NYSBA SPRING 2018 | VOL. 47 | NO. 1

Torts, Insurance & Compensation Law Section Journal

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

In This Issue:

www.nysba.org/TICL

TICL Journal

Vol. 47, No. 1
Spring 2018 Issue

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

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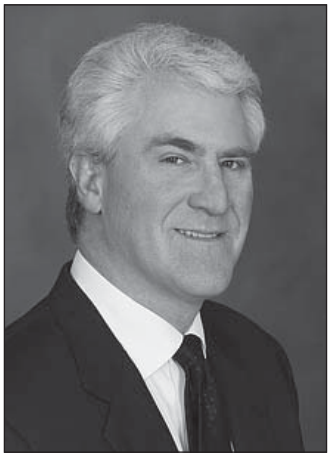
A View from the Chair



I am pleased to begin my term as Chair of the Torts, Insurance and Compensation Law Section. I am grateful for the support of the Executive Committee and you, the members, of this great Section, of which I have been a member for 35 years.

I would like to thank our outgoing Chair, Elizabeth Fitzpatrick, for her leadership. I look forward to working with our Vice-Chair, Jim O'Connor, our Secretary, Lori Petrone, and our Treasurer, Brendan Baynes, as well as the rest of the Executive Committee this year.

Our Section's Committees and Divisions work hard throughout the year to provide value to each of our approximately 2,000 members. In particular, I thank Joanna Roberto and Beth Fitzpatrick, who co-chair our CLE Committee. Our Section sponsors or co-sponsors topical programs on a frequent basis that are of the highest quality in the country. Organizing the speakers to make all this happen takes tireless effort and we could not do that without our committee co-chairs.

I am also proud to introduce this edition of the *TICL Journal*. For many years, Paul Edelman led the effort to provide on a frequent basis the best articles aimed at our practices so that our members had information at their desk or computer when they needed it. In recent years, our editor, David Glazer, has taken the reins of this gem and continues to meet, if not exceed, the standards set by Paul Edelman. I hope you enjoy this edition. Perhaps it will inspire you to submit an article. If not, our frequent publications from our Committees and Divisions are always looking for submissions.

One of the best things that TICL does is support our Young Lawyers Section and its efforts to improve the profession. I am dictating this as I am leaving the Section's Trial Academy, which just finished at Cornell University Law School. For nine years now, TICL has been a co-sponsor of the Academy. Approximately 60 young lawyers (and lawyers young at heart) attend each year and work to develop trial skills, which are hard to obtain in today's environment. Our Section's sponsorship includes a scholarship to attend the Academy. This year's scholarship awardee, Alyssa Jordan, has agreed to join our Executive Committee as Co-Chair of the Automobile Liability Committee. We welcome Alyssa and look forward to her contributions in the future.

If you are interested in joining our Executive Committee, please visit our website and review the numerous Committees and Divisions in which you may have an interest. Please contact me or any officer or member of the Executive Committee to express your interest. Executive Committee is a diverse group of lawyers from throughout the state representing some of the best and brightest lawyers with whom I have had the privilege of working. Even if some of the lawyers appear to "bite" in the courtroom, I can assure you that outside the courtroom we put an emphasis on collaboration and fun.

I have been a member of this Section for all 35 years of my practice. As a young lawyer, I attended my first destination meeting of the Section in Florida when my children were very young. At the meeting, I was welcomed with open arms and met several lawyers who remain great friends, including Bill Cloonan, who invited me to join the Executive Committee shortly thereafter. My wife and family continue to look forward to the annual destination meetings of the Section wherever they are and they have tried to attend each one of them. Our events are both professionally fulfilling and family friendly.

This summer, I am pleased to announce that our Summer Meeting will be at Powerscourt in County Wicklow, Ireland, on July 22-24. We will be joined by Professor Pat Connors of Albany Law School and several other speakers who will provide a total of six credits, including one Ethics credit and one Diversity credit. In addition to golf, we will have an excursion into Dublin and into the Wicklow Mountains. Please look for the notice of the meeting in this edition, as well as in all the other communications you receive from NYSBA. Any of you who choose to attend will likely want to tour Ireland or other parts of Europe. If you can join us, the NYSBA and incoming President, Michael Miller, will host a reception on Wednesday evening, July 25th, in Dublin with members of the Irish Bar. Details of the reception will follow. Many thanks to Brendan Baynes, who will be chairing the program this year.

In closing, I will leave you with the words of our Judiciary Committee Co-Chair, the Hon. George Silver, and remind you that "everybody needs a little TICL."

Timothy J. Fennell

A Field Guide to New York's "Recreational Use Statue" General Obligations Law § 9–103

By V. Christopher Potenza and James Maswick

With offices in upstate New York, including Buffalo, Albany, and Lake Placid, we see a fair share of claims against property owners for injuries from snowmobiles, mountain bikes, cross-country skiing, motor bikes, hiking, fishing, and all sorts of other recreational activities on property. General Obligations Law § 9–103, New York's "Recreational Use Statute," is intended to limit a property owner's liability for such claims and entice property owners to allow use of their properties for certain delineated recreational or sporting activities by limiting those property owner's risk of suit for negligence claims arising out of the listed uses. The statute provides that an owner, lessee or occupant of the premises **owes no duty** to keep the premises safe for entry or use by others for hunting, fishing, organized gleaning, canoeing, boating, trapping, hiking, cross-country skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering of wood for non-commercial purposes or training of dogs, or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes ("organized gleaning," of course, is "the harvest of an agricultural crop that has been donated by an owner, lessee, or occupant of premises or occupant of a farm by persons who are sponsored by a charitable not-for-profit organization" as defined by New York Agriculture & Markets Law § 71-y.).[1]

"If you allow someone to snowmobile on your property without charging a fee to do so, you are not liable when he or she eventually crashes into a tree."

The statute further provides that the owner, lessee or occupant of the premises who gives permission to another to pursue any such activities upon such premises does not thereby extend any assurance that the premises are safe for such purpose, or constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted. A plaintiff can overcome a GOL § 9-103 defense if he or she can show the property owner engaged in a willful or malicious failure to warn or guard against a dangerous condition, where consideration was paid to the land owner in exchange for the recreational use of the property, or when a permissive user injures another to whom duties are owed by the property owner. *Morales v. Coram Materials Corp.*, 51 A.D.3d 86, 90-91 (2nd Dep't 2008).

V. Christiopher Potenza

James Maswick

The purpose of the law is admirable as the Legislature wanted to make it easier for owners of real property to open up their property to the general public and let them get some fun, exercise and make use of the property without the risk that the property owner, who was generous enough to permit his or her property to be used free of charge, would be sued.[2] Of course, if a fee is charged to a property user, a higher standard of care is owed to those who utilize the property. It is a win-win for all involved parties, and happens frequently in trail systems around the state.[3]

Now this all seems pretty straightforward. If you allow someone to snowmobile on your property without charging a fee to do so, you are not liable when he or she eventually crashes into a tree. However, it's never that simple.

The breadth of this statute was tested in *Iannotti v. Consolidated Rail Corporation*, 74 N.Y.2d 39 (1989), in which the Court of Appeals reversed the Third Department and granted summary judgment to the defendant property owner. The plaintiff alleged that he was injured while riding his motorized trail bike within the City of Amsterdam along a stone and dirt right-of-way 20 to 25 feet wide adjacent to defendant's railroad tracks. The right-of-way, which had once formed the bed of a track, since abandoned, was used occasionally by railroad workmen as an access road for purposes of maintaining the tracks. The Appellate Division had concluded that the statute did not cover defendant's property because it was maintained and used for the commercial operation of a railroad, and was not the type of property the Legislature intended to encourage landowners to open up for public recreational use by enacting General Obligations Law § 9–103. The Court

of Appeals disagreed, finding no basis to make a categorical exception from the scope of General Obligations Law § 9–103 for properties that are in active commercial use. Commercial property may be well suited to public use for several of the enumerated activities (e.g., hiking, cross-country skiing, and horseback riding) and yet still be in active use for its commercial purpose. The question is whether it is a type of property that is not only physically conducive to the particular activity or sport but is also a type that would be appropriate for public use in pursuing the activity as recreation? If it is, application of General Obligations Law § 9–103 to such property as an inducement to the owner to make it available to the public would further the statutory purpose.

"As you can see, while well intentioned, there are many pitfalls to a GOL § 9-103 defense."

The Court of Appeals again addressed the scope of this statue in *Bragg v. Genesee Valley Agricultural Society, et al.*, 84 N.Y.2d 544 (1994), which affirmed the Fourth Department's dismissal of the claim against the land owner based on General Obligations Law § 9–103. The defendant, Genesee County Agricultural Society, was the owner of an abandoned railway bed that runs from Batavia to Lockport. An agreement was made with a trucking company to excavate gravel from the railbed. Despite being aware that off-road vehicles used the property, the contractor was not instructed to post warning signs or barriers in the area. At the time this accident occurred, the contractor's activities had left an opening in the railbed that was 10 feet deep and dropped from the trail at an angle of approximately 80 degrees. Plaintiff was injured while traveling on the railbed when he drove his motorbike into the excavation.

