DEFENDANT

THE JOURNAL OF THE DEFENSE ASSOCIATION OF NEW YORK, INC.

Vol. 14 No. 1 Summer 2013

FEATURING

The Quadripartite Relationship: Remedies of The Excess Insurer

IN THIS ISSUE

SERVING THE INSURANCE, CORPORATE & PRIVATE COMMUNITIES

CONFIDENTIAL & PROFESSIONAL

30 YEARS EXPERIENCE

100 BROADHOLLOW ROAD,
SUITE 200
FARMINGDALE, NEW YORK 11735
Office 631.454.1100

License# 11000065107

4400 N. FEDERAL HIGHWAY
SUITE 210
BOCA RATON, FL 33431
Office 561.391.6057

License# A2600213

WWW.ALPHAGP.COM

President's Column

JAMES M. BEGLEY*

Note from the Immediate Past President and Current Chair of the Board

I was most pleased to have had the opportunity to serve as the President of the Defense Association of New York (DANY) during the past year. Together with the other officers and members of the Board, we sought to make DANY as beneficial to its members as it has been in the past. A number of our committees were particularly noteworthy in their efforts during the year. The CLE committee, chaired by Teresa Klaum, worked tirelessly to provide meaningful and relevant programs and they were successful in doing so. These programs were quite informative and were well attended by the membership. Networking receptions were coupled with some of the CLE programs and these too proved to be well attended.

The Amicus Committee, chaired by Andy Zajak, continued its tradition of weighing in on important issues and filed a number of *amicus* briefs with the N.Y. Court of Appeals with its permission. It is our understanding that the court appreciates the submission of these briefs by DANY and finds them helpful to it. A number of Board committees joined in the efforts to make DANY's two major annual dinners a success. Both the Past Presidents

Continued on page 20

* *James M. Begley is the Deputy General Counsel for The Port Authority of N.Y. & N.J, for the past 11 years with broad responsibilities for the agency's legal business, particularly in the areas of Litigation, Risk Management and Corporate Security. During 38 years in the agency's Law Department, he was Chief of N.Y. Litigation (9 years) and a trial attorney and litigator in areas such as aviation, civil rights, constitutional, employment, insurance, environmental contract and tort law, including 8 years as lead attorney on the 1993 World Trade Center bombing litigation. Served as a Special Assistant Attorney General with the Special Prosecutor for Nursing Homes, Health and Social Services and was in private practice as a trial attorney. Honorable discharge from the U.S. Army, service included tour of duty in Vietnam. Past N.Y. State Representative for DRI. He is a graduate of St. John's University School of Law.*

The Quadripartite Relationship: Remedies of The Excess Insurer

JOHN J. MCDONOUGH, ESQ.*

There has been significant judicial examination recently of the "tripartite relationship" and the various duties arising between an insurer, an insured and counsel appointed to represent the insured by its insurer. Missing from most of the discussion is any consideration of the rights of the excess insurer where there has been a breach of fiduciary duty by the primary to the excess carrier and possible malpractice by its appointed counsel. Does New York recognize any rights or remedies of the excess insurer in this quadripartite situation? The New York Court of Appeals has yet to rule on this issue, but based on the handful of cases that have considered this issue, New York is one of the few jurisdictions that has permitted a direct action by an excess insurer against a primary carrier rather than limiting it to only those rights available to the subrogee of the insured. Moreover, the First Department has recognized an excess insurer's right to maintain a claim on its own behalf against an insurer's attorneys for malpractice.

While the answer to the question of who is a lawyer's client in a situation where the attorney is appointed by the liability insurer of the insured to defend the insured in a tort action continues to evolve, it is clear the excess insurer is contractually bound only with the insured.[1] The excess insurer has a duty to indemnify the insured upon exhaustion of the primary layer by settlement or judgment but generally has no duty to defend. Consequently, the excess insurer relies on the primary insurer to select and hire defense counsel. Given **the lack of privity** between the excess carrier and appointed defense counsel

Continued on page 2

* *John J. McDonough is a partner of the International Firm of Cozen O'Connor where he is the Vice Chairman of the Firm's Litigation Department. He is the Editor of The Defendant and the past president of the Defense Association of New York and a member of the Board of the Defense Research Institute.*

The Quadripartite Relationship: Remedies of The Excess Insurer

Continued from page 1

there would appear to be no duty to be breached as none is owed.

In 1983, the Appellate Division, First Department reinstated an excess insurer's complaint against a primary insurer and a law firm in *Hartford Accident and Indemnity v. Michigan Mut. Ins. Co.*, 93 A.D.2d 337,462 N.Y.S.2d 175 (1st Dept. 1983), aff'd *Hartford Accident and Indem. Co. v. Michigan Mut. Ins. Co.*, 61 N.Y.2d 269, 475 N.Y.S.2d 267 (1984). Hartford, excess carrier of the defendants in the underlying action, contended throughout the defense of the underlying personal injury action that the defendants, whose primary insurer Michigan Mutual appointed defense counsel for the defendants, should have commenced a third-party action against plaintiff's employer. Hartford alleged this was not done, which would have expanded the exposure of Michigan Mutual who was the Worker's Compensation insurer for the employer.

In its complaint, Hartford alleged breach of fiduciary duty by Michigan Mutual and malpractice by its appointed defense counsel. The lower court dismissed the complaint and the issue thus presented on appeal was whether Hartford has a cause of action in its own right, as opposed to acquiring such right through equitable subrogation from its insured, as against Michigan Mutual. In reinstating the complaint for breach of fiduciary duty the Court stated:

> It is well established that, as between an insurer and its assured, a fiduciary relationship does exist, requiring utmost good faith by the carrier in its dealings with its insured. In defending a claim, an insurer is obligated to act with undivided loyalty; it may not place its own interests above those of its assured. Similar, it has been recognized in this and other states as well as in the federal courts, that the primary carrier owes to the excess insurer the same fiduciary obligation which the primary insurer owes to its insured, namely, a duty to proceed in good faith and in the exercise of honest discretion, the violation of which exposes the primary carrier to the liability beyond its policy limits...

Id. at 341. The Court went on to find that Hartford could sue for a breach of the duty owed by the primary carrier. The Court stated that the primary insurer, acting as a fiduciary, "is held to an exacting standard of utmost good faith." *Id.*

Subsequent to the decision in Hartford, supra, Judge Spatt reiterated the rule regarding the duty owed by a primary insurer to an insured in *New England Ins. Co. v Healthcare Underwriters Mut. Ins.* 146 F.Supp.2d 280 (E.D.N.Y. 2001), rev'd on other grounds, 295 F.3d 232 (2002). "Under New York Law, a primary insurer owes an excess insurer the

Continued on page 21

Table of Contents

FEATURES

Enright Court Reporting, Inc.

Enright Corporation

A New Standard of Excellence in Service

100 South Main Street, Suite 202
Sayville, NY 11782
Phone: 631-589-7788 or 1-800-809-7797
www.enrightcorp.com

Enright Corporation offers a new level of customer service and support to its clients. Whether you are seeking court reporting services for pre-trial proceedings or transcription services for your general correspondence, reports and other important documents, Enright stands ready to assist you.

Enright Court Reporting

Offering:

- Skilled reporters trained by top court reporting schools
- Professionalism
- Reliability
- Accuracy
- Complimentary deposition suites in Brooklyn, Queens and LI
- Video depositions with transcript synchronization
- Scheduling of interpreters and document translation
- Complimentary services for clients such as mini transcripts and more

Experience The Enright Difference!

Enright Sten-Tel Transcription Services

Offering:

- Digital web based transcription service
- State-of-the-art technology ensuring data security (in compliance with HIPAA)
- Dictate anywhere 24/7
- No special equipment or setup fees
- Easy access to reports throughout transcription process
- Dedicated transcribers ensuring accuracy

Enright Sten-Tel®

CPLR Article 16: Treatment of Plaintiff's Fault and Other Perplexities

BRADLEY J. CORSAIR *

CPLR article 16 potentially limits a defendant's noneconomic exposure for personal injury. Before its enactment in 1986, pure joint and several liability was always the rule in New York tort cases.[1] That meant each tortfeasor was responsible not only for the share of damages he caused ("several" liability), but also for the shares attributable to any other culpable tortfeasors ("joint" liability).[2] Consequently, a tortfeasor risked paying the entirety of a personal injury award, regardless of minimal fault or inability to collect contribution from an underfunded joint tortfeasor.

CPLR 1601[3] was enacted to modify the common law rule. It was "the product of a painstaking balance of interests" which "included, among many others, the burdens to be imposed on innocent plaintiffs as well as a concern that defendants at fault to a small degree were consistently paying a disproportionate share of damages awards."[4] It "limits a joint tortfeasor's liability for noneconomic losses to its proportionate share, provided that it is 50% or less at fault."[5]

There are, problematically, a "myriad of exceptions and conditions" by virtue of CPLR 1602.[6] Thus, for instance, CPLR 1601 does not apply to "any person held liable by reason of his use, operation, or ownership of a motor vehicle or motorcycle"[7] or to "any person held liable by reason of the applicability of article ten of the labor law."[8]

Even so, there are numerous scenarios where CPLR 1601 can provide needed protection. As an example, envision a pedestrian struck by a vehicle due mostly to driver error, but also roadway defect a negligent contractor had created. Suppose further that the vehicle owner has a minimum limit liability policy, and the contractor is well insured. Absent 1601, the contractor's insurer would risk exposure for all noneconomic loss, less that minimum limit. With 1601, that exposure stays in line with the contractor's share of fault.[9]

The principal purpose for writing here is to examine perhaps the most controversial aspect of article 16 jurisprudence: whether to consider a plaintiff's share of fault in calculating the fault shares of sued and non-sued tortfeasors. The Pattern Jury Instructions (PJI) have suddenly changed and now call for excluding it, though there has not been truly recent appellate authority on this specific point.

