence under the policy). *See also Anastasis v. American Safety Indem. Co.*, 12 A.D.3d 628 (2d Dep't 2004) (where bouncer stepped on patron's leg unintentionally the act did *not* fall within insurance policy's exclusion for assault and battery, and the insurer had a duty to defend and indemnify).

"If motion practice is not available or successful in insulating the landowner from liability, additional strategies and considerations are available."

Moreover, public policy prohibits enforcement of an indemnity agreement where the agreement purports to indemnify a party for the intentional infliction of harm. *Austro v. Niagara Mohawk Power Corp.*, 66 N.Y.2d 674, 496 N.Y.S.2d 410 (1985). Thus, an agreement to indemnify may not provide indemnity against future criminal or illegal acts by employees.

VIII. Conclusion

The successful defense of a premises owner or possessor against a claim arising from the criminal conduct of a third party depends in the first instance on thorough investigation of the facts and circumstances surrounding the occurrence. Where the evidence demonstrates that there is no previous criminal history on the property or that the landlord is not otherwise on notice of the likelihood that criminal activity would occur there, the landlord owes no duty to the plaintiff as a matter of law, and a motion for summary judgment should be pursued. Where a landowner is found to owe a duty to the plaintiff, the investigation, and in most cases the opinion of a qualified security expert, will establish whether the landlord provided "minimal security measures." Although a Court can find that the security provided was sufficient as a matter of law, the determination is more often left for the jury to decide. If motion practice is not available or successful in insulating the landowner from liability, additional strategies and considerations are available. Because of the innate sympathy that a jury might have for the victim of a crime, establishing comparative liability of the plaintiff is a delicate exercise requiring care not to appear to be attacking the victim. The ability to apportion fault to the often judgment-proof criminal perpetrator is another means to reduce the defendant landowner's potential for joint liability and exposure for noneconomic damages.

Endnotes

1. The common-law duty to take minimal security precautions to protect tenants and members of the public from the foreseeable criminal acts of third parties is also applicable to managing agents in a negligent security cause of action. *Ungruhe v. Blake-Riv Realty LLC*, 90 A.D.3d 497 (1st Dep't 2011); *Wayburn v. Madison Land Ltd. Partnership*, 282 A.D.2d 301, 303 (1st Dep't 2001).
2. Note that a landlord is under a duty to exercise reasonable care to discover that such acts are being done or are likely to be done. *Nallan*, *supra*. Thus, ignorance of a pervasive criminal element in his property would provide no protection from liability if the exercise of reasonable care would have disclosed criminal activity to him.
3. Two justices issued a concurring opinion in which they argued that the record was sufficient to establish the security guard took the car without permission and, therefore, was not acting within the scope of his employment. They agreed with the majority, however, that the case should be submitted to jury on the separate allegation of negligent security.
4. This case concerns the murder of actress, Adrienne Shelly, who wrote and/or performed in a number of films, including the independent film *Waitress*.

New York Dram Shop Liability: Proving That the Tortfeasor Was "Visibly Intoxicated"

By Lisa Shiderly and David A. Glazer

The New York Dram Shop Act provides a cause of action for any plaintiff injured by an intoxicated person, or by reason of an intoxicated person, against the business that unlawfully sold or assisted in procuring alcohol for the tortfeasor.[1] The Act states that alcohol is unlawfully distributed when it is given or procured for any person actually or apparently under the age of twenty-one, a habitual drunkard, or any person who is *visibly intoxicated*.[2]

Proving that the tortfeasor was "visibly intoxicated" at the time he or she was served alcohol is at the heart of a Dram Shop action and is cause for much of the litigation surrounding the Dram Shop Act. This article provides an outline for those wishing to learn what nature and quality of proof will suffice to establish the "visibly intoxicated" element of a Dram Shop Act claim.

Applicable Statutes

The Dram Shop Act is comprised of New York General Obligations Law § 11-100 and 11-101 read in tandem with New York Alcoholic Beverage Control Law § 65. Section 11-100 provides a cause of action against "any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years."[3] Section 11-101 provides a cause of action against any person who has caused or contributed to the tortfeasor's intoxication by "unlawful[ly] selling to or unlawfully assisting in procuring liquor for such intoxicated person…"[4]

"Circumstantial evidence may be introduced as well to establish that the tortfeasor was visibly intoxicated."

Section 65 states that it is unlawful to furnish an alcoholic beverage to any person actually or apparently under the age of twenty-one, a habitual drunkard, or any "visibly intoxicated person."[5] Section 65(2) requires a predetermination that the customer was "visibly intoxicated" at the time of being served alcohol to "ensure that alcoholic beverage licensees have sufficient notice of a customer's condition before they can be subject to a potential loss of their license or to civil liability…for injuries subsequently caused by the intoxicated person."[6] This standard guarantees that a tavern owner who "had no reasonable basis for knowing that the consumer was intoxicated" would not be exposed to a regulatory or monetary penalty.[7]

Permissible Evidence—Direct vs. Circumstantial

The Court of Appeals has determined that the Legislature's use of the term "visible" in § 65(2) does not create a rigid requirement that direct proof in the form of testimonial evidence must be proffered from someone who observed the intoxicated person's demeanor at the time and place the alcohol was served.[8] Circumstantial evidence may be introduced as well to establish that the tortfeasor was visibly intoxicated.[9] Deciphering what nature and quality of circumstantial proof will suffice to successfully establish this element requires an analysis of case law and varies with changing fact patterns. Circumstantial evidence of visible intoxication that is based on multiple factors, each of which standing alone would be insufficient for a finding of liability, can constitute sufficient evidence when considered as a whole.[10]

"An expert must be of a field that is often called upon to make judgments about the manifestations of intoxication in live individuals."

BAC Level

The BAC test is the most common form of circumstantial evidence proffered.[11] The Court of Appeals has stressed that proof of a high BAC alone does not establish the visible intoxication determination that § 65(2) requires.[12] Permitting BAC tests to serve as a substitute for perceptible intoxication would run counter to the legislative goal of requiring an innkeeper's actual knowledge or notice of the customer's condition as a predicate for an "unlawful" sale.[13] Also, alcohol consumption can "differ greatly from person to person,"[14] resulting in a wide variation of tolerance levels.[15]

In *Romano v. Stanley,* an expert's affidavit was offered to show that because the intoxicated tortfeasor's BAC was high when she was served, she must have exhibited the symptoms of intoxication that are familiar to trained bartenders.[16] The court stated that because evidence of a high BAC level was the sole evidence provided, it was not enough to prove that the tortfeasor was visibly intoxicated at the time of service.[17]

In contrast, the expert's testimony in *McGilveary v. Baron* was deemed sufficient because the expert did not rely solely on the tortfeasor's BAC to reach his conclusion.[18] In addition to BAC level, the expert relied on the affidavit of the police officer who arrested the tortfeasor for driving while intoxicated.[19] The officer's affidavit reflected that the tortfeasor was stopped shortly after he left the bar and failed every sobriety test administered, had glassy eyes, a strong odor of alcohol, and impaired speech and motor coordination.[20] The expert's testimony concerning BAC level coupled with the police officer's statement was sufficient to prove visible intoxication and defeat defendant's motion for summary judgment.[21]

"The expert was a forensic scientist, as opposed to a forensic pathologist, whose qualifications and experiences included personal authoring of articles pertaining to the effects of alcohol on live individuals."