Plaintiff argued that the defendants were not entitled to the protection afforded by the statute because the property was not suitable for motorbiking after the intervening excavating activity had altered the property. The defendants maintained that the statute applied because the property was suitable for motorbiking as measured by its general characteristics, not by the presence of a dangerous condition that made the property unsuitable at some specific time. The issue addressed by the Court was whether the inquiry into the suitability of the property should focus exclusively on the condition of the land at the time when plaintiff's accident occurred. The Court reasoned that since the statute explicitly removes any obligation on the landowner to keep the premises safe or to give warning of any hazardous condition, suitability must be judged by viewing the property as it generally exists, not portions of it at some given time. Any test that required the owner to inspect the land, to correct temporary conditions or locate and warn of isolated hazards as they exist on a specific day, would vitiate the statute by reimposing on the owner the common-law duty of care to inspect and correct hazards on the land.

Recently the Fourth Department addressed the subject in *Cummings v. Manville*, 153 A.D.3d 58 (4th Dep't 2017). Plaintiff was injured when he struck a pothole and crashed while riding a four-wheel all-terrain vehicle on a gravel road located on property owned by the defendant. The issue addressed by the Court was whether the property was conducive to this recreational activity. The road where the accident occurred was the sole means of access to three homes. While located in a rural area, the two-lane private road was used for residential purposes, including at times for school bus access. The Fourth Department found that the physical characteristics of the road were residential, as opposed to recreational in nature, and thus the defendant could not rely on the General Obligations Law § 9–103 defense.

One of the exceptions to the statute insulating landowners is if consideration has been paid to the landowner by the user. What constitutes consideration? In *Ferland v. GMO Renewable Resources LLC*, 105 A.D.3d 1158 (3rd Dep't 2013), plaintiff brought an action on behalf of her husband, who died when his snowmobile struck a tractor-trailer carrying a load of logs on a private logging road. The road was also used by defendant Fund 6 Domestic LLC and other entities for logging and by the St. Lawrence County Snowmobile Association, Inc. (SLCSA) and two snowmobile clubs as a snowmobile trail, which the three groups maintained.

"Even if a court determines that the 'Recreational Use Statute' is not a proper defense in a particular instance, general negligence principles still apply to the case, meaning that plaintiff will still need to prove that defendant was negligent and the negligence was a proximate cause of the alleged injury."

Plaintiff, amongst other things, appealed the ruling that the defendant Fund 6, the SLCSA and the clubs were entitled to immunity under GOL § 9-103, arguing they accepted consideration. For our purposes, the Court found that the SLCSA's user agreement, which required the landowner to be named as an additional insured on the SLCSA's trail insurance policy, was not consideration which destroyed the immunity for the club or landowner. The Third Department noted that to treat this as consideration would otherwise eliminate the statutory immunity for those who permitted use of their property and obstruct the very point of the statute.

In *Powderly v. Colgate University*, 248 A.D.2d 365 (2d Dep't 1998), the plaintiff, a student at Colgate, was injured sledding down a hill on school property. The court found that with sledding one of the recreational activities provided for under GOL § 9-103, and with the hill suitable for sledding, plaintiff had to prove one of the exceptions to the statute applied to overcome summary judgment. The plaintiff's arguments that payment of his "student activity fee" and/or tuition to the university was "consideration" under GOL § 9-103 for purposes of establishing an exception to the insulating statute was rejected.

As you can see, while well intentioned, there are many pitfalls to a GOL § 9-103 defense. Courts weigh the intent of the statute to encourage recreational use of private property versus the actual use of the property so as not to expand the scope of this defense to non-recreational uses.

Even if a court determines that the "Recreational Use Statute" is not a proper defense in a particular instance, general negligence principles still apply to the case, meaning that plaintiff will still need to prove that defendant was negligent and the negligence was a proximate cause of the alleged injury. New York's primary assumption of risk doctrine may also apply in these types of cases, which provides a defendant with a full defense and holds that a voluntary and/or willing participant in a sporting activity is presumed to have assumed the risks inherent in that activity. See, e.g., *Turcotte v. Fell*, 68 N.Y.2d 432 (1986); *Maddox v. City of New York*, 66 N.Y.2d 270 (1985).

Happy trails!

Endnotes

1 Okay, we admit we had to look up what "Organized Gleaning" consisted of and how one practiced it.

2 The Court in *Morles v. Coram Materials Corp.*, 51 A.D.3d 86 (2d Dep't 2008) stated: "The overall purpose of GOL § 9-103 recognizes the value and importance to New Yorkers of pursuing recreational activities, so that a statute immunizing landowners from liability arising from recreational activities will result in more properties being made available for such uses."

3 Around our Lake Placid office, for instance, an organization called the Barkeater Trails Alliance (BETA), a registered 501(c)(3) entity, regularly utilizes and references this statute to help it expand mountain bike and ski trails onto private property of willing land owners.

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Are You Ready for Some Football?

By James A. Johnson

Every evening we seat ourselves in front of the television glancing at the headlines in the newspaper and then turn quickly to the sports page. After that, we grab the remote and click on *ESPN, Fox Sports Live, ESPN Classics, ESPN Sports Center, DirectTV or Xfinity.* If it is a Sunday, Monday or Thursday night in September, October and November there is a game of controlled violence, called football. We read, discuss, view and even vociferously argue sport in America. Most of us perform our jobs in a perfunctory manner, but when it comes time for sports our enthusiasm reaches a fervor level.

"Every concussion is a brain injury. The effect of this damage range from behavioral and emotional disorders to full body paralysis."

The 2018 Super Bowl is over and fans of the New England Patriots are hurt and somewhat injured by the loss. Now owners, players, coaches and team physicians can focus on real injuries, known as concussions. Concussions, also known as traumatic brain injuries, occur when your brain violently impacts the inside of your skull. Concussions can permanently damage your brain's ability to think or work. These injuries lead to tort claims and product liability lawsuits against the NFL, high schools, college teams, helmet manufacturers and others involved in the game of football.

Football

Are you ready for some football? This is the rhetorical question every September and at the Super Bowl. Well, yes and no. This controlled violence is still violence, engendering results like retired players who can't get out of bed without help, migraine headaches, quarterbacks and linemen who can't raise their arms or tie their shoes. This game has caused suicides, namely Aaron Hernandez, Jovan Belcher, Junior Seau, O.J. Murdock, Kurt Crain, Mike Current, Dave Duerson and Ray Easterling. There was an avalanche of litigation against the NFL, NFL Properties, Riddell Sports Group and others. Approximately 2,500 former players and surviving family members sued the NFL for allegedly distorting and hiding data about concussions. On April 15, 2013, a Denver, Colorado jury found Riddell Inc. liable for failing to warn about concussion dangers. The jury awarded $11.5 million to a Rhett Ridolfi, a high school student, and found Riddell 27 percent at fault. Ridolfi, a former Colorado high school football player, suffered serious brain injuries and partial paralysis. The jury assessed $3.1 million in damages against Riddell.

In 2010 the NFL gave Boston University's Center for the Study of Traumatic Encephalopathy $1 million to study the brains of 60 deceased football players.[1] Although all the test results are not in, many showed signs of (CTE) chronic traumatic encephalopathy. CTE is a neurodegenerative disease caused by repeated blows to the head. Do we need to have all of the tested results when we know that the symptoms of CTE are slurred speech, headaches, psychosis and depression? On December 3, 2012, an additional study from Boston University detailed 33 causes of chronic traumatic encephalopathy (CTE) in deceased ex-NFL players. I hope this article will direct the moral compass of the NFL, NFLPA, owners, coaches, general managers and players to action.

National Center for Injury Prevention

According to the National Center for Injury Prevention, it is estimated that as many as 47 percent of all high school football players suffer a concussion each year. Football players who suffer multiple concussions are at risk of suffering permanent brain damage. A few years ago, not one state required that high school and middle school athletes who suffered concussion symptoms receive medical clearance to return to play. According to USA Football, all 50 states now have some form of student–athlete concussion laws in place.[2]

"The power and tension between intercollegiate athletics and the university has escalated. Football and basketball coaches who are successful often overshadow the institution itself. Money is power."

One of the purposes of this article is to inform coaches, players, parents, athletic directors and general counsel of the seriousness of the risks of concussions to young people whose brains have not yet fully developed. Every concussion is a brain injury. The effects of this damage range from behavioral and emotional disorders to full-body paralysis.

An excellent resource for comprehensive facts and laws covering youth sports is Law Atlas/The Policy Surveillance Portal/Topics/Maps A-Z/Youth Sports Traumatic Brain Injury Map Laws/Injury and Violence Prevention. It covers such information as specifying requirements when an athlete may return to play and

requiring distribution of some form of TBI/concussion sheet. For example it states:

> Every year as many as 300,000 young people suffer concussions or traumatic brain injuries (TBIs), from playing Sports. These injuries can have serious and long term effects, and all states have adopted laws aimed at reducing harm for youth sports TBIs occurring at scholastic activities. This map identifies and displays key features of such laws across all 50 states and the District of Columbia and over time, from 2009 to 2017.[3]

"Students may not return to athletic activities until they are free of symptoms for a minimum of 24 hours and have been evaluated by and received written and signed authorization to return to activities from a licensed physician."