In presenting this centerpiece subject, several other article 16 topics will be discussed. Among them are the effects of the CPLR 1602 provisions regarding indemnification[10] and non-delegable duty.[11] The listing of indemnification and non-delegable duty in 1602 does not mean 1601 never applies in those contexts. 1601 remains available to potentially limit liability for common-law indemnification,[12] as well as contribution,[13] even when the plaintiff enjoys a 1602 exception. 1601 can also benefit a delegator with a non-delegable duty vis-á-vis joint tortfeasors who were not his delegates. Moreover, it now appears that a party-delegatee who undertook a non-delegable duty can have a delagator's fault share counted.[14]

Applying Article 16 to a Verdict: An Example

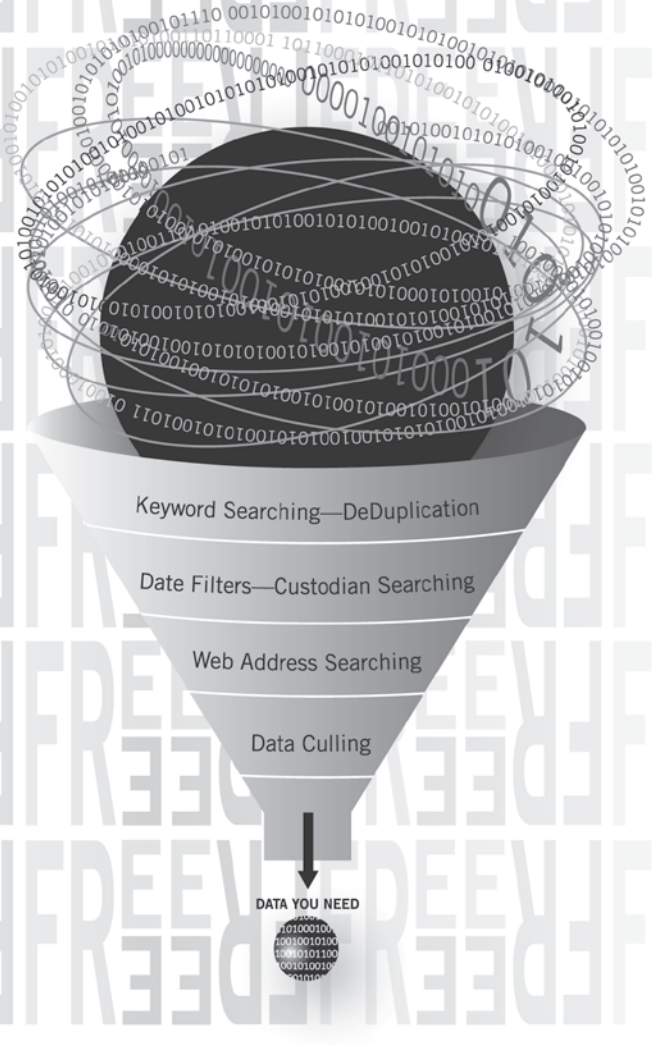
To illustrate CPLR 1601 in action, I will provide an example borrowed somewhat from Professor David Siegel.[15] Although not seen in this hypothetical, note that a fault share calculation under 1601 can take account of a non-party's fault in an appropriate case.

Presume a personal injury action by one plaintiff against two defendants, all having been actively negligent and unrelated to one another. Suppose a jury awards $1,000,000 to the plaintiff for noneconomic loss, i.e. pain and suffering. Suppose also that the jury finds the plaintiff to be 40% at fault, the first defendant to be 40% at fault, and the second defendant to be 20% at fault. Presume further that no CPLR 1602 exception exists, so 1601

Continued on page 6

* *Bradley J. Corsair is a Trial Attorney with The Law Offices of Edward Garfinkel in Brooklyn, New York.*

Why pay for data you don't need?



FREEDISCOVERY™

PAY ONLY FOR WHAT YOU NEED

DiscoveryWorks Global is the only electronic discovery service provider offering truly free data culling. Using our proprietary systems, we perform deduplication, keyword searches, data filters, custodian and web address filters to reduce your client's initial data set down to the documents relevant for your review. Whether your initial data collection is 10 gigabytes or 10 terabytes, you only pay for the data you need.

For more information, please contact Vincent D'Eramo, Director of Business Development at 888.557.8650.

DiscoveryWorks Global

WORLDWIDE
TOLL FREE 888.557.8650
24 HOURS

www.dw-global.com

ELECTRONIC DISCOVERY COURT REPORTING DOCUMENT REVIEW TRIAL PRESENTATION

CPLR Article 16: Treatment of Plaintiff's Fault and Other Perplexities

Continued from page 4

can apply. Will both defendants obtain a joint liability limitation?

If the plaintiff's share is counted, they would. In that scenario, the defendants' shares of fault are 40% and 20%, respectively, i.e. they meet the "50% or less" criterion. Therefore, their exposure is capped at $400,000 and $200,000, respectively. This would be especially important to one defendant if the other were underinsured, uninsured and/or insolvent. Absent CPLR 1601, the plaintiff could have collected $600,000 from the insured / solvent defendant, leaving that party with an inadequate contribution right against the other defendant.

If the plaintiff's share is not counted, a substantially different outcome results. To apply CPLR 1601 in this scenario, mathematical exercise with ratios and proportions is necessary to recalculate each defendant's share of fault. Their shares will change from 40% to 66.67%, and from 20% to 33.33%, respectively. Because 66.67% is not "50% or less," the first defendant does not have a joint liability limitation.

The calculation for the first defendant is as follows:

Step One: Add the percentage numbers the jury arrived at for the defendants' shares:

First defendant: 40
Second defendant: 20
40 + 20 = 60

Step Two: Take the first defendant's percentage number from Step One, and multiply that by 100:

40 x 100 = 4000

Step Three: Divide the Step Two total (4000) by the Step One total (60):

4000 / 60 = 66.67

Similarly, the calculation for the second defendant looks like this:

Step One: Add the percentage numbers the jury arrived at for the defendants' shares:

First defendant: 40
Second defendant: 20
40 + 20 = 60

Step Two: Take the second defendant's percentage number from Step One, and multiply that by 100:

20 x 100 = 2000

Step Three: Divide the Step Two total (2000) by the Step One total (60):

2000 / 60 = 33.33

This exercise in recalculation has come to be known as "extrapolation."

Is the Plaintiff's Fault to be Counted?

Unfortunately, article 16 does not unambiguously discuss whether to count a plaintiff's fault, in determining whether a sued party or non-party is 50% or less at fault. Also surprising, no appellate court has addressed this specific issue at length, though article 16 has existed for over a quarter century.

The debate stems from the CPLR 1601 wording about the equitable share. 1601 states that an equitable share is to be "determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss." "Determined in accordance with the relative *culpability* of each person" suggests a plaintiff's fault should be germane. However, many consider a plaintiff incapable of "causing or contributing to the total *liability*" and thus not a "person" under 1601.

An esteemed Committee has this view, but recommends a statutory change so a plaintiff's fault can be counted. A report titled "2012 Report of the Advisory Committee on Civil Practice to the Administrative Judge of the Courts of the State of New York" reflects belief that the present CPLR 1601 "liability" phrasing prevents a plaintiff's fault from counting.[16] In the Committee's opinion, this is because a plaintiff is not "liable" for his or her own injury.[17]

The Committee acknowledges the "bizarre result" that "the defendant's rights could be reduced by virtue of the plaintiff's negligence."[18] "If, for example, plaintiff is assigned 60% of the fault while defendants Smith and Jones are respectively assigned 30% and 10% of the fault, Smith's share of the 'total culpability' is 30% but his or her share of the 'total liability assigned to all persons liable' is 75%. Smith is thus wholly denied any benefits of Article 16 simply because the 60% share of the fault was assigned to the plaintiff rather than to another

Continued on page 18

ExamWorks

Providing authoritative evidence-based independent medical examinations services in accordance with national standards for the bodily injury, disability, liability and workers' compensation insurance lines throughout the U.S., Canada and the United Kingdom.

IMEs	Review Services	Support Services
Required Medical Evaluations	Medical Record Review	Expert Testimony
Disability Evaluations	Medical Bill Review	Quality Assurance
Fitness for Duty	Nurse File Review	On-site Representatives

For access to our national panel of credentialed ABMS Board Certified physicians or to learn more about our service offering in your area, please contact Chris Greco.

chris.greco@examworks.com
800.842.0034
www.examworks.com

Post Runner – A Narrowing of Labor Law §240(1)

KEVIN G. FALEY *

Introduction

With its 2009 decision in *Runner v. New York Stock Exchange*[1], the New York Court of Appeals reminded us that under Section 240(1) of the Labor Law the single most important factor to consider when analyzing an injury is whether the force that gravity exerts on either an object or a person caused the accident. While *Runner* did not explicitly overturn any prior cases, its expansive holding has enlarged recovery in cases where an injury was directly caused by a "physically significant elevation differential."