Similarly, in *Kish v. Farley,* the expert's testimony was sufficient to prove visible intoxication because the expert physician relied on eye-witness testimony and testimony of the tortfeasor's co-habitant in addition to the tortfeasor's BAC level.

Qualifications of the Expert

An expert must be of a field that is often called upon to make judgments about the manifestations of intoxication in live individuals.[22]

In *Romano,* the court determined that the qualifications of the expert were not probative to prove visible intoxication.[23] The expert was a clinical forensic pathologist who specialized in the performance of autopsies, not determining the manifestations of alcohol in live individuals.[24] The court stated that more would have to be presented to defeat defendant's motion for summary judgment, such as personal knowledge acquired through his own practice and studies or reference to other literature that provides technical support for how he arrived at his conclusions.[25]

"Proving that the tortfeasor was visibly intoxicated does not require direct evidence, such as eye-witness testimony."

The expert's qualifications in *Maiola v. Velazco* were deemed sufficient to prove visible intoxication.[26] The expert was a forensic scientist, as opposed to a forensic pathologist, whose qualifications and experiences included personal authoring of articles pertaining to the effects of alcohol on live individuals.[27] The expert's conclusions were based on his personal knowledge acquired through his practice and through literature he wrote and studied.[28] His conclusions were also based on affidavits of individuals who personally observed the tortfeasor's behavior.[29] This proof was sufficient to defeat defendant's motion for summary judgment.[30]

Similarly, in *Adamy v. Ziriakus,* the expert's testimony was deemed sufficient to prove visible intoxication because it referenced his medical training, his teaching career at several different institutions, and articles he wrote germane to his knowledge of alcohol and its effects, and his experience as a medical examiner.[31] The court stated that the expert's testimony coupled with eye witness testimony from police officers provided ample evidence that the tortfeasor was visibly intoxicated at the time of being served by the tavern owner.[32]

An Expert Must "Do More Than Just Infer"

For an expert's testimony to successfully prove that the tortfeasor was visibly intoxicated at the time of being served and defeat a defendant's motion for summary judgment, the expert must be able to support his conclusions with sufficient scientific information.[33]

"The missing link—and the final straw for the court—in Sorensen *was the expert's inability to equate a particular BAC with a specific set of physiological reactions."*

In *Sorensen v. Denny Nash Inc.*, an expert's affidavit was insufficient to prove visible intoxication because it failed to impart information which would lend validity to his conclusions.[34] Working backwards, the expert inferred that because the tortfeasor was found to have a .16 BAC level shortly after 5:30 a.m., he must have been intoxicated and exhibited signs of being intoxicated while being served at the tavern.[35] The expert claimed that his conclusions were based on "certain" scientific rates, studies and data, but he did not identify any such studies or data in his affidavit.[36] The court deemed these references "nonspecific and vague and unaccompanied by any evidence establishing their reliability."[37] An expert must "do more than just infer" that because the tortfeasor consumed a certain amount of alcohol, he must have been intoxicated during a time period three hours before, and more importantly, appeared so.[38]

Sorensen, like *Romano*, serves as a "pungent reminder to those that represent plaintiffs that they had better choose their expert carefully."[39] The missing link—and the final straw for the court—in *Sorensen* was the expert's inability to equate a particular BAC with a specific set of physiological reactions.[40] An expert's conclusions are of no probative value and insufficient to defeat a de-

fendant's motion for summary judgment without the ability to support his conclusions with sufficient scientific information.[41]

"An expert witness must have the appropriate qualifications and rely on these qualifications when drawing a conclusion."

Conclusion

Proving liability under the Dram Shop Act requires an initial showing that the tortfeasor was "visibly intoxicated" at the time of being served alcohol. Proving that the tortfeasor was visibly intoxicated does not require direct evidence, such as eye-witness testimony. Circumstantial evidence of visible intoxication that is based on multiple factors constitutes sufficient evidence when considered as a whole, even if the evidence would be insufficient for a finding of liability standing alone. BAC level cannot be the sole information relied upon in an expert's testimony, but it can be used to supplement other evidence. An expert witness must have the appropriate qualifications and rely on these qualifications when drawing a conclusion. Finally, an expert cannot simply make inferences about the tortfeasor's intoxication; the expert must be able to support his conclusions with scientific information.

Endnotes

1. N.Y. Gen. Oblig. Law §§ 11-100, 11-101 (McKinney 2016).
2. N.Y. Alco. Bev. Cont. Law § 65 (McKinney 2016).
3. § 11-100.
4. § 11-101.
5. § 65.
6. *Id.* at § 65(2); Governor's Approval Mem., 1986 McKinney's Session Laws of NY, at 3194.
7. *Romano v. Stanley*, 90 N.Y.2d 444, 449 (1997).
8. *Id.* at 450.
9. *Id.*
10. *Sullivan v. Mulinos of Westchester, Inc.*, 980 N.Y.S.2d 577 (2014).
11. *Romano*, 90 N.Y.2d at 450.
12. *Id.*
13. *Id.*
14. *Id.* (quoting *Burnell v. La Fountain*, 180 N.Y.S.2d 52 (1958)).
15. *Id.*
16. *Romano*, 90 N.Y.2d at 451.
17. *Id.*
18. *McGilveary v. Baron*, 772 N.Y.S.2d 775 (2004).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Romano*, 90 N.Y.2d at 452.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Maiola v. Velazco*, 12 Misc.3d 1178(A) (2006).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Adamy v. Ziriakus*, 92 N.Y.2d 396 (1998).
32. *Id.*
33. *Sorensen v. Denny Nash Inc.*, 671 N.Y.S.2d 559 (1998).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. New York Driving While Intoxicated § 40:3 (2d 3d. 2015).
40. *Id.*
41. *Sorensen*, 671 N.Y.S.2d at 559.

Lisa Shiderly is a law student at Pace Law School and is expected to graduate in 2017. David A. Glazer is a Partner at Shafer Glazer, LLP. His practice focuses on commercial trucking, products liability and premises liability cases. He has been honored as a Super Lawyer eight times.

The Dangers Of Pokémon Go

By Eva Brindisi Pearlman

It is a trend spreading all over the world. Children of the 90s rejoice as they reminisce on one of the favorite franchises of their childhood. Nintendo recently released the Pokémon Go app, an interactive and more modern way to bring this card game to life. In the game, players use their mobile device's GPS to locate, capture, battle and train virtual creatures called Pokémon, who appear on the screen as if they were in the same real world location as the player.

Pokémon Go is now on more android phones than the dating app Tinder and has been neck and neck in popularity with the social media platform Twitter, according to recent analytics. Pokémon Go made a whopping $35 million in revenue from in-app purchases in its first two weeks and brings approximately $1.6 million per day from its iPhone users alone. It remains the top selling app in the app store since its release.