Litigation

The power and tension between intercollegiate athletics and the university has escalated. Football and basketball coaches who are successful often overshadow the institution itself. Money is power. These coaches are deities on their campuses and in their respective states. The revenue stream from sports often drives university decision making and conflicts with the values of the university. My point is that university administrators must strike a delicate balance and enforce educational values and at the same time reward winning athletic programs. This balance requires a tightening of the reins on coaches and requiring in their contracts immediate reporting and action in handling allegations of wrongdoing and allegations of crimes. Case in point is the Penn State situation, but I suspect there are other athletic programs with serious problems that have not yet surfaced. A reassessment is in order with new rules to keep coaches input at a minimum in admission policies, discipline and other areas that are purely university business. So with the clarity of hindsight, I implore Athletic Directors, University General Counsel and lawyers in general to accept my challenge and moral assignment and eliminate this cascade of litigation involving educational institutions and athletic programs.

New York State

In 2011 New York passed *The Concussion Management and Awareness Act* (Ch. 496 of the laws of 2011) that became effective July 1, 2012 for all public and charter schools. This Act requires the Commissioner of Education, in conjunction with the Commissioner of Health, to promulgate rules and regulations related to students who suffered a concussion or (MTBI) mild traumatic brain injury. These guidelines apply to all public school students who have suffered a concussion regardless of where the concussion occurred.[4]

The law requires that school coaches, physical education teachers, nurses and certified athletic trainers complete a New York State Education Department (NYSED) approved course on concussions and concussion management every two years.

The law also requires that students who suffered or are suspected to have suffered a concussion during athletic activities are to be immediately removed from such activities. Students may not return to athletic activities until they are free of symptoms for a minimum of 24 hours and have been evaluated by, and received written and signed authorization to return to activities, from a licensed physician.

Show Me the Money

For years, there has been a groundswell of talk about whether college players should be paid or profit from their fame before they graduate. This writer answers that question with a resounding no! The reasons are obvious and you cannot make the amateurism argument if you are paying players. Moreover, paying players money raises questions of maintaining the academic integrity of institutions. The National Collegiate Athletic Association (NCAA) president, Mark Emmert, has increased the value of athletic scholarships to cover the *full* cost of attending college.

"Participation in sports by young people can engender mental and physical toughness, discipline, sportsmanship and leadership qualities. These individual attributes collectively can also provide an advantage in the game of life."

In fact, the five wealthiest college football conferences notified the NCAA in October 2014 of their proposals to provide more benefits to athletes under the new governance model. This allows the Big 10, ACC, Big 12, Pac-12 and SEC to pass legislation without the support of the other Division I leagues. These changes would increase benefits to student-athletes including athletic scholarships that will fully cover tuition; guaranteeing multiyear scholarships and allowing former athletes to return to school at any time, and providing long-term health care and insurance to former athletes.[5]

We need to restore authentication to sport and preserve the integrity of competition, which in turn will

foster even greater competition and help to remove the asterisk in front of new records. It appears that National Football League Commissioner, Roger Goodell, has heard my rumblings and message. Affirmative steps are being taken, in earnest, to address player safety, conduct and rule changes.

U.S. District Judge Anita Brody in Philadelphia approved a $1 billion settlement for NFL players and family members that became effective on July 7, 2017. The revised settlement approved by Judge Brody covers more than 20,000 NFL retirees and is designed to last at least 65 years. It also provides up to $5 million to individual retirees who develop Lou Gehrig's disease and other profound problems.[6]

Conclusion

The purpose of this article is not to deter participation in football but rather to educate and inform attorneys, athletic directors, coaches, parents and players of the risks and symptoms of concussion. Participation in sports by young people can engender mental and physical toughness, discipline, sportsmanship and leadership qualities. These individual attributes collectively can also provide an advantage in the game of life.

In the final analysis, to inspire true sport and protect the rights of athletes, Grantland Rice, the dean of sports journalists, said it best: *"When the one great scorer comes to mark against your name, he will not write if you won or lost, but how you played the game."*

Endnotes

1. Rich Barlow at www.bu.edu/today/2010/nfl-gives-1m-to-bu-center-for-athlete-brain-study/ (last visited 4-19-18).
2. http://usafootball.com—National Center For Injury Protection (last visited 4-19-18).
3. www.lawatlas.org—Choose a Topic-Injury & Violence—Youth Sports Traumatic Brain Injury Laws.
4. The Concussion Management Awareness Act www.nysenate.gov/Legislation.
5. Detroit Free Press, Nation & World, Oct. 2, 2014 at Sec. 9C.
6. https://nflconcussionsettlement.com (last visited 4-19-18).

James A. Johnson of James A. Johnson, Esq. in Southfield, Michigan is an accomplished trial lawyer. Mr. Johnson concentrates on insurance coverage under the Commercial General Liability Policy, serious personal injury and sports and entertainment law. He is an active member of the Massachusetts, Michigan, Texas and Federal Court Bars. He can be reached at www.JamesAJohnsonEsq.com.

The NYSBA Young Lawyers Section Trial Academy: A Young Lawyer's Take

By Patrick M. Butler

I was fortunate to have the opportunity to attend the NYSBA Young Lawyers Section Trial Academy at Cornell Law School from April 5-9, 2017. I want to extend a special thanks to the TICL Section for graciously granting me a scholarship. Overall, the Trial Academy is an outstanding opportunity for young lawyers to develop their trial skills. In addition to the attendees, there are team leaders, lecture speakers, and critique faculty in attendance over the course of the five days. The program focused on two fact patterns, one being a civil and the other a criminal case. The civil fact pattern involved a wrongful death motor vehicle accident. The criminal fact pattern was a kidnapping and felony murder case. The attendees were given packets that were to be read prior to the start of the program. These packets consisted of procedural instructions, deposition transcripts, witness lists, exhibits, and jury instructions.

The program consisted of morning and afternoon sessions. In the morning session, seasoned trial attorneys and/or judges gave lectures on all phases of trial. Lectures were presented in the chronological order that a typical trial consists of. Each day of the program built on what was learned the day before. The morning lectures were very informative and engaging. Attendees were instructed on proper trial techniques and also got to see experienced trial attorneys demonstrate jury selection, opening/closing statements, and direct/cross examination.

Each day, between the morning and afternoon session, was a luncheon sponsored by various NYSBA Sections. This daily luncheon was a great networking opportunity because attendees got the opportunity to meet attorneys and judges from all over New York State. I met a number of other young attorneys during the luncheons, many of whom I now see in court on a daily basis. Other networking opportunities were receptions that took place in the evening. There were also NYSBA executive committee meetings that attendees were encouraged to attend. I not only got the opportunity to sharpen my trial skills but also to meet some of the best litigators and judges in New York State.

The afternoon session of the Trial Academy is where the attendees put into practice what they learned in the lectures. Attendees presented a jury selection, opening statement, direct examination, cross examination, and closing argument in front of rotating critique faculty. What was great about these presentations was that attendees could take risks and try methods of litigation that they may not have felt comfortable doing in a traditional courtroom atmosphere. The critique faculty, team leaders and fellow attendees then gave you feedback on your presentation. You then worked one-on-one with a seasoned litigator or judge by reviewing your videotaped presentation. This one-on-one work really helped show you what you did right and what you could improve on. By watching your videotaped presentation, you were able to see how your body language and posture affected how your argument actually came across to your audience.

I had some trial experience before attending the Trial Academy, having picked numerous juries and taken to verdict a summary jury trial and unified trial. However, my previous trial experience had been in civil matters, and the Trial Academy gave me the opportunity to try my hand at criminal litigation. For example, I was assigned to do an opening statement for the defense in the criminal fact pattern. Having previously done opening statements defending civil matters, I felt confident that I would be able to deliver an adequate opening statement. I was overly optimistic about my ability to present a criminal defense opening statement, as I got mixed feedback from the critique faculty. That being said, the constructive criticism that I received from the critique faculty is the whole point of the Trial Academy. The critique faculty is not there to pat you on the back and tell you how good of an attorney you are. They are there to point out your shortcomings and help you become a better attorney.

There was also a lot to be learned at the Trial Academy by watching fellow attendees do their presentations. Breakout groups, consisting of about 10-15 young lawyers, and a group leader were designated. The members of my group came from various backgrounds and experiences. When getting feedback from the critique faculty, all group members were also listening to that feedback. On multiple occasions, a member of my group got feedback regarding a particular part of his or her presentation. Another member of my group would then do a presentation, keeping in mind what the critique faculty had just gone over. This gave all members of the group

the opportunity to see how a particular trial technique comes across when done the right way and the wrong way. This "trial by error" type method of learning really helped reiterate the trial techniques and etiquette that were taught. The team leaders in addition to keeping the presentations organized and timely, also gave excellent feedback.