The cases that have followed the *Runner* decision reaffirm the importance of determining whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against the risk arising from a physically significant elevation differential. While potentially this may encompass a large number of injuries in the workplace, the courts have been very cautious to maintain a common sense approach in differentiating between the simple effects of gravity on an object or person and instances where the resulting injury is caused by a considerable gravitational force.

Runner v. The New York Stock Exchange, Inc.

In *Runner v. New York Stock Exchange, Inc.*, the Court ruled that "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against the risk arising from a physically significant elevation differential."[2]

The Court found that although the accident in *Runner* did not involve either a falling worker or a falling object, the plaintiff's injuries were sufficiently related to a physically significant elevation differential to bring the injured worker under the protection of Labor Law §240(1).

The plaintiff and several of his co-workers were moving a large wheel of wire that weighed about 800 pounds down a set of stairs. To prevent the wheel from rolling away from the workers and down the stairs, the workers created a mechanism whereby they tied one end of a rope to the reel and then wrapped the rope around a metal bar that was horizontal across the door jamb. The plaintiff and two co-workers held the loose end of the rope while two other co-workers pulled the reel of wire down the stairs. The wheel pulled plaintiff and his co-workers towards the metal bar as the reel descended. The plaintiff was pulled into the bar due to the weight of the wheel and as a result injured his hands which jammed against the bar.

The Court's ruling signified a major shift in the important factors for interpreting Labor Law §240(1), specifically in cases of a "falling object." Prior to *Runner*, the Courts seemed to hold that the falling object must actually strike the plaintiff from a certain height above the worker in order for a cause of action to lie. In *Runner*, the gravity element of the Labor Law was expanded to the point where it is now no longer necessary for the object to fall from a height above the plaintiff or for the plaintiff to be struck by the falling object for the plaintiff to be entitled to the protection of Labor Law §240(1). It is only necessary that gravity – here, the gravitational pull of an 800 pound wheel down a flight of stairs – be involved.

Cases Since the Runner Decision

Since the Court's ruling in 2009 there have been many cases which follow and redefine the interpretation of the Labor Law set forth in Runner. After *Runner*, there seem to be three major aspects that courts look at to determine whether there has been a Labor Law §240(1) violation. They are: the distance the object fell, the weight of the object

Continued on page 10

* *Kevin G. Faley is a partner in the law firm of Morris Duffy Alonso & Faley located in Manhattan. Kerry Sullivan, a paralegal at my firm, helped with the article.*

Helping You Build a Better Case

This is what our Litigation & Valuation Consulting group is all about.

With over 2,500 matters and hundreds of court appointments and appearances, we are one of the largest and most experienced forensic accounting groups in the New York metropolitan area.

Business Fraud & Investigation
White Collar Crime & Tax Fraud
Economic Damages
Business Appraisal & Valuation

SUPERIOR THINKING.
UNMATCHED INTEGRITY.

Joel R. Podgor, CPA/CFF, CFE
212-697-6900
Podgor@hrrllp.com

Holtz Rubenstein Reminick LLP
125 Baylis Road, Melville, NY 11747
1430 Broadway, New York, NY 10018
www.hrrllp.com

HOLTZ RUBENSTEIN REMINICK
CERTIFIED PUBLIC ACCOUNTANTS. BUSINESS ADVISERS.

Post Runner – A Narrowing of Labor Law §240(1)

Continued from page 8

and the amount of force that the object was capable of creating.

Gasques

The Court of Appeal's first opportunity to address its ruling in Runner came quickly with the case *Gasques v. State*[3] in 2010. In *Gasques*, the plaintiff was injured while painting the inside of a leg of the Kosciuszko Bridge using a spider scaffold. While the spider scaffold was ascending, plaintiff's hand became caught between the scaffold and the leg of the bridge. While the Court of Appeals reaffirmed their ruling that liability attaches under Labor Law §240(1) when the injury is the direct consequence of the application of force to an object or person, the court did not think Gasques' injury fell under this rule. The court found that the plaintiff's injury was the result of the continued movement of a motorized scaffold, rather than the effects of gravity, and as such the worker was not entitled to protection under Labor Law §240(1).

Makarius

Also in 2010, the First Department applied the Runner decision in *Makarius v. Port Authority of New York and New Jersey*[4]. The five foot eight inch plaintiff was struck in the head by a falling transformer that had been installed at a height of about six to eight feet. The court ruled that this was not an injury that fell under Labor Law §240(1).

Citing *Runner*, the court placed a significant amount of emphasis on the first part of the *Runner* ruling, that there be a *physically significant elevation differential* when determining whether the plaintiff was protected by the Labor Law. Even though the injuries in this case were the direct result of the application of the force of gravity to an object, the court determined that based on the plaintiff's height of five feet, eight inches, the transformer's descent of a little over a foot above the plaintiff was not a physically significant elevation differential. Here, again, *Runner* was narrowly applied.

Wilinski

In 2011 the Court of Appeals once again revisited its ruling in *Runner*. In the case *Wilinski v. 334 East 92nd Housing Development Fund Corp.*[5], the plaintiff was struck in the head by two large pipes that had been left standing and attached to the floor while demolition occurred nearby. Debris from the demolition hit the pipes, causing them to topple over. The pipes fell approximately four feet and landed on the plaintiff, who is five feet, eight inches tall. The court found that this accident fell under the purview of Labor Law §240(1) because the plaintiff suffered an injury that flowed directly from the application of force to the pipes.

Additionally, the court declined to adopt the "same level" standard enunciated in *Misseritti v. Mark IV Constr. Co.*[6], noting that there can be a gravity-related injury by an object at the same or similar level as the plaintiff that causes an injury. The court stated that the "same level" standard categorical exclusion of injuries caused by falling objects that are on the same level as the plaintiff at the time of the accident ignores the nuances of a complete analysis of §240(1).

Harrison

That same year the First Department decided *Harrison v. State*[7]. Plaintiff was moving a generator weighing approximately 150 to 200 pounds from one bridge pier to another. Plaintiff and a co-worker were moving the generator five and a half to six feet from the dock to a barge. The plaintiff's coworkers lifted the generator onto the lip of the pier and the plaintiff, who was standing on the boat, attempted to steady it from the deck of the boat, approximately 5 and a half to 6 feet below. Before the plaintiff's coworker could get down to help him lift the generator to the boat's deck, the generator slipped toward the plaintiff, caught on his tool belt and pulled him to the deck, injuring his back. The court held that due to the weight of the generator, the height differential of five and a half to six feet was not "de minimis" and, as such, the plaintiff was entitled to recover under Labor Law §240(1).

McCallister

The focus of a Labor Law §240(1) analysis must not only include whether the injury arose from an elevation differential but also whether a considerable gravitational force was involved. This analysis is exemplified in *McCallister v. 200 Park, L.P.*[8].

Continued on page 17

Court Of Appeals Decisions Clarify Primary Assumption Of Risk Defense In Tort Actions

BRIAN W. MCELHENNY *

The Court of Appeals decided two cases in 2012 dealing with the primary assumption of risk defense in tort cases. In *Bukowski v. Clarkson University*,[1] Plaintiff was a college baseball pitcher who was injured when he was struck by a line drive during indoor baseball practice. He argued that the school was negligent due to the lack of an L screen which is a protective device used in batting practice, and inadequate indoor lighting.

Defendant argued that the indoor baseball practice field was as safe as it appeared, and the risks of being hit by a batted ball were open and obvious to a baseball pitcher.

The Court held that Bukowski was an experienced baseball player, and assumed the inherent risk of being struck by a batted ball. Even if the conditions at the winter indoor practice were less than optimal, the defense of primary assumption of risk defense applied. There was no defective equipment involved and no violation of any established safety protocol. The risks of being hit by a ball were not concealed or increased by defendant.

The Court concluded that the doctrine of assumption of risk…..

> "shields college athletics from potentially crushing liability. Clarkson University, a college located in upstate New York, should be able to allow its sports teams to practice indoors during the cold winter months without fear of liability for inability to replicate the ideal conditions of the outdoor spring season." [2]

Four months later, the Court of Appeals decided *Custodi v. Town of Amherst*,[3]. The Court held that primary assumption of risk did not preclude a rollerblader from maintaining an action against landowners for negligent maintenance of a driveway or street. Plaintiff was an experienced rollerblader, who was injured when her skates struck a two inch height differential at the edge of where the driveway met the street.

Defendants argued that she assumed the risk of injury by rollerblading in the street or on sidewalks with knowledge of elevation differences between sidewalk and streets. The trial court dismissed the action, but the Appellate Division Fourth Department reversed and reinstated the claim.[4]

The Court of Appeals affirmed the decision of the Appellate Division, holding that primary assumption of risk did not apply because plaintiff was not engaged in a sporting competition, at a designated venue or facility owned or operated by defendant.

Generally, the Court said that primary assumption or risk applies when a participant in a qualified activity is aware of and voluntarily assumes risks inherent in that activity.[5]

Application of the doctrine facilitates vigorous participation in athletic activities which has social value and shields sponsors or venue owners from liability which would discourage them from sponsoring athletic events or allowing participants to use their facilities.