While it seems like all fun and games, Pokémon Go has led users to unusual situations while attempting to catch their favorite Pokémon. A teen in Wyoming discovered a body in a river while catching water Pokémon. There have also been instances where criminals lure in users and attack them while they are distracted by the game. They use the geolocation feature to anticipate a location and the seclusion of unsuspecting users.

There have also been numerous reports of pedestrian injuries as well as at least one report of a pedestrian hit by car while playing Pokémon Go. Users are so enthralled with the game that they wander aimlessly through city streets, risking being struck by oncoming vehicles. Nintendo has placed a pop-up warning as the Pokémon Go app loads to warn its users prior to the start of the game to watch your surroundings as you play; however, this is a difficult task when users' eyes are glued to their phones while searching for nearby Pokémon, gyms and various poke-stops.

Pedestrian injuries due to distracted walking have been common since the age of texting began but Pokémon Go has taken the phrase "injured by a smart phone" to a whole new level. Pokémon Go users are bumping into stationary objects and people on the streets, resulting in minor bruises and scrapes. However, there have also been reports of more serious injuries resulting from falling. In Martinsburg, West Virginia, a 12-year-old boy suffered a broken femur while running in the dark and falling off a five foot high storm sewer. In California, two men fell off of a 90-foot ocean bluff cliff while playing Pokémon Go, resulting in them being taken to a trauma center. There is also a serious risk of being hit by a car, as pedestrians drift into the road to catch Pikachu, oftentimes blindly walking into oncoming traffic. In Tarentum, Pennsylvania, a 15-year-old teen girl was struck by a car while playing Pokémon Go and suffered a collar bone and foot injury that required hospitalization. If hit by a car, Pokémon Go users could suffer very serious injuries, including, broken bones or even death.

Pokémon Go has also hurt the fight against distracted driving. Forget changing the song on your iPhone, Pokémon Go has its users watching the road through their phone screen while searching for Pokémon. All of their focus is on where the Pokémon are and not where the road is. In Auburn, New York, a driver wrapped his car around a tree while playing Pokémon Go behind the wheel. In Baltimore, Maryland, a Pokémon Go user slammed into a parked police car while playing the game. These are very real situations and can lead to serious risks to pedestrians and motorists as a result of distracted walking or driving. If users are not paying attention, Pokémon Go could be a dangerous threat to entire communities.

Driving while using any mobile device is illegal and, worse yet, could have serious legal consequences if you cause harm or injury to someone. Further, studies have shown that 37% of your brain activity is focused on looking at your mobile device while it should be on driving. Your eyes may be on the road, but your brain is not.

Moreover, AAA found that mental distractions can last up to 27 seconds after the distraction has taken place. This type of unaware driving could lead to running stop signs, not paying attention to other drivers, and a slower reaction time. In no time at all, your vehicle can turn into a weapon if you do not invest 100 percent of your attention into driving, which could also have criminal and civil legal consequences.

There are several ways to prevent pedestrian or motor vehicle accidents or injury while playing Pokémon Go. Police are urging game users to be diligent and aware of their surroundings at all times while playing on the app. They also suggest playing with friends if the game takes you to new or unfamiliar places for safety. Most importantly, never play Pokémon Go while driving. Always put your phone away even before starting the car, and don't ever let your eyes linger from the road too long while driving. Distracted driving and walking has become an epidemic for deaths among people around the world. But it is 100% preventable. So, remember to be smart while you're out there playing Pokémon Go and trying to "catch them all"!

Eva Brindisi Pearlman is a Partner at the law firm of Brindisi, Murad, Brindisi & Pearlman.

New York Court of Appeals Upholds *Frye* Standards in Rejecting Plaintiff's Expert's "Symptom-Threshold" Methodology for Establishing Toxic Tort Exposure

By V. Christopher Potenza and Brian D. Barnas

In *Sean R. v. BMW of North America, LLC*[1] the New York Court of Appeals applied *Frye* standards for expert reliability to preclude expert testimony relative to causation in a toxic tort case. The facts of *Sean R.* are as follows: Guy R. purchased a new BMW 525i for his wife Debra in May 1989. In the spring of 1991, Debra began to notice a smell of gasoline in the vehicle that came and went. At times, the smell was so strong that it caused Debra headaches, dizziness, and throat irritation. Debra's mother also noticed the smell in the vehicle and said it made her nauseous and dizzy.

While the odor was present in the vehicle, Debra became pregnant with the plaintiff, Sean R. in July or August of 1991. In November, a fuel leakage into the car's engine compartment caused by a split fuel hose was discovered. In total, Debra had driven 6,458 miles in the eight months she smelled gasoline. Two years later, BMW of North America, LLC issued a recall of all 525i vehicles made between 1989 and 1991 due to defects in the feed fuel hoses. The recall report noted that customers had associated the defect with a conspicuous fuel odor.

"In her expert report, she explained that chemicals in gasoline vapor, specifically toluene and benzene, are causally related to an elevated risk of birth defects."

Sean R. was born without difficulty on May 13, 1992. However, testing revealed that he suffered from severe mental and physical disabilities.[2] Plaintiff commenced a personal injury action against BMW of North America, LLC, among others, in January 2008. He alleged that the vehicle's defective fuel hose caused his injuries by exposing him *in utero* to toxic gasoline vapor.

In furtherance of his claims, the plaintiff served notice of intent to rely on the testimony of expert witnesses Linda Frazier M.D., M.P.H. and Shira Kramer, M.H.S., Ph.D. Plaintiff's primary causation experts, Dr. Frazier and Dr. Kramer, were prepared to testify that Sean R.'s *in utero* exposure to gasoline vapor proximately caused his birth defects.

Dr. Frazier was expected to testify that Sean R's mother was exposed to 1,000 parts per million of gasoline vapor in the BMW. Dr. Frazier used a symptom to degree of exposure methodology to arrive at this conclusion. Specifically, the plaintiff's mother complained of headache, nausea, and throat irritation during exposure. According to studies cited by Dr. Frazier, a gasoline vapor concentration of at least 1,000 parts per million is required for such symptoms to occur. She also opined that unleaded gasoline vapor was capable of causing the type of birth defects Sean R. suffered. Based on these findings, Dr. Frazier concluded that the plaintiff's mother's high peak exposure to gasoline vapor during the first trimester of her pregnancy was the most likely cause of Sean R.'s injuries.

"While exposure to sufficient levels of a toxin does not always require a plaintiff to quantify exposure levels precisely, the Court of Appeals has never dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect."

Plaintiff's other causation expert, Dr. Kramer, reached a similar conclusion. In her expert report, she explained that chemicals in gasoline vapor, specifically toluene and benzene, are causally related to an elevated risk of birth defects. Based on the symptoms that the plaintiff's mother said she experienced and Dr. Frazier's estimate that plaintiff was exposed to 1,000 parts per million of gasoline vapor, Dr. Kramer further concluded that plaintiff's exposure to unleaded gasoline vapor was a substantial causative factor in plaintiff's birth defects.

The defendants moved to preclude the plaintiff's causation experts, arguing that the plaintiff's expert opinions lacked foundation as they did not use methods found to be generally accepted as reliable in the scientific community. In support of their motions, the defendants included affidavits from experts Anthony Scialli, M.D. and Peter Lees, Ph.D., which challenged the opinions of Dr. Frazier and Dr. Kramer for reaching novel conclusions and not using generally accepted principles and methodologies.