The lecture materials provided to the Trial Academy attendees are also a great resource. The last trial that I had was a motor vehicle accident case in Queens County, Supreme Court. The case involved a very contentious liability situation, with two completely different versions of events from the plaintiff and defendant. While preparing for the trial, I repeatedly referenced the lecture materials. Introducing a photograph into evidence, or impeaching a witness on a particular point, is not always that easy to do. Written materials regarding opening/closing statements, laying foundation to introduce exhibits into evidence, and common trial objections are just some of the many materials that I obtained and continue to use to this day.

Overall, the Trial Academy is an invaluable experience. I would highly recommend the program to every young litigator. The diversity and different backgrounds of the attendees, team leaders, lecture speakers, and critique faculty is what really makes the experience unique. I am grateful that I had the opportunity to learn trial practice from some of the best attorneys and judges in New York State.

Patrick is currently an associate attorney at Maroney O'Connor LLP in downtown Manhattan, concentrating on insurance defense matters. He is one of the firm's trial attorneys and regularly defends motor vehicle, premise liability, and labor law cases. He earned his J.D. from the University of Massachusetts School of Law in May, 2014. He was a member of the Mock Trial team, where he competed in the American Association for Justice's 2013-2014 Regional Student Advocacy Competition in Boston, Massachusetts. Patrick earned his B.A. in Political Science from St. Bonaventure University in 2010, where he was also the captain of the Men's Varsity Swimming Team during his senior year.

Patrick M. Butler (third from left in back) with "Team Fox"at the 2017 NYSBA Young Lawyers Section Trial Academy at Cornell Law School.

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NYSBA

Building Resilience

By Jim Kendall, LCSW

Jim Kendall

The American Psychological Association in its *Road to Resilience* Initiative defines resilience as the process of good coping and adaptation in the face of a challenge, trauma or significant sources of stress. Each of us faces challenges and unexpected events in our lives. Some are invigorating; some are devastating. The key is how well we are able to cope with life's surprises. *Resilience* is our capacity to adjust to changes and challenges in our life, as well as the ability to "spring back" emotionally after dealing with a difficult and stressful time (http://www.apa.org/helpcenter/road-resilience.aspx).

The American Psychological Association's Road to Resilience Initiative identifies 10 ways to build resilience:

1. Make connections.
2. Avoid seeing crisis as insurmountable problems.
3. Accept that change is a part of living.
4. Move toward your goals.
5. Take decisive actions.
6. Look for opportunities for self-discovery.
7. Nurture a positive view of yourself.
8. Keep things in perspective.
9. Maintain a hopeful outlook.
10. Take care of yourself.

Resilience is a relatively new focus area in research. The initial studies of resilience came from surveying individuals following traumatic events and measuring the presence of emotional distress. Some trauma researchers have shifted focus to examine how people cope with trauma and which traits buffer them against forming post-traumatic stress symptoms. Researchers at the University of North Carolina have coined another term for resilience, "post traumatic growth," to describe the factors associated with how human beings can be positively changed and even flourish resulting from their encounters following a traumatic event.

"We don't have control over the bumps and turns that we encounter along life's journey."

As the research community began focusing more on strengths, the concept of resilience has gained more attention. At the University of Pennsylvania, Dr. Martin Seligman, Director of the center and a professor of psychology, is known for his work on optimism, learned helplessness, and resilience. This group seeks to identify which traits and skill sets allow people to cope more effectively with a range of difficult traumatic life events, not just psychological obstacles.

People can be resilient when facing life transitions, unexpected changes, or unfortunate circumstances. A person does not have to face a trauma or dramatic event to experience stress or to possess resilience. Resilience can buffer many types of stress whether it is new procedures at work or dealing with the stress of chronic illness.

By developing strong personal resilience skills, people can equip themselves to respond to the pressures they may find in their personal lives and in the workplace.

Research in the area of resilience by the American Psychological Association, the Penn Resilience Program, and the Posttraumatic Growth Research Group at the University of North Carolina, suggests a number of traits that combine to help an individual exhibit growth and strength following life changes, crises, or traumatic events. There are a number of characteristics that have been linked with being resilient. These characteristics for building resilience can be divided into three major themes:

1. Attitude
   Providing the outlook, focus, and psychological support that can lead to personal growth.
2. Resilience Skill Development
   Identify and practice various tools for problem solving—changing perspective, empathic listening, and the ability to effectively communicate with others.
3. Healthy Lifestyle
   Supporting the physical and emotional energy needed to recharge.

We don't have control over the bumps and turns that we encounter along life's journey. Building resilience can help us navigate those bumps and turns so we keep moving forward.

For more reading on Resilience: There are a number of venues (classes, self-help books and coaching opportunities) that can help someone develop these skills. It takes practice but resilience is a learnable skill.

Attitude

Our attitude drives our behavior. This is the foundation for resilience, the way we view the world. Six ways to build a resilient attitude include:

1. Be optimistic. The first key driver is the capacity for optimism. It is the outlook that a person chooses in order to keep adversity in perspective. If you believe that your troubles are temporary, then there is always a solution. This enables you to move forward and not feel stuck in place. Martin Seligman, Ph.D, in his book *Learned Optimism,* notes, "Life inflicts the same setbacks and tragedies on the optimist as on the pessimist, but the optimist weathers them better."

2. Nurture social connections. Cultivating and nurturing relationships with others is the second key driver. We are not alone. The quality of our relationships with other people influences how emotionally resilient we can be in the face of a crisis. In a study of Vietnam Veterans after returning from war, Lynda King, Ph.D, noted that high levels of social support were associated with significantly lower levels of PTSD among. Biologically, social ties stimulate the release of oxytocin, a hormone that has been linked with the reduction of fear and anxiety, in part by limiting the cortisol response to stress.

"You can minimize the number of stressful situations you have to deal with in life by stating your thoughts and emotions clearly and without attacking others."

3. Welcome change. There is a need to think flexibly and embrace change as an opportunity for growth. The Social Readjustment Rating Scale (SRRS), also known as the Holmes-Rahe Scale of Life Stress, identifies life changes, both positive and negative, with stress. Learn to view the challenge of change as a routine part of life.

4. Use humor. Learning to laugh along the way and not take ourselves so seriously is a useful outlook. Humor can help people get through even the worst of times, as we learn from Victor Frankl in his account of surviving the concentration camps in *Man's Search for Meaning*.

5. Cultivate gratitude. Being grateful for the things that go right and the people that help out along the way is another component of optimism. Results from a study examining the benefits of gratitude (Emmons and McCullough, 2003) suggest that a conscious focus on blessings may have emotional and interpersonal benefits of feelings of happiness and well-being.

6. Accept help. This can be seeking out experts when there is a problem that we are not equipped to solve or seeking emotional support when needed. Work/Life Connections-EAP provides psychological support to the Vanderbilt faculty and staff through coaching and counseling services.

Resilience Skill Development

It would be great if everyone was born with a full repertoire of traits and skills for resilience. Since we are not, it is reassuring to know that with practice and training we can learn the behaviors, attitudes and skills necessary to increase our ability to spring back from challenges. There are four skill sets that are particularity helpful:

1. Mindfulness

2. Effective communication

3. Problem solving

4. Emotional intelligence

Mindfulness. The hectic pace of modern life places many demands on your attention. Your schedule may become so busy that you don't have time to stop and truly pay attention to what you're doing, which creates stress. Mindfulness is a technique that teaches how to become more attentive. There is a focus on how your body is reacting to what is happening in the moment. As you go about your daily routine, using the skills of mindfulness, you can increase your enjoyment of those activities. Jon Kabat-Zin, Ph.D, founded the Center for Mindfulness in Medicine, Health Care and Society at the University of Massachusetts Medical School and pioneered a mindfulness-based stress reduction program (MBSR) that has been successfully taught throughout the country. Developing mindfulness mediation skills, such as deep breathing and visualization, can also help you to maintain a resilient attitude in the face of pressure and stress.

Resources:

- Kabat-Zinn, J. (1990). *Full Catastrophe Living: Using the Wisdom of Your Body and Mind to Face Stress, Pain, and Illness.* Delta Publishing, New York.
- Hanson, Rick (2011). *Just One Thing: Developing a Buddha Brain One Simple Practice at a Time.* New Harbinger Publications, Oakland, California.
- Tan, Chade-Meng (2012). *Search Inside Yourself: The Unexpected Path to Achieving Success*. Harper Collins Publishers, New York.

Effective Communication. Good communication is essential to emotional resilience because it breeds positive emotions instead of negative ones. Learning to get your message across is an important skill. Assertive communication is also a skill worth learning because it helps you to communicate more effectively. "Assertive communication involves asking clearly and directly for what one wants and being positive and respectful in one's communica-

tion" (Sotile and Sotile). You can minimize the number of stressful situations you have to deal with in life by stating your thoughts and emotions clearly and without attacking others.

Resources:

- Peterson, Kerry (2002). *Crucial Conversations :Tools for Talking When the Stakes are High.* McGraw-Hill, New York.
- Sotile, Wayne and Sotile, Mary (2002). *The Resilient Physician: Effective Emotional Management for Doctors and Their Medical Organizations.* American Medical Association Press.