The Court clarified that the defense is available to those defendants that sponsor or support athletic activity at a designated venue.[6] In *Custodi*,

1 *Bukoski v. Clarkson University*, 19 NY3d 353 (June 5, 2012).
2 *Bukowski*, Id. at 358.
3 *Custodi v. Town of Amherst,* 2012 NY Lexis 3261, 2012 NY Slip Op 7225 ____ NY 3d ____ October 30, 2012.
4 *Custodi v. Town of Amherst*, 81 AD 3d 1344 (App. Div Fourth Dept. 2011).
5 *Custodi* 2012 NY Slip Op 07225 at 3.
6 *Custodi* 2012 NY Slip Op 07225

continued on page 12

* *Brian W. McElhenny is a partner with the firm of Goldberg Segalla and is located in the Mineola, New York office.*

Court Of Appeals Decisions Clarify Primary Assumption Of Risk Defense In Tort Actions

Continued from page 11

plaintiff was rollerblading on a public sidewalk and street, not at a rink or skate park operated by a defendant. Defendants did not sponsor or promote her rollerblading activity.

The Court declined to apply assumption of risk for an alleged defect on a public street or sidewalk as it would diminish the duty of landowners to maintain their property in a reasonably safe condition.[7] Sidewalk or street defects are not the type of inherent risks to be assumed by all joggers, runners, rollerbladers or bicyclists. Extending the defense under these circumstances would not further the rationale for the doctrine to encourage sporting activity.

As such, the usual rules of negligence, causation and comparative fault apply and the case was remanded back for trial.

CONCLUSION

The 2012 decisions issued by the Court of Appeals clarified the elements of the primary assumption of risk defense which is a complete defense in a tort action.

It applies to inherent risks in qualified athletic activities sponsored or operated by a defendant that are held at designated venues. It does not apply as a complete bar in suits against landowners for defects in public streets or sidewalks being used by joggers, bicyclists or rollerbladers. In those cases, the usual rules of comparative fault apply.

7 Custodi 2012 NY Slip Op 07225 at 5

The Defendant Welcomes Contributors
Send proposed articles to:
John J. McDonough
Cozen O'Connor
45 Broadway, New York, NY • 10006

Worthy Of Note

VINCENT P. POZZUTO *

TRIAL PRACTICE

Motion Granting Setting Aside of Jury Verdict Affirmed

Wittorf v. City of New York
(1st Dept. March 26, 2013)

Plaintiff and her boyfriend rode their bicycles to the Central Park Traverse Road on West 65th Street. A City DOT employee was setting up cones to block off the road so a "special condition" could be repaired. A "special condition" was a defect "bigger than a pothole" but "less involved" than road resurfacing. Plaintiff's boyfriend asked the DOT employee if they could ride through, and he told them "go ahead." Plaintiff was injured when her bike hit a "large pothole." A verdict was rendered in favor of Plaintiff. The City made a motion to set aside the verdict on the ground that the City was immune from liability because the supervisor was engaged in the discretionary governmental function of traffic control and not the proprietary function of street repair. The motion was granted and plaintiff appealed. The Appellate Division, First Department affirmed, holding that because the repair work had not yet begun at the time of plaintiff's accident, the supervisor was engaged in traffic control, a "governmental function undertaken for the protection and safety of the public pursuant to the general police powers."

DAMAGES

No Award for Conscious Pain and Suffering Affirmed

Marie Curry v. Hudson Valley Hospital Center
(2nd Dept. March 27, 2013)

Plaintiff brought a wrongful death action to recover for, inter alia, the conscious pain and suffering of her decedent, her mother. Plaintiff claimed that defendants Hudson Valley Hospital and Dr. Arroham Schreiber failed to properly treat polyps that had developed on decedent's vocal chords. The jury found defendants 50% responsible and decedent 50% responsible. The jury made no award for conscious pain and suffering. The plaintiff's expert testified that death by sudden asphyxiation was "miserable" and that a person who was suddenly unable to breathe would wake up if they were asleep and feel "terrible." Defendant's expert testified that the decedent, who had been taking muscle relaxant medication, died of sleep apnea and chronic obstruction pulmonary disease. Defendant's expert testified that such a condition could "blunt" a person's response to asphyxiation such that a gradual diminishment of oxygen in the blood would cause the person to "just go to sleep" resulting in a "slow…fairly somnolent death." The Court held that an award for conscious pain and suffering requires proof that the injured party experienced some level of cognitive awareness following the injury. The Court held that the jury's decision to make no award for conscious pain and suffering was based on a fair interpretation of the evidence and there was no reason to disturb the jury's resolution of credibility issues in favor of defendants.

LABOR LAW

Plaintiff's Motion for Summary Judgment Pursuant to Labor Law §240(1) Granted

Nacewicz v. The Roman Catholic Church of the Holy Cross
(1st Dept. April 2, 2013)

Plaintiff was performing brickwork on the exterior of a church as part of a renovation. Plaintiff was ascending an extension ladder between the first and second level of a four-tiered scaffold. The ladder, which was not properly secured, slid causing plaintiff to fall to the first tier 10 feet below. Defendants, in response to plaintiff's motion for summary judgment pursuant to Labor Law § 240(1) argued that plaintiff's actions were the sole proximate cause of his injuries because he did not use the fire escape to go from

Continued on page 14

* *Vincent P. Pozzuto is a member in the Manhattan office of Cozen O'Connor.*

Continued from page 13

the first-tier to the second tier. The lower court denied plaintiff's motion but the Appellate Division reversed, holding that the evidence failed to raise an issue of fact as to whether plaintiff knew he was expected to use this alternative means of ascending to the second tier "exclusively" and unreasonably chose not to use it.

LABOR LAW

Plaintiff was not Engaged in Protected Activity; Labor Law § 200 Claim Dismissed as Hazard was Readily Observable.

Bodtman v. Living Manor Love, Inc.
(1st Dept. April 2 2013)

Plaintiff was on a roof of a motel, drilling several holes in order to attach a temporary sign. After ascending to the roof, he slipped off and fell to the ground. The Court held that this work would have entailed only a slight change to the building and did not constitute "altering" for the purpose of Labor Law §240. The Court also dismissed the Labor Law §200 claim. Plaintiff testified that he saw that the roof contained corrugated and smooth portions, yet he walked up the smooth part. The Court took notice that plaintiff had worked on other roofs in the past, and held that the inherent risk of walking up a smooth portion of a sloped roof rather than walking on the visibley corrugated portion was just as apparent to plaintiff as it would have been to defendants, and thus plaintiff could not recover on the theory that defendants had constructive notice of such a condition.

LABOR LAW

Plaintiff was not Engaged in a Protected Activity Pursuant to Labor Law § 240(1)

Amendola v. Rheedlen
(1st Dept. April 2, 2013)

Plaintiff was hanging window shades, which entailed securing brackets with screws to the ceiling or pan protruding from the wall, and inserting the shades into the bracket. The Court held that this was not an enumerated activity under Labor Law § 240(1) as the work did not amount to a "significant physical change to the configuration or composition of the building or structure." Plaintiff could not establish that the work fell under the definition of "repairs" under the statute, as it was conceded that the shades were being newly installed at the time of the accident. Plaintiff also could not establish that the work was "performed in the context of the larger construction project", as the evidence demonstrated that the construction manager and owner ultimately decided that the owner should contact plaintiff's employer directly as the construction manager's work was coming to an end. Plaintiff's employer, City View, sent proposals and invoices for the subject work directly to the owner. As such, the Court held that the work installing window shades was not "ongoing and contemporaneous with the other work that formed part of a single contract."

MEDICAL MALPRACTICE

Summary Judgment Awarded to Defendants

Giambona v. Hines
(2nd Dept. February 7, 2013)

Plaintiff's decedent died as a result of a thoracoabdonmial aortic aneurysm that was allegedly not timely diagnosed or treated. On appeal of various motions for summary judgment, the Appellate Division, Second Department, held that defendant Hines and Winthrop Cardiovascular made a prima facie showing of their entitlement to judgment as a matter of law by submitting an expert affidavit demonstrating that Hines did not depart from good and accepted standards of medical care by opting not to surgically repair a lower thoracic aortic aneurysm that appeared on a CT-scan in April 2005, given the size of the aneurysm and other conditions which made the decedent a poor candidate for surgery. The expert opinion also demonstrated that any departure in opting not to surgically repair the April 2005 aneurysm was not a proximate cause of the injury because decedent in July 2005 suffered complications from a separate pseudoaneurysm. The plaintiff's expert's affidavit in opposition to the motion for summary judgment was conclusory and unsupported by the record on the issue of causation. The Court further held that Winthrop University Hospital's cross-motion for summary judgment was properly granted in that any departure by a Dr. Shah in misreading the April 2005 CT-scan was not a proximate cause of injury because Dr. Hine's treatment of decedent was based upon an independent review of the CT scan. The court further held that Winthrop University

Continued on page 22

Social Media and Cell Phone Requests: Not a LOL Matter

ANDREA M. ALONSO, ESQ. AND KEVIN G. FALEY, ESQ. *

With just the click of a button, 67% of adult Internet users are communicating with friends and family members worldwide, sharing pictures, posting "statuses" and "liking" what their "friends" are doing. Social media websites such as Facebook, Twitter, Instagram and Tumblr enable individuals to stay in touch easily and efficiently. With the advent of smartphones, sharing information has gotten even easier. Given that 15% of Americans share "everything" or "most things" online, attorneys need to know that the information contained on social network profiles and in cell phone records may be discoverable and even admissible into evidence if the lawyer is able to establish a factual predicate as to the information's relevancy and the requests are narrowly tailored.

Public Posts Contradict Claims

CPLR § 3101 requires there "be full disclosure of all matter material and necessary in the prosecution or defense of an action." New York courts have routinely held that "plaintiffs who place their physical condition in controversy, may not shield from disclosure material which is necessary to the defense of the action."