Supreme Court granted the defendants' motion to the extent that it precluded the testimony of Drs. Frazier and Kramer. The court determined that those experts did not rely on generally accepted methodologies in concluding that *in utero* exposure to unleaded gasoline vapor caused Sean R.'s injuries.[3] After granting plaintiff's motion for reargument, Supreme Court adhered to its original decision.[4] On appeal, the Appellate Division, First Department, affirmed.[5]

The Court of Appeals upheld the lower court's rulings that granted the defendants' motion to preclude plaintiff's experts' testimony at trial. The decision was penned by Justice Pigott, with Justices Rivera, Abdus-Salaam, Stein and Fahey concurring.[6] In so doing, the Court relied on

its previously established precedent for causation in toxic tort cases. In a toxic tort case, an expert opinion on causation must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation).[7] This three-part test is sometimes referred to as the *Parker* test.

Of particular importance to this case was the third requirement of the *Parker* test. While exposure to sufficient levels of a toxin does not always require a plaintiff to quantify exposure levels precisely, the Court of Appeals has never dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect. At a minimum, there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of the agent that are known to cause the kind of harm that the plaintiff claims to have suffered.

Even if the expert has met all of the requirements of *Parker*, the expert must arrive at his opinion through methods found to be generally accepted as reliable in the scientific community. Commonly referred to as the *Frye*[8] test, the question is whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally. Although unanimity is not required, the proponent must show consensus in the scientific community as to the methodology's reliability.

"In arriving at this conclusion, the Court of Appeals rejected Dr. Frazier's claim that it is accepted practice in occupational medicine to use standardized studies of symptoms as a guide when assessing exposures retrospectively."

In this case, the Court of Appeals concluded that Dr. Frazier and Dr. Kramer did not show that the plaintiff was exposed to sufficient levels of gasoline vapor to cause his claimed birth defects. In effect, the court held that the plaintiff's expert's causation showing failed to satisfy the third prong of *Parker*. In so holding, the Court of Appeals held that the methods utilized by the plaintiff's experts to arrive at the exposure level of 1,000 parts per million were not generally accepted as reliable within the scientific community.

In particular, the Court was not satisfied with how Dr. Frazier reached her conclusion that the plaintiff's mother was exposed to gasoline at a level of 1,000 parts per million. In reaching her conclusion, Dr. Frazier relied on the reports by the plaintiff's mother and grandmother that the smell of gasoline occasionally caused them nausea, dizziness, headaches and throat irritation. Dr. Frazier was essentially working backwards from reported symptoms to divine an otherwise unknown concentration of gasoline vapor. Importantly, the plaintiff and his experts did not identify any text, scholarly article or scientific study that approves of or applies this type of methodology, let alone a consensus as to its reliability.

"The Court of Appeals also addressed the admissibility of the odor threshold analysis method, which had been deemed admissible in other toxic tort cases, in analyzing Dr. Frazier's report."

In arriving at this conclusion, the Court of Appeals rejected Dr. Frazier's claim that it is accepted practice in occupational medicine to use standardized studies of symptoms as a guide when assessing exposures retrospectively. Dr. Frazier cited a couple of sources in support of her methodology, including the documentation report for gasoline by the American Conference of Governmental Industrial Hygienists, which synthesizes the results of controlled studies and states that the threshold for immediate, mild toxic effect is approximately 1,000 ppm. She also cited to a 1991 study in which subjects exposed to known quantities of toluene and ethanol experienced an increase in headaches as their exposure level increased, as well as a 2008 report on the safety of n-Butyl alcohol in cosmetic products.

These sources appeared to support Dr. Frazier's conclusion that there is a dose-response relationship between exposure to the chemical constituents of gasoline and symptoms of toxicity. However, and importantly, the Court of Appeals concluded that these sources did not establish the reliability of Dr. Frazier's methodology in this case. Those controlled studies did not support the inverse approach Dr. Frazier employed in this case—working backwards from reported symptoms to divine an otherwise unknown concentration of gasoline vapor. Dr. Frazier did not identify any study, report, article or opinion that admits or employs such a methodology.

"In sum, the Court of Appeals acknowledged that it is often difficult, if not impossible, for the plaintiff to quantify his past exposure to a substance."

The Court of Appeals also addressed the admissibility of the odor threshold analysis method, which had been deemed admissible in other toxic tort cases, in analyzing Dr. Frazier's report. The odor threshold of a substance is the level at which the substance can be detected by human smell. It follows that if a particular substance is detectable by human smell it must exist in quantities greater than or equal to the odor threshold.[9]

The Court of Appeals characterized Dr. Frazier's analysis in this case as a symptom threshold analysis rather than an odor threshold analysis. Had Dr. Frazier applied a true odor threshold analysis, she only could

have concluded that the plaintiff's mother was exposed to gasoline at a concentration of at least one part per million.[10] Instead, Dr. Frazier averred that there is a minimum threshold of gasoline vapor beneath which individuals do not experience headache, nausea or dizziness. Because the plaintiff's mother experienced headaches, nausea and dizziness, Dr. Frazier concluded she must have been exposed to at least that concentration. The Court rejected this analysis because the plaintiff did not show that such a "symptom-threshold" methodology, unlike the odor threshold methodology admitted in other cases, was generally accepted in the scientific community.

In sum, the Court of Appeals acknowledged that it is often difficult, if not impossible, for the plaintiff to quantify his past exposure to a substance. Despite the difficulties, practitioners in New York still must show that the plaintiff was exposed to sufficient amounts of a toxin to cause the injuries alleged. Further, the plaintiff must make this demonstration through generally accepted methodologies in the scientific community. The decision in *Sean R.* demonstrates how difficult it may be for the plaintiff to meet this burden, affirms previously articulated standards regarding toxic tort causation and expert methodology, and demonstrates that the Court will not accept expert conclusions divined by unsupported methodology.

Endnotes

1. 26 N.Y.3d 801 (2016).
2. The conditions that Sean R. suffered from listed by the Court of Appeals in its decision included spastic quadriparesis (a form of cerebral palsy), developmental delays, ventricular asymmetry, delayed myelination, microcephaly, aortic stenosis, malformed bicuspid valve, tracheomalacia and impaired visual function (26 N.Y.3d at 806).
3. 2012 N.Y. Slip Op. 33030(U) (2012).
4. 39 Misc. 3d 1234(A), 2013 N.Y. Slip Op. 50874(U) (2013).
5. 115 A.D.3d 432 (1st Dept. 2014).
6. Chief Judge DiFiore and Judge Garcia did not take part. There was no dissent or concurring opinion.
7. *Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448 (2006).
8. 293 F. 1013 (D.C. Cir. 1923).
9. For example, in *Beckner v. Bayer Cropscience, LP*, No. 2:05-0530, 2011 WL 805788, *6 n. 8 (S.D.W.Va. Mar. 2, 2011) the odor threshold was utilized to determine the amount of hexane that the plaintiff was exposed to. Similarly, in *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F. Supp. 2d 584 (D.N.J.2002), *aff'd*, 68 Fed. Appx. 356 (3d Cir.2003) the plaintiff's occupational exposure to perchloroethylene was calculated based on the chemical's odor threshold, coupled with other employment information, the cubic footage of the workspace and industrial literature.
10. It was undisputed between the parties that unleaded gasoline had a very low odor threshold in the early 1990s, somewhere between .5 and .76 parts per million. However, the Court of Appeals' decision stated that one part per million was "the minimum level at which gasoline is detectable by human smell." 26 N.Y.3d at 811.