Emotional Intelligence. Becoming aware of how you react when you face stress helps you gain better control over your reactions. This involves developing the following emotional skills:

1. Gain an awareness of what you are feeling.
2. Control and manage how you express your emotions.
3. Avoid acting impulsively.
4. Develop the ability to notice and correctly interpret the needs and wants of others.
5. Manage relationships by developing and maintaining boundaries.

Resources:

- Bradberry, Greaves (2009). *Emotional Intelligence 2.0*. San Diego: TalentSmart.
- Goleman, Daniel (1995). *Emotional Intelligence*. Bantam Books, New York.

Problem Solving Skills. Resilient people engage in accurate, flexible thinking. It involves gaining a perspective that what you are facing is not insurmountable. This allows you to move forward and look for the solution. Resilient people believe that they are in control of some aspects of the situation and can facilitate a more positive outcome. They view mistakes as opportunities for learning and embrace change as an opportunity for growth. Clearly not everyone was born with this outlook. With practice, as you would need to do to develop any skill set, you can learn to develop this outlook.

1. Be flexible.
2. Keep it in perspective.
3. View no problem as insurmountable.
4. Take action.
5. Look for opportunities for growth.

Resources:

- Edward M. Glaser (1941). *An Experiment in the Development of Critical Thinking*. New York, Bureau of Publications, Teachers College, Columbia University.
- Paul, Richard; Linda Elder (2006). *The Miniature Guide to Critical Thinking, Concepts and Tools. Foundation for Critical Thinking. p. 4.* Retrieved 3 June 2013.
- Sotile, Wayne and Sotile, Mary (2002). *The Resilient Physician: Effective Emotional Management for Doctors and Their Medical Organizations*. American Medical Association Press.

Healthy Lifestyle

Being resilient requires mental and physical energy. In order to have the emotional energy to deal with the challenges that life throws your way, it is important to maintain healthy lifestyle practices for optimal functioning.

Be physically active

Regular physical activity is key to overall health and resilience. Regular exercise facilitates information processing and memory functions. Aim for a minimum of 150 minutes a week, or 30 minutes most days of the week. It can be broken up into increments as well. Besides biking, running, and sports activities, walking, using stairs, and gardening also serve to burn calories and get your heart rate up.

Eat healthy

Resilience relies on strong, healthy minds and bodies. What we eat fuels our bodies in order to respond to the demands that come our way, both physically and emotionally. The American Heart Association, American Dietetic Association, and Center for Disease Control and Prevention recommend meal choices that control portions and focus on low-calorie, nutrient-rich foods, such as fruits and vegetables, low fat proteins, and whole grains.

Get sufficient sleep

Sleep has been called the "third pillar" of health, according to the CDC. Adults usually need between 7-9 hours of sleep to recharge mentally and physically for optimal energy and functioning. Research suggests that sleep is a favored time for many types of restoration and renewal. Sleep heavily influences the prefrontal cortex which is important for innovation, self-control and creativity, according to the 2013 Harvard Corporate Sleep Summit. (Learn more about The National Sleep Foundation at www.sleepfoundation.org).

Jim Kendall, LCSW, CEAP
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CPLR Update: Amendment to CPLR 503(a) Provides an Additional Venue Option for Personal Injury Plaintiffs

By John Coco

On October 20, 2017, Governor Cuomo signed legislation amending the Civil Practice Law and Rules (CPLR) 503(a), thereby availing plaintiffs of an additional option for venue when commencing an action.[1] The amended law, which applies to actions commenced after October 23, 2017, more closely resembles venue rules for causes of action against municipalities and public authorities where the location of an injury may dictate venue.[2]

Under the amended CPLR 503(a), plaintiffs may now designate venue based upon the location where the cause of action arose, in addition to the county of a party's residence when the action is commenced. While this article focuses solely on personal injury litigation, the new law applies to commercial and other cases as well.

CPLR 503(a) was amended to read as follows (new language in bold):

> CPLR 503(a) Generally. Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; ***the county in which a substantial part of the events or omissions giving rise to the claim occurred;*** or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county.[3]

Benefits to Parties, Witnesses, and Courts

Prior to this amendment, New York residents were required to designate venue in a county of a party's residence when the action was commenced.[4] This restriction could result in deleterious effects for all involved in the litigation.

For example, assume an individual is injured in a motor vehicle collision in Queens County when the defendant, Donna, crashes into the plaintiff, Paul, on Queens Boulevard. Further assume that both Paul and Donna reside in Suffolk County. A man emerging from his apartment witnesses the crash, and an NYPD officer responds.

Under the amended CPLR 503(a), Paul could designate Queens County for trial.[5] This additional option is equitable for all parties, witnesses, and could even benefit the courts.

Firstly, under the prior CPLR 503(a), Paul *must* commence his action in Suffolk County, regardless of where the collision occurred. This prior rule precluded a Queens jury from hearing the case, even though a Queens jury is more familiar with Queens traffic and the perils of Queens Boulevard. A jury's familiarity with the accident scene would equitably serve both Paul and Donna's interests, and is now an option for Paul under the new law.

John Coco

Secondly, this amendment provides for the convenience of witnesses to an accident. In our example, the police officer works in Queens, and the eyewitness lives in Queens. Here, a Queens County trial would be more convenient for both the police officer and witness than a Suffolk County trial. It stands to reason that witnesses to an accident often live or work near an accident scene.

Lastly, a particular court may be overburdened, while another has a lighter caseload. Paul can designate venue simply based upon where his case will resolve most expeditiously. This serves to ease congestion in busy courts, and may generally hasten litigation throughout New York.

Conclusion

The CPLR 503(a) amendment is a significant and equitable change in the law. This amendment avails parties of better equipped juries, is more convenient for witnesses, and may accelerate litigation throughout New York.

Endnotes

1. The Bill, S6031/A8032, was sponsored by Senator Michael H. Ranzenhofer and Asssemblymember Linda B. Rosenthal.
2. See CPLR 504 and 505.
3. Civil Practice Law and Rules 503(a) as amended, effective as of October 23, 2017.
4. CPLR 503(a) also allows a plaintiff to designate a county for venue when none of the parties to the action reside within the state.
5. Under CPLR 503(a), the plaintiff can choose the county of residence of a party for venue. This portion of the CPLR 503(a) remains unchanged.

John Coco is founder of the Law Offices of John Coco, PLLC, located in Woodbury, New York, and Chair of the Plaintiff's Personal Injury Committee of the Nassau County Bar Association. John is a frequent lecturer on emerging law and other issues surrounding personal injury litigation. He recently co-presented "Anatomy of a Car Accident Case: From Crash to Court" at NCBA. John can be reached at 516-224-4774 or jcoco@johncocolaw.com. **Reprinted with permission by the Nassau County Bar Association.**

Appellate Division Confirms Foreign Risk Retention Groups Not Subject to Insurance Law § 3420(d)(2)'s Prompt-Disclaimer Requirement

By Max Gershweir

Max Gershweir

In *NadKos, Inc. v. Preferred Contractors Insurance Company Risk Retention Group LLC*, 2018 N.Y. Slip Op. 03242 (1st Dep't May 3, 2018), the New York Appellate Division addressed for the first time whether foreign risk retention groups (RRG) are subject to New York Insurance Law § 3420(d)(2), which requires liability insurers issuing policies in New York, under penalty of preclusion, to promptly disclaim coverage of claims involving bodily injury sustained in New York. The court found that New York law governing foreign RRGs, consistent with federal law limiting the right of states to regulate them, exempts such RRGs from complying with § 3420(d)(2). Moreover, the court's reasoning suggests that foreign RRGs are exempt from other important requirements found in § 3420.

In the 1980s, responding to disturbances in the interstate insurance markets, Congress authorized "persons or businesses with similar or related liability exposure to form 'risk retention groups' for the purpose of self-insuring." *Wadsworth v. Allied Prof'ls Ins. Co.*, 748 F.3d 100, 102-03 (2d Cir. 2014). An RRG "is a liability insurance company owned and operated by its members, and those members are its insureds." Id. at n. 1. The Liability Risk Retention Act of 1986 (LRRA) extended the right to form RRGs for all commercial liability insurance. The LRRA pre-empts "any State law, rule, regulation, or order to the extent that such law, rule, or order would make unlawful, or regulate, directly or indirectly, the operation of a risk retention group." 15 U.S.C. § 3902(a)(1). That pre-emption notwithstanding, the LRRA permits an RRG's chartering, or domicillary, state to regulate its "formation and operation," *id.*, and permits non-domicillary states to, among other things, require compliance with unfair claim settlement practices rules.

Consistent with this federal law, New York enacted Insurance Law § 5904(d), which recognizes the limits on its ability to regulate foreign RRGs by enumerating the limited types of regulation to which they are subject, including compliance "with the unfair claims settlement practices provisions as set forth in [Insurance Law § 2601]." Section 2601, in turn, proscribes insurers from committing certain acts deemed "unfair claims settlement practices," including "failing to promptly disclose coverage pursuant to [Insurance Law § 3420(d)]," without delineating between § 3420(d)'s subsection (1), which sets forth time requirements for an insurer to "confirm" liability limits and "advise" when sufficient identifying information is lacking, and subsection (2), which sets forth time requirements for an insurer to disclaim coverage.