Michelle'le McCarthy learned the hard way that this includes information posted online, even if the information is blocked to the general public. In 2011, McCarthy brought a suit in Kings County to recover damages for personal injuries arising out of an automobile accident. She testified at a deposition that the accident "impaired her ability to play sports and caused her to suffer pain that was exacerbated by cold weather." Yet, on her public Facebook profile, which defendant's attorneys were able to easily access, were photographs dated post-accident depicting McCarthy on skis in the snow. The court determined that "defendants demonstrated that McCarthy's Facebook profile contained a photograph that was probative of the issue of the extent of her alleged injuries and it [was] reasonable to believe that other portions of her Facebook profile [may have contained] further evidence relevant to that issue." The Court directed McCarthy to disclose, for in camera review, "status reports, emails, and videos that [were] relevant to the extent of her alleged injuries" in addition to the photographs depicting her participating in sports.

Social Media

The New York State Bar Association in 2010 opined that a lawyer who has access to social media websites "may access and review the public social network pages of [an opposing party] to search for potential impeachment material." However, lawyers are prohibited from "friending" or directing a third person to "friend" an opposing party in litigation. Taking this into consideration, it would be wise for attorneys to conduct a preliminary search of an opposing party on social media websites to see if any information is freely discoverable. Furthermore, attorneys should advise their clients as to what privacy settings to use, what posts to keeps blocked from the public and what information to remove from social media pages altogether. In July of this year, the Ethics Committee for the New York County Lawyers' Association opined that this was all proper as long as lawyers comply with their ethical duties and keep in mind the "substantive law[s] pertaining to the preservation and/or spoliation of evidence."

Users of social media should not be surprised that posts, messages, statuses and pictures are all subject to discovery since they choose to share this information publicly. Likewise, users do not have a reasonable expectation of privacy in the information they share. As Judge Matthew Sciarrino stated in *People v. Harris* in discussing Twitter posts, "[i]f you post a tweet, just like if you scream it out the window, there is no reasonable expectation

Continued on the next page

* *Andrea M. Alonso and Kevin G. Faley are partners in the firm of Morris Duffy Alonso & Faley located in Manhattan. Rebecca Rosedale, a paralegal, assisted in the preparation of this article.*

of privacy." Essentially, what a person chooses to display to the public, belongs to the public.

However, as Michelle'le McCarthy learned, information displayed on public profiles is not the only information that can be discovered. In 2010, the Suffolk County Supreme Court in *Romano v. Steelcase, Inc.* allowed information on a social media profile that was hidden from the public's view to be discovered. Plaintiff filed a personal injury action and claimed that as a result of her injuries she could not participate in certain activities and that her injuries affected her enjoyment of life. Defendants contended, however, that on the public portion of plaintiff's Facebook and MySpace profiles was information contrary to her claims. Specifically, there was information conveying that plaintiff had an active lifestyle and had traveled to Pennsylvania and Florida during the relevant time period.

Defendants served authorizations for access to the information on plaintiff's profiles, but the plaintiff denied theses requests. The court held that because the public portion of plaintiff's online profiles contained material contrary to her personal injury claims, there was a "reasonable likelihood" that the private portions also contained relevant information to the defense of the action and therefore were discoverable. In citing New York's liberal disclosure policy, the court stated that the plaintiff's right to privacy was outweighed by defendant's need for the information.

Importantly, however, discovery requests for information contained on social media websites must be narrowly tailored to be granted. Courts apply a balancing test to determine whether to compel the production of information contained on a litigant's social media page. The information requested by the opposing party must be "material and necessary" to the defense of the case and production of the information should not "result in a violation of the account holder's privacy rights." What this essentially means is that parties cannot make broad requests with the expectation that they will be able to go on "fishing expeditions" through the requested materials with the hope that they might find something relevant.

For example, the Fourth Department denied a motion to compel the disclosure of the "entire contents" of any social media account maintained by or on behalf of the injured party because "there [was] no contention that the information in the social media accounts contradict[ed] plaintiff's claims for the diminution of the injured party's enjoyment of life." A party must "establish a factual predicate with respect to the relevancy of the evidence," something that "contradicts or conflicts with [p]laintiff's alleged restrictions, disabilities, and losses, and other claims." A mere allegation of relevancy, such as "mere possession and utilization of a Facebook account," will not suffice for a request to be granted. Nevertheless, courts have held that parties whose requests are denied are not precluded from making a more narrowly tailored request at a later date.

Furthermore, information taken from social media websites can be admitted into evidence if the information's evidentiary value outweighs the potential for prejudice. In *Johnson v. Ingalls*, the plaintiff appealed her case claiming that photographs taken from her Facebook account were "unduly prejudicial and improperly admitted into evidence." In her initial complaint, plaintiff claimed that as a result of an accident she suffered severe anxiety which prevented her from going out and socializing with friends. However, photographs obtained from plaintiff's Facebook account depicted her "attending parties, socializing and vacationing with friends, [and] dancing…." The court found no abuse of discretion by the trial court in admitting the photographs into evidence as they "ha[d] probative value with regard to plaintiff's claimed injuries."

Cell Phone Records

Lawyers may make demands for cell phone records and should always request cell phone records in automobile accident cases. The failure to observe Vehicle and Traffic Law § 1225-c, which states that "no person shall operate a motor vehicle upon a public highway while using a mobile telephone to engage in a call while such vehicle is in motion," is a violation of the law and constitutes negligence on behalf of a driver involved in a motor vehicle accident. Furthermore, studies suggest that even the use of "hands-free" devices is pertinent to a person's contributory negligence. Importantly, courts prefer cell phone record requests to be made pursuant to CPLR § 3124, not through the service of a subpoena upon a nonparty. Similar to requests for information on social network profiles,

Continued on page 30

Post Runner – A Narrowing of Labor Law §240(1)

Continued from page 10

In *McCallister*, the plaintiff and his foreman were moving a four foot high baker's scaffold with approximately 450 to 550 pounds of material piled on it. As plaintiff and his foreman were moving the baker's scaffold, the two wheels on plaintiff's side fell off. The plaintiff squatted down with the bars of the scaffold on his chest to pick up the wheel-less end of the scaffold. Rather than moving it to the side as the plaintiff expected, the foreman pushed the scaffold towards him. The scaffold fell forward onto the plaintiff's chest, pinning him against the wall and injuring his spine.

The Second Department held that the worker was entitled to protection under Labor Law §240(1) as a result of this injury. The court determined that although the base of the scaffold was at the same level as the plaintiff and the scaffold only fell a short distance, given the combined weight of the device and its load and the force it was able to generate over its descent, the difference was not de minimis. In other words, the weight of the object can sometimes overrule the elevation differential. Thus, the plaintiff suffered harm that flowed directly from the application of the force of gravity to the broken scaffold. However, it should be noted that the Court never set forth the actual distance the scaffold did fall.

DeRosa

One of the most recent decisions relating to *Runner*'s interpretation of liability under Labor Law §240(1) came in June 2012. In *DeRosa v. Bovis Lend Lease LMB, Inc.*[9] the driver of a cement-mixing truck brought an action under the Scaffold Law after he was injured when the back of his shirt was caught in the mixer's rotating hatch handle, causing the worker to be thrown over the truck.

The Court denied the plaintiff's claim under Labor Law §240(1) and held that while §240(1) is to be liberally construed, such liberality must be construed with a common sense approach to the realities of the work place at issue. The First Department reiterated that the protections of the statute "are not implicated simply because the injury is caused by the effects of gravity upon an object." Rather, the "single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential."

Burton

On July 17, 2012 the Appellate Division, First Department reviewed a case where the plaintiff fell from a permanent concrete walkway that had no guardrails or other barriers. In *Burton v. CW Equities*[10], the court held that the plaintiff's fall was a direct result of the defendant's failure to provide adequate protection against a risk arising from a physically significant elevation differential and thus the defendants were liable under Labor Law §240(1). The permanent walkway extended over an approximately fifteen foot deep vaulted area below grade level and the court held that this was a sufficient elevation differential to bring the worker under the protection of the Labor Law.

Oakes

On July 19, 2012 the Third Department offered one of the first detailed analyses of *Wilinski* and found that liability under §240(1) did not apply. In *Oakes v. Wal-Mart Real Estate Business Trust*[11], the Third Department held that the plaintiff, whose legs were crushed under a truss that fell over, could not recover under §240(1) because the piece of steel was no taller than the plaintiff.

Many thought that *Wilinski* would open the door to recovery when the plaintiff and the object were essentially at the same height. This case does not totally preclude recovery when the plaintiff and the item are at the same height, but reinforces the three factors that have become central to a proper §240(1) analysis. The Third Department panel held "notwithstanding the substantial weight of the truss and significant force generated as it fell due to the force of gravity…there was no elevation difference present here let alone the required physically significant elevation differential."[12]

The Third Department differentiated this case from the situation in *Wilinski*, stating that the "plaintiff's injury occurred after the truss was rendered unstable by an object that hit it horizontally…Under these circumstances, the plaintiff was exposed to the 'usual and ordinary dangers' of a construction site, not the extraordinary elevation risks envisioned by Labor Law §240(1)."[13]

Continued on page 20

CPLR Article 16: Treatment of Plaintiff's Fault and Other Perplexities

Continued from page 6

defendant or a non-party."[19]

The Committee has expressed belief that the Legislature could not have intended such a result. Thus, as Professor Vincent Alexander explains in present practice commentary for CPLR 1601,[20] the Committee has proposed an amendment specifying that the apportionment of 1601(1) be based on the "culpability of all persons deemed culpable," rather than basing apportionment on "the total liability assigned to all persons liable." This way, "a plaintiff's culpability, as contemplated by CPLR 1411, would remain part of the overall mix in determining whether any defendant is more than 50% at fault."[21]

Until if and when 1601 is amended, it is important to know the sources for the competing views of how to treat a plaintiff's fault. This writing now covers that at length.