V. Christopher Potenza, Esq. is a Member of Hurwitz & Fine, P.C. He leads the firm's statewide Toxic Tort and Environmental litigation team and serves as the Vice-Chair of the Toxic Tort Committee of the Torts, Insurance and Compensation Law Section of the New York State Bar Association. Brian D. Barnas, Esq. is an Associate of Hurwitz & Fine, P.C., and focuses on litigation and insurance coverage.

A Timely Reminder: The Three-Year Limitations Period for Legal Malpractice Claims Is Not an Absolute Shield for Practitioners Seeking to Recover Legal Fees

By Andrew R. Jones and Dara Lebwohl

Most practitioners know that there is a three year limitations period to commence a legal malpractice action. However, many are unaware that an action to recover unpaid legal fees opens the door to limited counterclaims for legal malpractice, regardless of the timing. Two recent decisions from the Appellate Division, Second Department serve as practical reminders that commencing a legal action to recover unpaid legal fees should be the practitioner's remedy of last resort. *Balanoff v. Doscher*, 2016 NY Slip Op. 04896 (App. Div. 2d Dept. June 22, 2016) and *Lewis, Brisbois, Bisgard Smith, LLP v. Law Firm of Howard Mann*, 2016 NY Slip Op. 05484 (App. Div. 2d Dept. July 13, 2016) underscore the risks of collections actions for legal fees.

"The period is calculated from the date of the alleged malpractice, irrespective of the date of discovery."

The best way to avoid having to pursue fees via litigation is to maintain scrupulous accounting practices; sending invoices on a regular basis and promptly addressing delinquent accounts minimizes an attorney's exposure in the long run.[1] Nevertheless, the realities of the profession warrant that every practicing attorney know the fundamentals of legal malpractice claims *vis-à-vis* actions to recover unpaid legal fees.

Limitations Period for Legal Malpractice Claims

The three-year limitations period for legal malpractice claims is set forth in CPLR 214(6). The period is calculated from the date of the alleged malpractice, irrespective of the date of discovery. *See Farage v. Ehrenberg*, 996 N.Y.S.2d 646 (2d Dept. 2014); *Landow v. Snow Becker Krauss, P.C.*, 111 A.D.3d 795, 975 N.Y.S.2d 119 (2d Dept. 2013). The only circumstance which will have a "tolling effect" on a legal malpractice claim is where the attorney provides continuous representation to the client"…with respect to the matter underlying the malpractice claim." *See Debevoise & Plimpton, LLP v. Candlewood Timber Group LLC*, 102 A.D.2d 571, 959 N.Y.S.2d 43 (1st Dept. 2013). In such cases, the limitations period is tolled until the ongoing representation of a client with the particular matter is completed. *Id*. It is irrelevant if the matter underlying the alleged malpractice has not been resolved. *Id*.; *see also Farage v. Ehrenberg supra*; *see also McCormick v. Favreau*, 82 A.D.2d 1537, 919 N.Y.S.2d 572 (3d Dept. 2011). Once the attorney and the client asserting the malpractice claim are released from the underlying action, the period begins to run. This is because the relevant factor is the attorney-client *relationship*, not the certainty of quantifiable damages.

"The difficulty arises when considering the damages sought in the legal malpractice counterclaim."

These cases suggest an absolute bar for any legal malpractice claim asserted after the three-year limitations period closes. Consequently, many practitioners hold the misapprehension that they bear little-to-no risk if they commence an action to collect unpaid legal fees more than three years after the representation ended. This is incorrect.

The Decisions

Balanoff is fairly straightforward in its facts and its holding. Plaintiff sued to collect legal fees, and the defendant counterclaimed, asserting legal malpractice. The lower court granted Plaintiff's motion to dismiss the counterclaims. The Appellate Division reversed, finding that the counterclaim for legal malpractice should not have been dismissed"…to the extent that counterclaim seeks to offset any award of legal fees…". This counterclaim, which ordinarily would be time-barred by limitations period imposed by CPLR 214(6), is afforded the benefit of the relation-back doctrine, as codified in CPLR 203(d). The *Balanoff* Court unambiguously sets forth the limitations of counterclaims pursuant to CPLR 203(d), holding that the provision may serve"…only as a shield for recoupment purposes, and does not permit the defendant to obtain affirmative relief…".

"Taken out of context, one could conceivably argue that a party asserting an otherwise untimely malpractice claim may now seek affirmative recovery."

Lewis Brisbois, conversely, treads in murkier waters. The facts are procedurally convoluted, and the wording of the decision is somewhat ambiguous. In an action to recover unpaid legal fees, defendant asserted nine counterclaims. Plaintiff moved to dismiss the counterclaims.

Plaintiff's motion was granted only with respect to the first counterclaim. On appeal, the Appellate Division affirmed the lower court's decision that counterclaim alleging "professional negligence" was timely.[2]

The difficulty arises when considering the damages sought in the legal malpractice counterclaim. Rather than demand a "refund," "recoupment," or "offset," defendant demanded "an amount to be determined at trial, plus interest." *Lewis Brisbois.* The Appellate Division held that the legal malpractice counterclaim was timely" …to the extent of the demand in the complaint." *Id*. The decision does not address the counterclaim demands whatsoever.

"Again, the Court gave no rationale behind the determination."

Taken out of context, one could conceivably argue that a party asserting an otherwise untimely malpractice claim may now seek affirmative recovery. However, read in the context of this area of law, it is apparent that the Court was performing a cursory analysis of the counterclaims to see if they satisfied the requirements of CPLR 203(d).

Pursuant to CPLR 203(d), an otherwise untimely counterclaim is permissible only if it "…arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint." Counterclaims are limited to the extent of the demand in the original complaint. *See Goldberg v. Sitomer, Sitomer & Porges*, 97 A.D.2d 114, 469 N.Y.S.2d 81 (App. Div. 1st Dept. 1983), *aff'd,* 63 N.Y.2d 831, 472 N.E.2d 44 (1984). As such any counterclaim to an action to collect a sum certain of legal fees is necessarily limited to recoupment. *See Alvarez v. Attack Asbestos Inc.*, 287 A.D.2d 349, 731 N.Y.S.2d 431 (App. Div. 1st Dept. 2001) (counterclaim for specific performance was impermissible where demand in complaint was payment on promissory note).

"Dereliction of regular and consistent accounting can result in irregular invoices and large, outstanding balances. Failing to diligently follow up on non-payments results in similarly large amounts owing."