In *Nadkos*, the plaintiff general contractor Nadkos, Inc., which was sued in a personal injury action by a worker hired by subcontractor Chesakl Enterprises, Inc., sought additional-insured coverage under a general liability policy issued by defendant Preferred Contractors Insurance Company Risk Retention Group LLC (PCIC), an RRG domiciled in Montana. PCIC disclaimed coverage to Nadkos under various policy exclusions; Nadkos argued that § 3420(d)(2) precluded PCIC from relying on the exclusions due to its alleged failure to promptly disclaim.

In contending that PCIC, despite being a foreign RRG, was not exempt from § 3420(d)(2)'s prompt-disclaimer requirement, Nadkos argued that, by referencing § 3420(d) without distinguishing between its subsections, § 2601 rendered the violation of any portion of that section an "unfair claims settlement practice" to which foreign RRGs like PCIC are subject. The court disagreed, finding that § 2601's use of the term "disclose" when referring to § 3420(d) made clear it referred only to § 3420(d)(1)'s insurance information disclosure requirements and not to § 3420(d)(2)'s disclaimer requirement. The court added that while a § 3420(1) violation "may result in a civil penalty for the unfair claim settlement practice, failure to disclaim results in coverage being extended beyond the scope and clear language of a policy," contrary to the LRRA's purposes.

The court's strict reading of § 5904(d) and recognition of the expansive scope of the LRRA's preemptive effect with regard to foreign RRGs suggests that state courts would also find that, in addition to § 3420(d)(2)'s disclaimer requirements, foreign RPGS are exempt from other § 3420 requirements, including those requiring that liability policies issued in New York contain provisions entitling injured persons and other claimants to satisfy such policies' notice conditions in the insured's stead and to sue the insurer directly to recover unsatisfied judgments against the insured, as the Second Circuit has already held. *Wadsworth*, *supra*.

Non-RRG insurers issuing commercial liability policies in New York should thus be aware that the tendering rights on which they typically rely may be significantly limited where the target insurer is a foreign RRG. With that in mind, such insurers issuing policies to building owners or general contractors, i.e., those that often benefit from additional-insured coverage for their insureds under subcontractor policies, may consider taking measures to encourage their insureds to hire contractors that are not insured under policies issued by foreign RRGs—both because such RRGS may be largely exempt from § 3420 and because the policies they issue often include a wide array of exclusions not typical to subcontractor policies.

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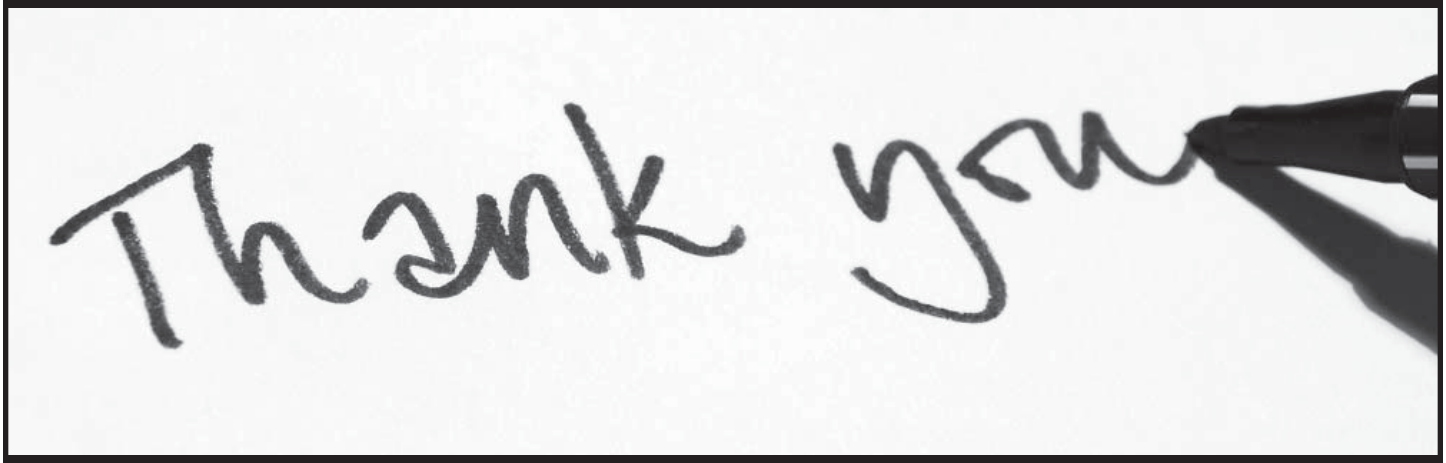

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Facebook Is Open to Discovery

By David A. Glazer and Melissa Persaud

To say there has been a proliferation of social media use in this country over the last decade would be a serious understatement. The percentage of Americans with a social media profile has jumped from 24 percent in 2008 to 81 percent in 2017.[1] A recent ReportLinker survey shows that out of the 46 percent of Americans who check their smartphones as soon as they wake up, 30 percent of the respondents say they immediately check their social media apps.[2] Facebook, being the world's most popular social network, has an American audience of over 214 million.[3] As social media becomes increasingly popular and integral to the way people communicate, courts across the country have had to grapple with finding the balance between the admissibility of evidence from an individual's social media accounts and that individual's right to privacy.

Until recently, New York courts have struggled to articulate a consistent standard for the discoverability of contents within social media profiles. However, on February 13, 2018, the Court of Appeals in *Forman v. Henkin* announced that the scope of social media discovery is governed by New York's "well-established rules."[4] New York's highest court noted that "disclosure in civil actions is generally governed by CPLR 3101(a), which directs: 'full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.'"[5] This general principle of discovery, the court stated, is equally applicable to the context of social media materials.[6] In ruling this way, the court upheld New York's liberal discovery standard and squashed any debate that judges have the authority to apply a heightened standard for production of social media content.[7]

This ruling is long overdue as lower courts have narrowly interpreted CPLR 3101(a) as it applies to social media profiles, specifically the private portions of those accounts. This has led some courts to condition the discoverability of the private portion on "whether the party seeking disclosure demonstrated there was material in the 'public' portion that tended to contradict the injured party's allegations in some respect."[8]

For instance, courts in personal injury actions such as *Fawcett v. Altieri* and *Tapp v. New York State Urban Dev. Corp.* outlined this exact standard for the discoverability of social media profiles.[9] There the courts attempted to strike a balance between the liberal interpretation of the words "material and necessary" under CPLR 3101(a) disclosures and a party's right to be free of unreasonable or burdensome discovery requests.[10] These courts reasoned that though a party cannot use the privacy settings of Facebook to shield materials from discovery, the party seeking those materials still bears the burden of proving that the private content is relevant to the litigation.[11] Following this reasoning, the courts concluded that the party seeking to compel discovery of private social media content must show "with some credible facts that the adversary subscriber has posted [public] information or photographs that are relevant to the facts of the case at hand."[12] If the demanding party can demonstrate that this public information "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims," only then it may be justified for the court to compel disclosure of private portions of the user's profile.[13]

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It was this standard that the Appellate Division in the *Forman* case articulated in order to modify the trial court's broad grant of defendant's motion to compel.[14] In the underlying action, plaintiff alleged that she suffered serious and permanent injuries when she fell from a horse owned by defendant.[15] She claimed that before the accident, she posted "a lot" of photographs to her Facebook account that showcased her active lifestyle.[16] Six months after the accident, however, she testified that she was forced to deactivate her account.[17] She became a recluse and found it difficult to compose coherent messages, both of which she blamed on the accident and her related injuries.[18] In hopes of discrediting her story, defendant requested unlimited access to plaintiff's Facebook account, arguing that under CPLR 3101(a) he was entitled to all photographs and postings that would be "material and necessary" to his defense.[19] The trial court granted his motion to compel production of private pre-accident photos that plaintiff intended to introduce at trial, all private post-accident photos that did not include nudity or romantic relations, and Facebook records that indicated when plaintiff posted private messages after the accident and the number of characters of those messages.[20] Only plaintiff appealed the decision.[21]

Turning to *Tapp* for precedent, the Appellate Division stated that "vague and generalized assertions that information in the plaintiff's social media sites might contradict the plaintiff's claims were not a proper basis for disclosure" and amounted to nothing more than a "fishing expedition."[22] Defendant, instead, needed to "establish a factual predicate" that materials from a party's private social media account "would result in disclosure of relevant evidence or would be reasonably calculated to lead to discovery of information bearing on the claim."[23] In its decision to only allow disclosure of photos that plaintiff intended to introduce at trial, the Appellate

Division maintained that it was not upholding a heightened standard for social media-related discovery; the court insisted that "[t]he discovery standard [it] applied in the social media context is the same as in all other situations."[24]