The PJI Reverses Course

Before the annual PJI update of December 2012, the PJI view was that a plaintiff's fault is to be counted. That was clear from the December 2011 Comment for PJI 2:275 ("Comparative Fault – Apportionment of Fault Between Defendants"), and Special Verdict Form PJI 2:275 SV-II of that time.

Deep within the December 2011 PJI 2:275 Comment (on page 16 of the then-existing Westlaw version) is a discussion titled "Limitations on Joint and Several Liability – Article 16." Its third paragraph states, at the outset: "The comparative fault of plaintiff is included in the apportionment for Article 16 purposes."

As though replying to dissenting opinion elsewhere, the PJI commentator went on to state:

> "The language of CPLR 1601 is ambiguous as to what effect plaintiff's percentage of fault should be given in calculating whether any defendant's percentage of fault exceeds 50% of the 'total liability.' The statute provides that defendant's share of fault is taken as a percentage 'of the total liability assigned to all persons liable' and, if the share is 50% or less, liability for non-economic loss is limited to defendant's share 'determined in accordance with the relative culpability of each person causing or contributing to the total liability,' CPLR 1601. At first blush, the term 'total liability' might seem to have reference only to those defendants obligated to pay a judgment. However, a plaintiff whose conduct contributed to plaintiff's own injury may not recover to the extent of plaintiff's share of fault and, because of plaintiff's 'relative culpability,' is partially 'liable' for his or her own injury, see CPLR 1411."

The commentator then continued:

> "Moreover, the reference in CPLR 1601 to 'relative culpability' was drawn from the relative culpability concepts of CPLR Article 14-A, suggesting that the Legislature intended to include plaintiff's fault in the Article 16 joint and several apportionment. If plaintiff's fault were to be excluded from the computation and if defendants' percentages of fault for joint and several liability purposes were arrived at by applying the percentage of each defendant solely against the total of all defendants' percentages of fault, a defendant whose share of the total fault (including that of plaintiff) was 50% or less might find that his or her percentage of the total of all defendants' percentages of fault is greater than 50%. Therefore, it is apparent that whether a defendant is responsible for 'fifty percent or less of the total liability' is determined by simply adopting the percentage number assigned to that defendant in the verdict or decision."

After additional discussion, an introduction for Special Verdict Form PJI 2:275 SV-II ("Apportionment of Fault and Limitations on Liability") is provided in the December 2011 version: "The following special verdict form is suggested for use in actions subject to the limitations of Article 16. This form is adapted from the special verdict forms suggested for use with respect to comparative fault, see PJI 2:36, and apportionment of fault, see Special Verdict Form PJI 2:275 SV—I." At Question 5, this special verdict form instructs jurors to provide the percentages of fault of the plaintiff, as well as of any defendant, third party defendant, or non-party whose percentages of fault should be determined.

Thus, under the December 2011 PJI view,[22] a defendant or third party defendant seeking article 16 protection simply takes the percentage number

Continued on the next page

assigned to him in a verdict or decision. There is no need for the extrapolation mathematics illustrated above.

Seemingly out of nowhere, the December 2012 PJI 2:275 calls for the opposite formulation. It does not discuss its change from earlier versions, nor indicate that recent judicial authority requires extrapolation. This view is supported by impassioned academic writing[23] and seemingly one appellate case,[24] as well the aforementioned Committee acknowledgement. Regardless, good arguments for the contrary position remain extant.

The present Comment for PJI 2:275, at page 17 of the Westlaw version, has a paragraph titled "Effect of plaintiff's fault." It states as follows:

> CPLR 1601 provides that a defendant's share of fault is taken as a percentage "of the total liability assigned to all persons liable" and, if the share is 50% or less, liability for non-economic loss is limited to defendant's share "determined in accordance with the relative culpability of each person causing or contributing to the total liability," CPLR 1601. The First Department has concluded that a plaintiff is not a "person liable" under CPLR 1601 and a plaintiff's share of fault is excluded from the CPLR 1601 calculation, *Risko v Alliance Builders Corp.*, 40 AD3d 345, 835 NYS2d 551; see also *Frank v Meadowlakes Development Corp.*, 6 NY3d 687, 816 NYS2d 715, 849 NE2d 938; Dillon, *The Extrapolation of Defendants' Liabilities Under CPLR Article 16 Where the Plaintiff is Contributorily Negligent*, 73 Albany Law Review 79 (2009). Notably, in *Frank v Meadowlakes Development Corp.*, supra, the court considered whether a tortfeasor whose liability is determined to be 50% or less can be found responsible for total indemnification of non-economic loss despite CPLR Article 16. The court answered that question in the negative and, in calculating the subject indemnitor's liability to the indemnitee, divided indemnity among the potential indemnitors and excluded a plaintiff's share of fault since a plaintiff could not be an indemnitor. If plaintiff's fault were to be excluded from the computation and if defendants' percentages of fault for joint and several liability purposes were arrived at by applying the percentage of each defendant solely against the total of all defendants' percentages of fault, a defendant whose share of the total fault (including that of plaintiff) was 50% or less might find that his or her percentage of the total of all defendants' percentages of fault is greater than 50%.

The *Frank* and *Risko* cases just cited involve application of CPLR 1601 to common law indemnification claims. In excluding a plaintiff's fault in that context, *Frank* emphasizes that a plaintiff "cannot be an indemnitor."[25] In other words, a plaintiff is incapable of causing or contributing to "indemnification liability." Accordingly, a plaintiff's fault is factored out when figuring an outcome in non-plaintiffs' indemnification contests.

Risko is rather perplexing. *Risko*, like *Frank*, involved an indemnitee seeking to limit indemnification liability under 1601. Citing *Frank*, the Appellate Division / First Department understandably concluded that the plaintiff's fault share should be excluded from consideration. However, curiously, *Risko* does not mimic the Court of Appeals' explanation that a plaintiff "cannot be an indemnitor." Doing so was all that was necessary to justify the intended outcome for the parties' appeal. Instead, the First Department announced that "a plaintiff is not a 'person liable' under CPLR 1601."26 Despite the potentially broad ramifications of this conclusion, no explanation for it is provided.

In light of *Frank* and especially *Risko*, commentators infer that a plaintiff's fault should not or cannot enter a 1601-based calculation in any kind of dispute. However, whether to count a plaintiff's fault to limit liability vis-á-vis his own claims, as distinct from indemnification disputes, should be a different question. Per the wording of 1601, calculation of an equitable share takes account of culpability causing or contributing to the "total liability." Arguably, *Frank* did not resolve whether a plaintiff's negligence cannot cause or contribute to "total liability," as contrasted with "indemnification liability."[27]

As for *Risko*, the Honorable Mark C. Dillon in 2009 wrote that while it "may be viewed as persuasive, recent authority, no parallel analysis has been undertaken by the Appellate Divisions in

Continued on page 23

Post Runner – A Narrowing of Labor Law §240(1)

Continued from page 17

The *Oakes* case suggests that gravity and a height differential are still required to activate §240(1) and the Third Department has decided to read the Wilinski case narrowly.

CONCLUSION

When comparing the rulings in Runner, Wilinski and recent cases such as Oakes, it seems that the courts have started to move away from focusing primarily on the physically significant height differential and towards looking at the amount of force than an object can generate over a certain distance. The more force the object can generate, the less significant the height differential can be.

While at first blush it seems that the scope of Labor Law §240(1) was significantly broadened by the Court of Appeals with the ruling in *Runner*, a closer analysis reveals that the courts are still remaining faithful to the examination of the height differential, the weight of the object and the amount of force that the object is capable of generating. Additionally, as the First Department in *DeRosa*, and Third Department in *Oakes* indicated, courts are wary of extending the protections of Labor Law §240(1) to every worker who falls and is injured on a construction site.

(Endnotes)

1 13 N.Y.3d 599, 895 N.Y.S.2d 279 (2009)
2 *Runner*, supra, 13 N.Y.3d at 603, 895 N.Y.S.at 280, 81
3 15 N.Y.3d 869, 910 N.Y.S.2d 415 (2010).
4 76 A.D.3d 805, 907 N.Y.S.2d 658 (1st Dept 2010).
5 18 N.Y.3d 1, 935 N.Y.S.2d 551 (2011).
6 86 N.Y.2d 487, 488, 634 N.Y.S.2d 35 (1995).
7 88 A.D.3d 951, 931 N.Y.S.2d 662 (2d Dept 2011).
8 92 A.D.3d 927, 939 N.Y.S.2d 538 (2d Dept 2012).
9 96 A.D.3d 652, -- N.Y.S.2d — (1st Dept 2012)
10 2012 N.Y. Slip Op. 05596, 2012 WL 2891131
11 2012 N.Y. Slip Op. 05694, 2012 WL 2924030
12 *Oakes*, supra, at *6
13 *Id.; See also* John Caher, *Parsing Recent Precedent, Panel Declines to Apply Gravity Liability*, New York Law Journal, July 20, 2012

President's Column

Continued from page 1

Dinner in the fall and the Pinckney Awards Dinner in the spring were well attended by membership—the Pinckney also saw a significant number of judges in attendance—and both dinners were in fact quite successful. The Pinckney award went to the Hon. Randall T. Eng, Presiding Justice of the Appellate Division, 2nd Department, and the Distinguished Jurist award went to Hon. George J. Silver, a Justice of the Supreme Court, New York County. The James T. Conway Award went to Past President, editor of the Defendant and long time DANY member John J. McDonough. The last major event for members during my term was the annual golf outing held at the Village Club of Sands Point. The Golf Committee, Chaired by Lawton Squires, again saw a well attended and successful outing and the weather cooperated in helping make the day an enjoyable one for all attendees.