There is a well-established body of case law holding that—as long as they arise out of the same transaction alleged in the complaint—counterclaims asserted pursuant to CPLR 203(d) limit damages to recoupment or "offset" of any recovery by Plaintiff. The law is very clear that a defendant may not seek affirmative relief by this means. *See Rothschild v. Industrial Test Esquip. Co.*, 203 A.D.2d 271, 610 N.Y.S.2d 58 (App. Div. 2d Dept. 1994); See also *Carlson v. Zimmerman*, 63 A.D.3d 772, 882 N.Y.S.2d 139 (App. Div. 2d Dept. 2004).

Here, the Court summarily held that the "subject counterclaims…all arise from the transactions and occurrences upon which the complaint depends," noting that the appellant failed to address the CPLR 203(d) issue—leaving little for the Court to deliberate. The decision did give the basis of its finding. The Court also held that the counterclaim for legal malpractice was timely "to the extent of the demand in the complaint." Again, the Court gave no rationale behind the determination.

At first glance, *Lewis Brisbois* may indicate a change in this area of practice. However, a closer reading suggests that the Court was simply stating legal conclusions and terms of art in the absence of argument from the appellant. It seems unlikely that the Court would break with decades of legal precedent on an issue that was not disputed.

Conclusion

These cases are of interest to legal malpractice practitioners. Although neither *Balanoff* nor *Lewis Brisbois* appear to be signaling a sea change in the law governing counterclaims for legal malpractice brought pursuant to CPLR 203(d), they exemplify the prudence of good accounting practices.

Dereliction of regular and consistent accounting can result in irregular invoices and large, outstanding balances. Failing to diligently follow up on non-payments results in similarly large amounts owing. In the event a client does refuse to pay, the necessity of litigation is directly proportional to the outstanding balance. The larger the amount outstanding, the greater exposure you face for recoupment.[3]

Endnotes

1. For a more in-depth discussion of the limitations period for legal malpractice actions, *see* Andrew R. Jones, Esq, *How to Avoid Being Sued When Collecting Legal Fees*, *Professional Liability Defense Quarterly*, 7:2:pp 8-12 (Spring 2015).
2. Although the counterclaim for legal malpractice was found to be timely, the Appellate Division dismissed a number of the other counterclaims as duplicative. When concurrent claims are based upon the same set of operative facts as the legal malpractice claim, the concurrent claims will be properly dismissed as redundant. *See Ullman-Schneider v. Lacker & Lovell-Taylor, P.C.*, 121 A.D.3d 415, 944 N.Y.S.2d 72 (1st Dept 2014).
3. *See* Footnote 1.

For more information on this area of law or defending attorneys generally, please contact Andrew R. Jones at ajones@fkblaw.com or Dara Lebwohl atdlebwohl@fkblaw.com.

Obtaining Out-of-State Subpoenas for State Court Litigation

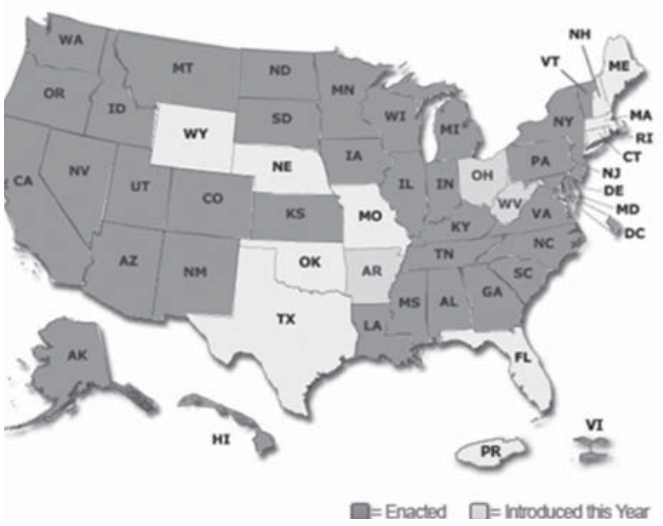
By John R. Ewell

Obtaining out-of-state evidence can be a daunting task, especially when each state has its own procedure for issuing a subpoena for an action pending in a foreign jurisdiction. However, in recent years this process has become significantly easier. On January 1, 2011, New York[1] adopted the Uniform Interstate Depositions and Discovery Act (UIDDA).[2] The UIDDA establishes one simple procedure for securing an out-of-state subpoena, which eliminates the need for obtaining commissions and/or commencing a miscellaneous action in the discovery state.[3]

By enacting the UIDDA, codified at CPLR 3119, New York became a UIDDA member state. As such, New York will enforce subpoenas served by attorneys from other UIDDA member states. It is analogous to full faith and credit. In other words, by enacting the UIDDA, New York voluntarily subjected its citizens to out-of-state issued subpoenas. In return, New York attorneys can now reach out-of-state witnesses and documents in other UIDDA member states. Since New York is a UIDDA member state, the foreign jurisdiction must recognize the foreign subpoena drafted by the New York practitioner. If the foreign state where the witness or documents are located has adopted the UIDDA, then a New York practitioner can submit an out-of-state subpoena directly to the clerk of the foreign court.[4]

Who Has Adopted UIDDA?

As of today, 36 states have adopted UIDDA.[5] Washington D.C. and the Virgin Islands have also adopted UIDDA.[6] As long as the foreign state has enacted the UIDDA, a New York practitioner can obtain out-of-state discovery via subpoena without a court order.



The Old Way: Burdensome and Costly

Before UIDDA, a New York practitioner had to obtain (at least) two court orders to obtain a document or depose a witness located out-of-state. The attorney needed to obtain a commission from a New York trial court, and then go to the foreign jurisdiction and obtain an order from that court enforcing the commission.[7] Typically this might require retaining local counsel in the foreign jurisdiction[8] and/or petitioning a judge in the foreign state.[9]

"The New York practitioner should also send a cover letter notifying the clerk that the subpoena is being sought pursuant to the discovery state's UIDDA statute."

The New Way: Simple and Efficient

If the state where the evidence is located has adopted UIDDA, then a New York practitioner can skip the steps of obtaining a commission or letters rogatory, engaging local counsel, and seeking an order from the foreign court.[10] To request a foreign subpoena, the party seeking discovery must submit a New York subpoena to a clerk of the court in the jurisdiction where the evidence is located.[11] Once that clerk receives the New York subpoena, the clerk issues a subpoena in the foreign state for service upon the intended person or entity.[12] Presenting the New York subpoena to the clerk of court in the discovery state invokes the jurisdiction of the discovery state.[13] Note, however, that requesting the issuance of subpoena does not constitute an appearance in the foreign state.[14]

The New York practitioner should also send a cover letter notifying the clerk that the subpoena is being sought pursuant to the discovery state's UIDDA statute. In each case, it is necessary to research (or Google) the discovery state's UIDDA statute. The out-of-state subpoena is not sought pursuant to CPLR 3119. CPLR 3119 is New York's UIDDA statute and will only be used by an out-of-state practitioner seeking to execute a subpoena in New York.