Neither the dissent nor the Court of Appeals was convinced that the Appellate Division was using the established threshold for social media discovery.[25] In reversing the Appellate Division's holding, the Court of Appeals recognized that if the party seeking disclosure is forced to rely on the public portion of the user's account in order to establish a factual predicate for the disclosure of the private portion, then the account holder would be permitted to "unilaterally obstruct disclosure merely by manipulating 'privacy' settings or curating the materials on the public portion."[26] Rejecting the notion that the scope of discovery depends on the "privacy" setting of an account, the court reiterated the fact that the purpose of discovery is indeed to discover whether material may be relevant to a claim or defense.[27] For example, medical records enjoy a high level of privacy but may still be subject to discovery if a mental or physical condition is at issue.[28]

The Court, nevertheless, acknowledged that litigants should be protected from unnecessary and burdensome discovery requests.[29] In other words, despite the liberal standard established in New York, the party seeking disclosure does not have unlimited access to a person's social media accounts.[30] Instead the court must first determine "whether relevant material is *likely* to be found on the Facebook account."[31] If so, then the court must tailor the discovery order, bearing in mind the privacy concerns of the account holder, in order to avoid disclosing non-relevant materials.[32] In the case at hand, the court suggested temporal limitations on disclosures and exemptions for "sensitive or embarrassing materials" to protect the privacy of plaintiff.[33] In its conclusion, the court determined that the defendant "more than met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence."[34] The plaintiff asserted in her deposition that her lifestyle, including her use of Facebook, changed significantly after the accident.[35] Therefore, disclosure of her pre- and post-accident Facebook activity would be germane not only for the defendant's defense, but also to corroborate plaintiff's own credibility.

With the explosion of social media usage, most people recognize that any information posted to the internet, even information in private portions of their accounts, may not remain private. The question becomes how much of this private information should be discoverable to attorneys and the court? Although the Appellate Division was merely following precedent regarding social media discovery, it failed to recognize that the heightened standard they articulated has no basis in traditional paper discovery.[36]

Nowhere in the rules governing traditional discovery does it require a requesting party to first find publicaly available information that is relevant to the case before gaining access to a broader scope of discovery.[37] True, it is important to prevent discovery from becoming a "fishing expedition," but as the Court of Appeals stated, it is possible to tailor discovery even in the context of social media in order to find a harmonious balance between liberal disclosure and the user's right to privacy.[38] With these guidelines now in place, the lower courts now can tailor discovery of social media requests appropriately.

Endnotes

1. *Percentage of U.S. population with a social media profile from 2008 to 2017*, Statista, https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/ (last visited Apr. 2, 2018).
2. *For Most Smartphone Users, It's a 'Round-the-Clock' Connection*, ReportLinker (Jan. 26, 2017), https://www.reportlinker.com/insight/smartphone-connection.html.
3. *Number of Facebook users by age in the U.S as of January 2018 (in millions)*, Statista, https://www.statista.com/statistics/398136/us-facebook-user-age-groups/ (last visited Apr. 2, 2018).
4. See *Forman v. Henkin*, 30 N.Y.3d 656, 665, 70 N.Y.S.3d 157 (2018).
5. *Id.* at 661 (quoting N.Y. C.P.L.R. 3101(a) (McKinney 2014)).
6. *Id.* at 662.
7. *Id.* at 665.
8. *Id.* at 663.
9. *See Fawcett v. Altieri*, 38 Misc. 3d 1022, 960 N.Y.S.2d 592 (Sup. Ct. 2013); *see also Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620, 958 N.Y.S.2d 392 (2013).
10. *Fawcett*, 38 Misc. 3d at 1024.
11. *Id.* at 1026-27.
12. *Id.* at 1027-28.
13. *Tapp*, 102 A.D.3d at 620.
14. *See Forman v. Henkin*, 134 A.D.3d 529, 531, 22 N.Y.S.3d 178, 180 (N.Y. App. Div. 2015), *rev'd*, 30 N.Y.3d 656, 70 N.Y.S.3d 157 (2018) (allowing defendant's request for photos plaintiff intended to introduce at trial, but denying request for post-accident messages).
15. *Forman*, 30 N.Y.3d at 659.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *See Forman v. Henkin*, 2014 WL 1162201 (N.Y.Sup.).
21. *Forman*, 134 A.D.3d at 530.
22. *Id.* at 530-31.
23. *Id.* at 531.
24. *Id.* at 532.
25. *See Forman*, 134 A.D.3d at 539 (Saxe, J., dissenting); *see also Forman*, 30 N.Y.3d at 665.
26. *Forman*, 30 N.Y.3d at 664.
27. *Id.*
28. *Id.* at 666.
29. *Id.* at 664-65.
30. *Id.*
31. *Id.* at 665 (emphasis added).
32. *Id.*
33. *Id.*
34. *Id.* at 666.
35. *Id.* at 666-67.
36. *Forman*, 134 A.D.3d at 542 (Saxe, J., dissenting).
37. *Id.*
38. *Forman*, 30 N.Y.3d at 665.

Recent Developments in Labor Law/Construction Accident Litigation

Has The Court of Appeals Taken One Small Step on the "Stairway to Heaven" for the Defense of Labor Law § 240(1)?

By Dominic Curcio

In the very recent case of *O'Brien v. Port Authority of New York and New Jersey*, 2017 N.Y. Slip Op. 12466 (March 30, 2017), the Court of Appeals, in a 4-3 decision involving a lengthy dissent, found issues of fact to preclude the Appellate Division's grant of partial summary judgment in favor of the Plaintiff pursuant to Labor Law § 240(1). Plaintiff O'Brien, the employee of a subcontractor, sustained injury when he slipped and fell while descending a temporary metal exterior staircase that was wet from the elements.

Plaintiff's expert, based solely on a review of photos in the record, opined that the stairs were not in compliance with good and *accepted standards* of construction site safety and practice, were smaller, narrower and steeper than typical stairs, were constructed with treads whose noses generally became worn and slippery, and had small rounded protruding metal nubs that tended to become slippery when wet.

Defendant's expert countered, stating that based upon his review of photos of the subject staircase, as well as an inspection of a staircase of the same make and model, the staircase was designed for outdoor use and was perforated to allow rain to drain and had raised metal nubs for traction, and thus provided acceptable slip-resistant features *within industry standards and practices* in times of inclement weather. He also opined that there was no evidence that the steel treads had become worn down from foot traffic, and that the staircase was not smaller, narrower or steeper than usual. Finally, he confirmed that the staircase was equipped with proper handrails.

Citing *Narducci v. Manhasset Bay Association*, 96 N.Y.2d 259 (2001), the Court held that "[A]lthough the statute is meant to be liberally construed to accomplish its intended purpose, absolute liability is 'contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, *or the inadequacy of*, the safety device of the kind enumerated therein.'" (Emphasis added). Since the experts differed as to the adequacy of the device provided, and framed their opinions in terms of whether there had been compliance with industry standards, the Court held that this case was distinguishable from those cases wherein a ladder or scaffold collapsed or malfunctioned. Here, questions of fact exited as framed by the party's experts, as to whether the staircase provided adequate protection.

Dominic Curcio

Looking at the small picture, the Court clearly delineated between cases involving a failed piece of safety equipment, and those that involve a question as to whether a specific piece of safety equipment was adequate under the circumstances. Looking at the bigger picture, the Court of Appeals reasserted the premise that the mere fact a worker falls at a construction site does not establish a Labor Law 240(1) cause of action. Citing *Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90 (2015), the Court held "liability may be imposed under the statute only where the plaintiff's injures were a direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." In cases where the question is whether a specific safety device was adequate for the task at hand, couching a defendant's arguments through an expert in terms of the device meeting acceptable industry standard should be enough to defeat a plaintiff's application for summary judgment.

Repetitive Stress Injuries (Still) Not Covered Under Labor Law § 240

By Matthew Bremner

Twenty-four years ago, in *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993), the Court of Appeals articulated important limitations on the scope and applicability of Labor Law § 240. Ross involved an injured welder who alleged that in order to avoid falling off a platform and down a 50-foot shaft, he had to continuously contort his body in an awkward position for several hours, causing him to suffer serious injuries to his back.

"Plaintiff alleged his injury resulted from repetitive exposure to the unchecked force of gravity exerted on heavy buckets filled with epoxy and that no safety devices, such as a pulley or lift, were furnished to protect against the gravity-related risk."