I am sure the DANY will continue with these and similar efforts during the upcoming year under the leadership of newly installed President Brian Rayhill and I wish him all the best in his efforts during the upcoming year.

DEFENDANT

VOL. 14 NO. 1 **Summer 2013**

John J. McDonough
EDITOR IN CHIEF

STAFF

Anthony Celentano, Antoinette Delio
Alexandra M. McDonough

James M. Begley, Bradley J. Corsair,
Kevin G Faley, Brian W. McElhenny and
Vincent P. Pozzuto

Published quarterly by the Defense Association of New York, Inc., a not-for-profit corporation.

Continued from page 2

same duty of good faith that it owes to its insured." *Id*. at 284.

In 2004, the First Department upheld the right of an excess insurer to pursue a malpractice claim against the primary appointed attorney in *Allianz Underwriters Ins. Co. v. Landmark*, 13 A.D.3d 172,787, N.Y.S.2d 15 (1st Dept. 2004). In this matter, the excess insurer claimed that the defense counsel appointed by the primary insurer refused to implead plaintiff's employer to insulate the 1B portion of the employer's liability policy, which policy was also issued by the insurer who issued the primary policy. Allianz claimed this manipulation of coverage constituted a breach of the fiduciary duty owed to it by the law firm appointed by the primary insurer. Allianz claimed it was entitled to maintain an action against the law firm as the "equitable subrogee" of its insured and because it was in "near privity" with the primary appointed law firm.

Subrogation is the principle by which an insurer, having paid losses if its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss. It has also been held that "Subrogation is an equitable doctrine [that] entitles an insurer to stand in the shoes of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse." *Fed. Ins. Co. v. N. Am. Specialty Ins. Co.*, 47 A.D.3d 52 at 62, quoting *N. Star Reins Corp. v. Cont'l Ins. Co.*, 82 N.Y.2d 281, 294, 604 N.Y.S.2d 510 (1993).

The law firm challenged Allianz's right to proceed against it as an equitable subrogee by asserting that Allianz had not yet paid anything on the underlying judgment. The Court rejected this contention by stating that "contingent claims by subrogees have been recognized especially where it would further judicial economy." *Allianz*, 13 A.D.3d at 175 (citations omitted).

Allianz also claimed that it could maintain an action against the law firm based on a 'near privity' relationship. The Court set forth a three prong test to determine whether an excess insurer could pursue a malpractice action against a law firm appointed by the primary insurer to defend its material insured. "In order for a relationship to approach 'near' privity's borders, for the purpose of maintaining a professional negligence claim, the professional must be aware that its services will be used for a specific purpose, the plaintiff must reply upon those services, and the processional must engage in some conduct evincing some understanding of the plaintiff's reliance." *Allianz*, 13 A.D.3d at 174. The First Department reinstated Allianz's complaint against the law firm.

Judge Robert Carter upheld the "equitable subrogee" theory of liability in deciding *Harleysville Worcester Ins. Co. v. Hurwitz and Silverstein & Hurwitz*, 2005 U.S. Dist. Lexis 5721 (S.D.N.Y.April 14, 2005):

> Moreover, since Federal courts apply New York law have held that excess insurers may bring malpractice claims against an insurer's counsel based on the doctrine of equitable subrogation, [citation omitted] the Court believes that an insurer may allege a claim for subrogation based on counsel's negligent representation of its insured.

Id. at 14.

With respect to the potential 'privity' problem facing an excess carrier due to the fact that the excess carrier generally does not have a duty to defend and thus does not usually appoint defense counsel, the First Department addressed that issue in *Great Atlantic Ins. Co. v. Weinstein*, 125 A.D.2d 214, 509 N.Y.S.2d 325 (1st Dept. 1986). In this matter, the Court reinstated an excess insurer's complaint alleging malpractice against defense counsel appointed by the primary insurer. In doing so, the Court found the complaint "legally sufficient" under CPLR 3211 in its allegations that defense counsel owed a duty not only to his client, the insured, but a similar duty to the excess carrier.

Judge Nina Gershon of the United States District Court for the Eastern District of New York was compelled to address New York law on the rights of an excess carrier as against a primary insurer and its assigned defense counsel in *Allstate Ins. Co. v. Am. Transit Ins.*, 977 F.Supp 197 (E.D.N.Y. 1997). In this matter, American Transit Insurance Company was the primary insurer for the lessor, lessee and the driver of a truck that caused severe injuries to two plaintiffs in underlying personal injury actions. Federal Insurance Company was

Continued on next page

Worthy of Note

Continued from page 14

Hospital was not vicariously liable for the actions of Dr. Raio, as decedent was referred to a Dr. Raio, a private attending, by his own internist.

ROADWAY LIABILITY

City Motion for Summary Judgment Denied

Laracuente v. City of New York
(2nd Dept. January 17, 2013)

Plaintiff's decedent was struck and died as a result of his injuries by a vehicle operated by defendant Yohan while decedent was walking across the Horace Harding Expressway. Plaintiff alleged that the City affirmatively created a dangerous condition consisting of a curved fence erected alongside the roadway that was allegedly a proximate cause of the accident. The Court held that the City did not have prior written notice, however, an exception exists where the locality created the defect or hazard through an affirmative act of negligence. The affirmative creation exception is limited to work that immediately results in the existence of a dangerous condition, and the court held that in the subject case the dangerous condition would have been immediately apparent.

The Quadripartite Relationship: Remedies of The Excess Insurer

Continued from page 21

an excess insurer of the lessee and the driver of the truck, and Allstate was the excess insurer of the lessor of the truck. American Transit hired one defense firm to represent all three defendants. Allstate alleged that this representation involved conflicts and/or potential conflicts, of which none of the defendants were advised. Furthermore, Allstate alleged that neither American Transit, nor its assigned defense counsel provided proper notice of the state court action. Allstate and Federal each sought to recover the one million dollars each paid as part of a pre-trial settlement of the action by alleging that American Transit breached the fiduciary duties it owed to the excess insurers and by claiming the appointed defense counsel committed malpractice. In denying the defendants' F.R.C.P. 12 (b)(6) motion to dismiss, Judge Gershon stated:

Moreover, as the Court of Appeals for the Second circuit has noted, New York is one of the few

Continued on page 29

Continued from page 19

the Second, Third, or Fourth Departments, nor has the issue been directly confronted by the Court of Appeals."[28] That remains true today.

Other Judicial Discussions and Allusions Concerning a Plaintiff's Fault

Interestingly, neither the December 2011 nor December 2012 PJI 2:275 Comments mention the seminal reported case on this subject, *Robinson v. June*,[29] from Supreme Court / Tompkins County. *Robinson* involved a plaintiff attacked by two individuals outside a saloon. The plaintiff asserted Dram Shop claims against those persons and the saloon proprietor. The jury assigned fault as 5% to the plaintiff, 45% to the two individuals, and 50% to the saloon defendant. The court decided to factor out the plaintiff's 5% share. Consequently, the saloon's share was extrapolated and "nudged" above 50%, making article 16 protection unavailable to it.

The *Robinson* court pondered the policy considerations behind common law joint and several liability, and article 16 joint liability limitation. The court indicated that the lower a defendant's fault, the higher is its justification for article 16 protection, and vice versa. In *Robinson*, it so happened that the solvent defendant (the saloon) was the party with the greatest fault, and its share was right at the 50% threshold. The court thus believed that the remedial justification for article 16 was barely present, if at all.

With that context, the court thought it appropriate to preserve full joint liability by excluding the plaintiff's share. It described article 16 as in derogation of common law, and appropriate to construe narrowly "where the advancement of the remedial purposes of the statute is not being served." But, notably, the *Robinson* court was clear that it did not intend a precedent that a plaintiff's fault be excluded in all cases.

A difficulty with the *Robinson* approach is the lack of a bright line standard. It leaves parties to argue about justification for an article 16 limitation, whenever the outcome hinges on whether a plaintiff's fault is excluded.

Let's now examine whether Court of Appeals opinions foretell whether it would count a plaintiff's fault. Keep in mind commentators' focus on the 1601 language "relative culpability of each person" versus "each person causing or contributing to the total liability." Again, the "culpability" reference is stressed for counting a plaintiff's fault, whereas the "liability" reference is underscored for excluding it. Has the Court of Appeals has displayed a penchant for either phrase, or similar lingo?

It turns out that review of all Court of Appeals cases citing CPLR 1601, 1602 and/or 1603 does not indicate a definitive preference. However, those cases do provide clues, and excellent education about other article 16 subjects. Accordingly, here now is a digest of them, followed by three Court of Appeals opinions regarding CPLR 1411. Because articles 14 and 14-A also call for findings of fault shares, cases concerning 1411 merit consideration. With those in particular, the Court of Appeals has repeatedly referred to culpable plaintiffs as "liable" or having "liability."