The foreign subpoena must incorporate the terms used in the New York subpoena.[15] In addition, the subpoena must contain the names, addresses, and telephone numbers of all counsel of record in the proceeding, and of any party not represented by counsel.[16] The subpoena must comply with the laws of the state where you are seeking discovery.[17] As such, any evidentiary issues that arise, including objections on the basis of relevance or privilege,

are decided in the discovery state under its laws. [18] Any application to the court to modify, enforce, or quash the subpoena must also comply with rules or statutes of the discovery state.[19] This procedure protects the interests of residents of the foreign state from unduly burdensome or unreasonable discovery requests.[20] On the other hand, UIDDA establishes a simple clerical procedure for obtaining out-of-state subpoenas that is fair to deponents, has minimal judicial oversight, eliminates the need to engage local counsel, and should reduce the cost of discovery.[21]

"Although this is an extra step, the UIDDA process is still better than attempting to secure one or multiple court orders."

A Practical Example

To illustrate: consider a case filed in New York (the trial state) where the witness to be deposed lives in Pennsylvania (the discovery state)—two UIDDA states.[22] An attorney of record for a party to the action will issue a subpoena in New York (the same way lawyers in New York routinely issue subpoenas in pending actions). That lawyer will then check with the clerk's office in the Pennsylvania country or district where the witness to be deposed lives to obtain a copy of its subpoena form (the clerk's office will usually have a web page explaining its forms and procedures). The lawyer will then prepare a Pennsylvania subpoena that has the same terms as the New York subpoena. Next, the lawyer will hire a process server in Pennsylvania to take the New York subpoena and the completed but not executed Pennsylvania subpoena to the clerk's office in Pennsylvania. The lawyer should prepare a short letter to accompany the New York subpoena advising the clerk that the Pennsylvania subpoena is being sought pursuant to Pennsylvania Statute _____ (citing the appropriate statute and quoting section 3 of the state's UIDDA provision). The clerk of the Pennsylvania county, upon being given the New York subpoena, will then issue the identical Pennsylvania subpoena (including signing, stamping, and assigning a case or docket number). The process server will pay any necessary filing fees, and then serve the Pennsylvania subpoena on the deponent or record holder in accordance with Pennsylvania law.

"If the state follows the UIDDA, turn to the procedural rules of that state and determine if there are any additional or different requirements."

A Word of Caution

Not all UIDDA states have the same rules. Although the aim of the UIDDA is to create uniform rules for interstate discovery across the nation,[23] some states decided not to adopt UIDDA verbatim and imposed some additional limitations.[24] Therefore, it is always necessary to review the foreign state's version of UIDDA.[25] Although this is an extra step, the UIDDA process is still better than attempting to secure one or multiple court orders.

"If the state follows the UIDDA, turn to the procedural rules of that state and determine if there are any additional or different requirements."

States That Have Not Adopted the UIDDA: Use the Old Way

As of today, the significant states that have not adopted UIDDA are Connecticut, Massachusetts, and Ohio. In Connecticut[26] and Ohio,[27] a commission from the out-of-state court is still required. In Massachusetts, an order from a court in that state is still required to obtain documents or depose a witness. [28] However, the law is quickly changing. Ohio introduced a bill to enact UIDDA, and thus will likely soon adopt it.[29] Going forward, it is expected that remaining states will adopt UIDDA and the Uniform Law Commission provides a map on its website showing which states have adopted it.[30]

Conclusion

When securing a subpoena to obtain out-of-state discovery, first look to the jurisdiction where the evidence is located and determine whether or not the state has adopted UIDDA.

- If the state follows the UIDDA, turn to the procedural rules of that state and determine if there are any additional or different requirements.
- If the state does not follow the UIDDA, turn to the procedural rules of that state and determine whether that state requires a commission or a court order and proceed accordingly.

Endnotes

1. CPLR 3119 (McKinney's 2016).
2. Uniform Interstate Depositions & Discovery Act (2007). The full text of the UIDDA and comments from the National Conference of Commissioners on Uniform State Laws is available at http://www.uniformlaws.org/shared/docs/interstate%20depositions%20and%20discovery/uidda_final_07.pdf.
3. UIDDA § 3, Cmt. at 7.
4. *Id* § 3.
5. The states that have adopted some form of the UIDDA are: Alabama, Alaska, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan,

Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin. In addition, the District of Columbia and the U.S. Virgin Islands have adopted the UIDDA. Legislative Fact Sheet—Interstate Depositions & Discovery Act, Uniform Law Commission, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Interstate%20Depositions%20and%20Discovery%20Act.

6. *Id.*
7. Steven R. Schoenfeld & Elizabeth Rozon, *Making Interstate Discovery Easier in NY*, LAW360 (March 15, 2011), http://www.dorsey.com/files/Uploads/Documents/Making%20Interstate%20Discovery%20Easier%20In%20NY.PDF.
8. *See* UIDDA, Prefatory Note.
9. *See supra* note 7.
10. UIDDA § 3, Cmt. at 7.
11. UIDDA § 3.
12. *Id.*
13. UIDDA § 3, Cmt. at 7.
14. UIDDA § 3.
15. *Id.*
16. *Id.*
17. UIDDA § 6.
18. UIDDA § 6, Cmt. at 9.
19. UIDDA § 6.
20. UIDDA § 6, Cmt. at 9.
21. UIDDA, Prefatory Note.
22. UIDDA § 3, Cmt. at 7.
23. *Id.*
24. Rebecca Phalen, *Obtaining Out-of-State Evidence for State Court Civil Litigation: Where to Start?*, Georgia Bar Journal (October 2011), http://www.rebeccaphalen.com/wp-content/uploads/2014/06/Obtaining-Out-of-State-Evidence-for-State-Court-Civil-Litigation.pdf.
25. *Id.*
26. Conn. Gen. Stat. §§ 52-148e(f), 52-155 (2016); Conn. R. Super Ct. Civ. § 13-28(g) (2016).
27. Ohio Rev. Code Ann. §§ 2319.08 - .09 (West 2016).
28. Mass. Gen. Laws Ann. ch. 223A, § 11 (2016).
29. Legislative Fact Sheet—Interstate Depositions & Discovery Act, Uniform Law Commission, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Interstate%20Depositions%20and%20Discovery%20Act.
30. Interstate Depositions and Discovery Act, Uniform Law Commission, http://www.uniformlaws.org/Act.aspx?title=Interstate%20Depositions%20and%20Discovery%20Act.

John R. Ewell is a third-year law student at SUNY Buffalo Law School. He is a Publications Editor for the *Buffalo Law Review*, member of the SUNY Buffalo Trial Team, and Research Assistant to Professor S. Todd Brown. After graduation, John will be joining the Buffalo, New York, law firm of Hurwitz & Fine, P.C., in the insurance coverage practice group.

Book Review:
Commercial Litigation in New York State Courts, Fourth Edition

Edited by Robert L. Haig
Reviewed by Kenneth A. Manning

For over two decades, *Commercial Litigation in New York State Courts* has been an invaluable resource to practitioners of all levels of skill and expertise. The first edition, published in 1995, provided comprehensive coverage and detailed analysis through 68 chapters. Since 1995, this paramount treatise on commercial litigation has continued to evolve, with the addition of 21 new chapters in the second edition in 2005, and again by adding 19 new chapters in the third edition, published in 2010. Now, with the addition of 22 new chapters, the 127-chapter fourth edition combines the work of 182 distinguished authors to continue its legacy as an easily accessible, yet comprehensive, treatment of New York substantive law and civil procedure.