Plaintiff claimed that his injury fell within the purview of Labor Law § 240 because the platform was an inadequate safety device that exposed him to the gravity-related risk of falling down the shaft. In dismissing Plaintiff's Labor Law § 240, the Court of Appeals held

"Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device *proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person.*"

This key phrase would later be cited by the Court of Appeals in *Runner v. New York Stock Exchange, Inc.*, 13 N.Y.3d 599 (2009), in which the Court held that Labor Law § 240 was not solely limited to scenarios where workers fell from a height or were struck by objects that fell from a height. In *Runner*, the injured plaintiff was tasked with moving an 800 pound reel of cable down a short staircase by tying a rope around the reel and wrapping it around a metal bar that was placed against the door jam, creating a makeshift pulley. As he attempted to lower the reel down the stairs, its weight proved too heavy to control and plaintiff was pulled forward into the metal bar suffering injury to his hands. In holding that the accident fell within the purview of Labor Law § 240, the Court, citing *Ross*, stated, "the applicability of the statute in a falling object case such as the one before us does not [] depend upon whether the object has hit the worker. The relevant inquiry, one which may be answered in the affirmative even in situations where the object does not fall on the worker, is rather whether the harm flows directly from the application of the force of gravity to the object." Accordingly, while the Court's decision in *Runner* did not specifically address repetitive-stress-type injuries under Labor Law § 240, the broad holding issued seemingly left open the possibility that a repetitive-stress injury may be covered by the statute if it resulted from the direct "application of the force of gravity to [an] object" rather than as a consequence of cramped working conditions like those at issue in *Ross*.

In the recent decision of *Ciechorski v. City of New York*, 2017 NY Slip Op. 06891 (1st Dep't, 2017) (decided on October 3, 2017), however, the First Department dismissed the Labor Law § 240 claim of a worker who alleged he suffered serious injuries to his shoulder "caused by his repeated work, over the course of weeks, of being handed heavy buckets filled with epoxy from workers at a higher level." Plaintiff alleged his injury resulted from repetitive exposure to the unchecked force of gravity exerted on heavy buckets filled with epoxy and that no safety devices, such as a pulley or lift, were furnished to protect against the gravity-related risk. But the court rejected the plaintiff's argument and held that since he was at most "exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240(1), [he could not] recover under the statute."

Unlike the worker in *Ross*, the worker in *Ciechorski* was arguably injured by the repeated, unchecked application of the force of gravity to a heavy object or objects. The *Ciechorski* decision is significant because it seemingly eschews a literal application of *Runner* to avoid expanding liability under Labor Law § 240 to include ordinary repetitive-stress injuries that merely have some tangential relationship to a gravity-related mechanism of injury. While the facts of *Ciechorski* are unique and may ultimately be distinguished by future cases, for the time being it appears that repetitive stress injuries are still not covered under Labor Law § 240.

So You're Telling Me There's a Chance?

By Dawn Foster

Back to basics: A fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1)

These days it is cause for celebration when the Appellate Division reverses the grant of summary judgment to a plaintiff under Labor Law § 240(1). The Second Department did just that in the case of *Shaughnessy v. Huntington Hospital Association*, 4 N.Y.S. 3d 121 2017, NY Slip Op. 01245 (2nd Dep't 2017).

In *Shaughnessy*, plaintiff, a steamfitter, was allegedly injured when he fell from a ladder as he was installing refrigeration piping into a ceiling as part of a renovation project in a hospital owned by the defendant/third-party plaintiff. There was evidence submitted that the ladder upon which he worked was placed on top of plastic sheeting that covered the walls and floor of the room.

"It's refreshing to see the Appellate Division, at least in Shaughnessy, *get back to basics. It is high time that more cases are decided in a similar fashion."*

As usual, upon completion of discovery, plaintiff moved on the issue of liability under Labor Law § 240 as against the owner and general contractor. The defendants and third-party defendants moved for dismissal of the Labor Law claims and indemnification amongst each other. The Supreme Court granted plaintiff's motion for summary judgment under Labor Law § 240(1), but the Appellate Division recently reversed. The court's reversal of Labor Law § 240(1) is instructive. The Appellate Division found that "plaintiff's own submissions demonstrated the existence of triable issues of fact, *inter alia*, as to how the accident occurred, whether the ladder was inadequately secured, and whether the plaintiff's actions were the sole proximate cause of the accident."

The court in *Shaughnessy* reiterated, "a fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1). There must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries." *Shaughnessy; Campos v. 68 East 86th Street Owners Corp.*, 117 A.D.3d 593 (1st Dep't 2014); *Blake v. Neighborhood Housing Services of*

New York City, 1 N.Y.3d 280, 771 (2003). Here, it was established that: (1) plaintiff opened the ladder and confirmed that it was sturdy, (2) plaintiff did not experience any problems with the ladder when he was on it; (3) plaintiff did not remember how or why he fell and (4) there was no evidence that the floor underneath the ladder was slippery. These factors led the Court to conclude that there was not sufficient evidence to establish that there was a failure to provide proper protection which proximately caused plaintiff's injuries. With all of the factors established, it begs the question why didn't the court grant summary judgment to the defendants?

As Labor Law § 240(1) has been interpreted so broadly in recent years, it seems that courts are reluctant to dispute a plaintiff's version of events and due to its nature as a strict liability statute, the courts appear more inclined to find liability against a defendant (or a question of fact) even if there is no evidence of a failure in the safety device at issue or if plaintiff may be the one solely at fault. It's refreshing to see the Appellate Division, at least in *Shaughnessy*, get back to basics. It is high time that more cases are decided in a similar fashion.

Documenting Efforts of Training and Accident Reporting Is Imperative

By Dawn Foster

Recently, in *Cardona v. New York City Housing Authority*, the First Department unanimously affirmed plaintiff's partial summary judgment motion as to liability on his Labor Law § 240(1) claim. Although the decision provides limited facts, Cardona testified that he was directed to access the top of a sidewalk bridge by climbing up its side, and that while attempting to do so he lost his grip, slipped and fell to the ground.

"While not expressly addressed in the decision, the court likely considered that no additional safety devices beyond the secured planking were needed to afford plaintiff "proper protection" as contemplated under the scaffolding statute."

The court found that defendants failed to raise a triable issue of fact. Specifically, plaintiff's supervisor testified that he did not give plaintiff his work instructions on the morning of his accident, although someone else could have. In addition, the court found that defendants provided insufficient support to establish that plaintiff was affirmatively instructed not to go up on the sidewalk bridge and that his assignment was to pick up debris from the ground. Further, defendants' unsworn Employer's Injury report was disregarded as the defendants' own witness denied preparing it and there was no proof to establish that it was prepared by anyone with personal knowledge of the relevant facts.

Simply, the court flatly refused to place responsibility upon plaintiff for the accident and held that any comparative negligence was not a defense under Labor Law § 240(1). The court failed to even find a question of fact existed as to whether plaintiff was "recalcitrant" or the "sole proximate cause" of his accident in light of defendants' inadequate proof.

To successfully defend these claims, owners and contractors must promptly and properly document accidents and identify pertinent information including names of witnesses and detailed narratives of the accident. Most critically, proof that a worker has been trained on selecting the right tool or piece of equipment for the job and the specific task instructions and warnings given will go a long way in either supporting a "sole proximate cause" or "recalcitrant worker" defense or, at the very least, establish that an issue of fact exists to avoid adverse summary judgment.

Revisiting the "Sole Proximate Cause" Defense

By I. Paul Howanksy

As defense counsel encounter time and time again, it often takes a unique set of facts and admissions from plaintiff to successfully dismiss a Labor Law § 240(1) claim based on the so-called "sole proximate cause" defense. Those facts and admissions were on full display in a recent Second Department case entitled *Melendez v. 778 Park Avenue Building Corp.*, 153 A.D.3d 700 (2nd Dep't 2017) wherein the Appellate Division unanimously affirmed the lower court's ruling and dismissed plaintiff's claims on account of plaintiff being solely responsible for his accident.

Melendez involved a worker constructing the platform portion of the scaffold by placing planks on top of I-beams. In the process, he stepped on an unsecured plank and fell. The evidence, however, made clear that it was plaintiff, and only plaintiff, who placed the unsecured plank on the I-beams mere seconds before his fall. Moreover, plaintiff had the option of standing atop secured planks of which he was fully aware since he admitted to walking on the secured planks shortly before the accident. The court held that plaintiff was solely responsible for the unsafe means and methods chosen to construct the platform and dismissed the § 240 claim against the owner and general contractor. While not expressly addressed in the decision, the court likely considered that no additional safety devices beyond the secured planking were needed to afford plaintiff "proper protection" as contemplated under the scaffolding statute. As straightforward as this analysis seems, one has to wonder whether the outcome would have been different had this case been heard in the First Department, where outright dismissals of Labor Law § 240 claims seem few and far between.

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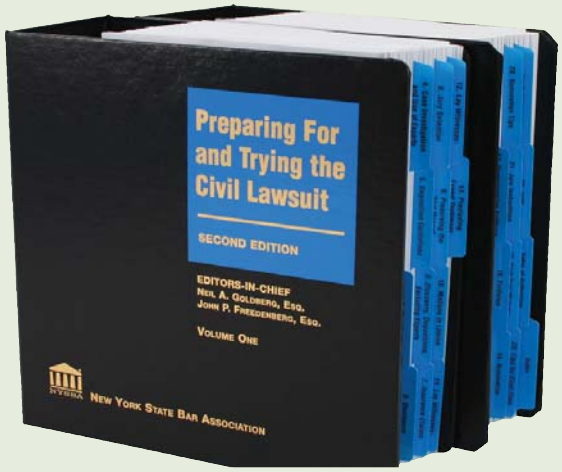

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