In the accurate words of its editor-in-chief, Robert L. Haig, the treatise employs "[t]houghtful consideration to the delineation and attainment of objectives and to the advantages as well as ramifications and pitfalls of various actions and inactions on the part of the commercial litigator throughout the entire course of a lawsuit." Its success is undeniably an outgrowth of the judgment and expertise of its 182 authors. While the treatise may not provide every answer, it provides practitioners with a resource from which to develop further analysis.

"One of the chapter's greatest successes is its organization, whereby reinsurance is separated and broken down into seven comprehensive and effective sections, each of which addresses an important aspect of reinsurance."

Comprehensiveness and accessibility combine to crown the treatise as an essential and formidable research tool. In addition to providing in-depth treatment of a broad array of topics arising in the context of commercial litigation, the treatise includes "Practice Aids" that serve to benefit practitioners of all degrees of experience. Whether by practice tips interspersed throughout or by the checklists, forms, or sample pleadings often found at the end of each chapter, the treatise equips practitioners with the necessary tools.

Though each and every chapter of this eight-volume treatise is deserving of praise, there are three new chapters particularly worthy of attention: reinsurance, workers' compensation, and medical malpractice.

Reinsurance

John F. Finnegan authors the new chapter on reinsurance (No. 74). A well-recognized practitioner in the areas of insurance and reinsurance law, Mr. Finnegan provides seasoned, meaningful insight into the many intricacies of reinsurance law.

"Whether it be a dispute involving untimely notice or the follow doctrines, or a dispute seeking to recover expenses in addition to limits or declaratory judgment expenses, the chapter guides even the most inexperienced attorney."

One of the chapter's greatest successes is its organization, whereby reinsurance is separated and broken down into seven comprehensive and effective sections, each of which addresses an important aspect of reinsurance. For example, the second section, "Nature and Fundamentals of Reinsurance Transactions," provides a comprehensive and detailed analysis of the basic types and forms of reinsurance, the parties involved in reinsurance transactions, and the documentation most often used to place, memorialize, and administer reinsurance transactions. This section effectively arms the reader with sound understanding of the key concepts and jargon that permeate the reinsurance field.

The chapter fluidly segues into its next section, "Core Concepts and Doctrines of Reinsurance," to present a specific and detailed discussion of the core concepts and doctrines of reinsurance, such as the ever-important follow the fortunes and follow the settlements doctrines, and the duty of utmost good faith, the cornerstone of the reinsurance industry.

Enhanced by citations to and detailed discussions of statutory and case law, the chapter delves into the types of disputes that most commonly arise out of reinsurance transactions. Whether it be a dispute involving untimely notice or the follow doctrines, or a dispute seeking to recover expenses in addition to limits or declaratory judgment expenses, the chapter guides even the most inexperienced attorney. Notwithstanding that many reinsur-

ance disputes are resolved in arbitration, the author also presents the procedural issues when reinsurance disputes are litigated in court, such as discovery issues unique to reinsurance and pre-appearance security requirements applicable to foreign reinsurers.

Workers' Compensation

Martin Minkowitz, perhaps the most accomplished expert in the field of workers' compensation, authors chapter 75, which approaches workers' compensation law from the perspective of an attorney representing the employer. It also provides meaningful guidance for a practitioner representing a claimant-employee or decedent-employee's estate.

"While the chapter's primary focus relates to New York State workers' compensation benefits, the author undertakes to provide a comprehensive treatment of the field, also addressing federal workers' compensation laws and benefits."

Rather than plunging headlong into the procedural and substantive aspects of workers' compensation law, the author begins with a well-developed illustration of the history and theory of workers' compensation law, walking the reader through the social and statutory development of workers' compensation law. The author concisely presents key features of workers' compensation law such as an employer's obligations, compensable injuries, and the ever-important exclusive remedy doctrine (and equally, if not more, important, its exceptions).

The author smoothly transitions from conceptual background into practical application, guiding the reader through the entire workers' compensation process, from pre-hearing conferences to hearings before a Workers' Compensation Law Judge and subsequent review by the Workers' Compensation Board and the Appellate Division, Third Department. Helpful "Practice Pointers" are interspersed throughout the discussion, alerting practitioners to issues deserving of close attention.

The chapter delineates and discusses the specific benefits that an employer is required to provide and a claimant is entitled to receive. Of great benefit to the reader, the author takes care to explain many of the unfamiliar terms used in the context of workers' compensation benefits, such as "schedule and non-schedule awards" and "permanent partial or temporary total disability." While the chapter's primary focus relates to New York State workers' compensation benefits, the author undertakes to provide a comprehensive treatment of the field, also addressing federal workers' compensation laws and benefits.

"As a whole, the author strikes a solid balance between offering both practical and legal advice."

Finally, the practice aids presented at the end of the chapter are invaluable. For practitioners who will scarcely (if ever) find themselves practicing before the Workers' Compensation Board, the chapter prepares them for their journey into the unknown, including practice checklists for both the employer and employee's counsel, as well as various forms that may be used in practice before the Board.

Medical Malpractice

The chapter authored by the Honorable Karla Moskowitz (No. 99) untangles some of the complexity of medical malpractice law. The author begins by advising that best practices in this field for unfamiliar counsel would be to work with an experienced medical malpractice attorney due to the intricacy of the law and the technical medical aspects. However, for the attorney with an existing client who has a medical malpractice claim, or any attorney who may be unfamiliar with the topic, the chapter provides a comprehensive overview. The chapter offers insight for attorneys from both plaintiff and defendant perspectives on a variety of issues, including the basic elements of a claim as well as litigation procedure and strategy. It also includes several practice aids, which should prove extremely useful for unfamiliar practitioners. As a whole, the author strikes a solid balance between offering both practical and legal advice.

A key point emphasized throughout the chapter, and one that should not be taken lightly, is the need to understand the medical issues and terminology that may arise. Litigators frequently find themselves thrust into situations where they must become quasi-experts in a variety of subjects, and the chapter makes clear that this is a particularly daunting task in medical malpractice actions. To assist in this weighty endeavor, the author provides a number of useful suggestions, including consulting with specialists in the field.

The chapter is extremely useful in condensing information for a complex legal topic that might otherwise require counsel to spend many hours searching for this information and guidance. This chapter is a significant and valuable addition to the overall work.

Mr. Manning is a Partner in the firm of Phillips Lytle, LLP. In addition to personal injury and wrongful death claims involving products liability, workplace accidents, negligence and environmental exposure experience, Mr. Manning has prosecuted and defended class actions in both state and federal courts.

NEW YORK STATE BAR ASSOCIATION
TORTS, INSURANCE & COMPENSATION LAW SECTION
One Elk Street, Albany, New York 12207-1002

NEW YORK STATE BAR ASSOCIATION

ANNUAL MEETING

2017

JANUARY 23–27, 2017

NEW YORK CITY

New York Hilton Midtown

TORTS, INSURANCE & COMPENSATION LAW SECTION
PROGRAM | January 26, 2017

REGISTER NOW. BOOK YOUR HOTEL TODAY!
www.nysba.org/am2017