The Court of Appeals' earliest mention of article 16 happened in 1992, in *Sommer v. Federal Signal Corp.*[30] That case was actually focused on the different subject of whether a grossly negligent party can invoke a contractual limitation of liability. In holding to the contrary, the Court of Appeals noted the analogous article 16 scheme that denies protection to parties who recklessly disregard the safety of others. The opinion has a footnote (fn 6) advising the Bar that article 16 can limit a party's exposure; it states that a tortfeasor whose "culpability" is apportioned at 50% or less is "liable" only for its proportionate share of noneconomic loss.

The Court of Appeals' next occasion to discuss article 16 was nearly five years later, in *Matter of New York City Asbestos Litigation*.[31] The debate there was whether trial evidence was insufficient to support a jury's finding that a defendant manufacturer had recklessly disregarded end users' safety. If that were so, CPLR 1602 would operate to deprive the manufacturer of limited exposure it would otherwise have under 1601. The case sheds no light on the culpability / liability dichotomy.

Cole v. Mandell Food Stores, Inc.,[32] a 1999 case, is somewhat more enlightening. The primary issue was whether a plaintiff could claim a CPLR 1602 exemption at trial, without having pled the exemption or sought leave to amend pleadings

Continued on the next page

to include it. The Court of Appeals answered that question in the negative.

En route to that conclusion, a brief history of article 16 was provided. The Court of Appeals recounted the traditional rule that each tortfeasor is jointly and severally liable regardless of his degree of "culpability." However, under article 16, a personal injury defendant whose pro rata share of "fault" is 50% or less is "liable" for the plaintiff's noneconomic loss only to the extent of such proportionate share.

Morales v. County of Nassau,[33] also decided in 1999, is instructive as well. Involved again were potential implications of a plaintiff's failure to plead a CPLR 1602 exemption to the 1601 liability limitation. In this instance, the failure to so plead or move for leave to amend prevented the Court of Appeals from reviewing applicability of belatedly desired exemptions. Additionally, the Court of Appeals declined plaintiff's invitation to judicially legislate an exemption not explicitly listed in 1602, stating "the expression of these exemptions in the statute indicates an exclusion of others."[34] As such, police officers' failure to enforce an order of protection does not support an exemption to 1601.

As with *Cole*, the *Morales* opinion includes a brief history of article 16. The Court of Appeal explained that before its enactment, a plaintiff could hold any one tortfeasor liable for the entire loss, even though it may have been only "partially responsible." However, with article 16, a joint tortfeasor could now limit its "liability" for non-economic losses to its proportional share upon proof that it is 50% or less "culpable" for a personal injury. It is also mentioned that the trial judge had declined to instruct the jurors that they could apportion "culpability" between the defendant and the non-party at issue.

In 2001, the Court of Appeals concurrently decided *Rangolan v. County of Nassau*[35] and *Faragiano v. Town of Concord*.[36] Rangolan reiterates that before article 16, a joint tortfeasor could be held liable for the entire judgment, regardless of its share of "culpability." In contrast, with CPLR 1601, there is potential for liability to be limited as per a proportionate share. *Faragiano* does not have content akin to "relative culpability or "contributing to liability."

Significantly, these decisions establish that involvement of a non-delegable duty does not render CPLR 1601 categorically unavailable. It is true that non-delegable duty is mentioned in CPLR 1602(2)(iv). However, the 1602 provisions are not purely "exceptions" to 1601. Rather, as *Rangolan* and *Faragiano* explain, 1602(2)(iv) is instead a "savings provision."[37]

Whether this aids persons with non-delegable duties depends on the scenario. Unfortunately for them, CPLR 1601 is not a shield against exposure created by delegates. Rather, 1602(2)(iv) "ensures that a defendant is liable to the same extent as its delegate or employee, and that CPLR article 16 is not construed to alter this liability."[38] Thus, a municipality remains vicariously liable for an independent contractor's negligent maintenance of a roadway. Similarly, an employer cannot disclaim respondeat superior liability for employee wrongdoing by arguing it was not a true tortfeasor. Any persons with non-delegable duties simply cannot use 1601 to apportion liability between themselves and delegates.

On the other hand, nothing in 1602 precludes such delagators from seeking apportionment between themselves and other tortfeasors for whose liability they "are not answerable."[39] Let's consider again the scenario of a pedestrian struck by a vehicle due to both driver error and roadway defect from a negligent contractor. If the municipal roadway owner were sued, the jury should separately determine its share and the driver's share. If the municipality's share were considered 50% or less, it would pay that share only.

More article 16 history emerged in 2002 with *Chianese v. Meier*.[40] That case centered upon the CPLR 1602(5) exception in an action requiring proof of intent. The issue was whether, in a lawsuit involving an intentional and non-intentional tortfeasor, the latter was excepted from 1601 protection. The Court of Appeals held in the negative.

As with the dispute about treatment of plaintiff's fault, statutory language provided grounds for both sides in the "proof of intent" debate. Perhaps significant for our subject, the Court of Appeals' resolution emphasized the statutory purpose of remedying inequities borne by low-fault, deep pocket defendants. It explained that withholding protection to the defendant in

Continued on page 26

Franklin Court Press, Inc.

Appellate Printers and Specialists

229 West 28th Street, 8th Floor
New York, New York 10001
(212) 594-7902
Fax: (212) 233-1817

5 Fourth Place
Garden City, New York 11530
(516) 984-8135

Our goal has always been very simple:
To reduce your printing costs without compromising the quality of our work.

How do we do it?

- **NO PARALEGAL FEES**
- **NO RUSH CHARGES**
- **NO SALESPEOPLE, NO COMMISSIONS TO PAY**

With fewer choices available to you today, Franklin Court Press is here to offer you

DEFENDANT

P.O. Box 950
New York, NY 10274-0950

2013 Display Advertising Rates

(Prices are per insertion)

Production Information

Deadlines: The Defendant is published quarterly. Reservations may be given at any time with the indication of what issue you would like the ad to run in. Deadlines are two weeks prior to the printing date.

Discount: Recognized advertising agencies are honored at a 15% discount off the published rate.

Art Charge: Minimum art charge is $125.00. Custom artwork, including illustrations and logos, is available at an additional charge. All charges will be quoted to the advertiser upon receipt of copy, and before work is performed.

Color Charge: Each additional color is billed net at $175.00 per color (including both process and PMS).

Bleed Charge: Bleed ads are billed an additional 10% of the page rate.

Placement Charge: There is a 10% charge for preferred positions. This includes cover placement.

Inserts: Call for details about our low cost insert service.

Mechanical Requirements:

Ad Size	Width x Height
Full Page	7 1/2" 10"
Two-Thirds Page	4 7/8" 10"
Half Page (Vertical)	4 7/8" 7 1/4"
Half Page (Horizontal)	7 1/2" 4 7/8"
Third Page (Vertical)	2 3/8" 10"
Third Page (Square)	4 7/8" 4 7/8"
Third Page (Horizontal)	7 1/2" 3 1/8"

Advertising Materials:

EPS files of advertisements, press optimized, ALL FONTS embedded can be emailed to; fdenitto@gmail.com; Negatives, 133 line screen, right reading, emulsion side down-offset negatives, only. ALL COLOR MUST BE BROKEN DOWN INTO CMYK, for 4-color ads, progressive proofs or engraver's proofs must be furnished. Please call 631-664-7157 if other accommodations need to be met. NO FAXED COPIES.

Bleed:

The trim size of the publication is 8 1/2" x 11". For bleed ads, allow an additional 1/2 inch on each side for trimming purposes.

Full Page
Width x Height
7 1/2" x 10"
$500

Third Page Vert.
Width 2 3/8" x **Height** 10"
$275

Two-Thirds Page
Width x Height
4 7/8" x 10"
$450

Third Page (Square)
Width x Height
4 7/8" x 4 7/8"
$275

Half Page (Horizontal)
Width x Height
7 1/2" x 4 7/8"
$375

Third Page (Horizontal)
Width x Height
7 1/2" x 3 1/8"
$275

Half Page (Vertical)
Width x Height
4 7/8" x 7 1/2"
$375

CPLR Article 16: Treatment of Plaintiff's Fault and Other Perplexities

Continued from page 26

Chianese would be inconsistent with the chief remedial purpose of article 16. This should help anyone advocating that a plaintiff's fault should not be ignored, where resulting extrapolation would strip a deep pocket defendant of 1601 protection.

Concerning the culpability / liability distinction, *Chianese* has some phraseology of interest. When CPLR 1601 applies, low-fault tortfeasors are liable only for their "actual assessed share" of "responsibility." Additionally, the Court of Appeals thought it illogical to make availability of 1601 to a non-intentional tortfeasor dependent on "the nature of the culpability" of another tortfeasor. Such should not affect a merely negligent defendant's ability to "apportion liability."

The Court of Appeals next cited article 16 in 2003 in *Peralta v. Henriquez*.[41] There, the main issues were whether landowners had a duty to illuminate a parking lot, and whether prior notice was an element of a negligence claim against them. Also sued were a store lessee, DeLeon, and a vehicle owner, Botex.

Of especial interest here is the Court of Appeals' recitation of the trial result: "The jury returned a verdict for plaintiff and apportioned liability for plaintiff's injuries between defendants (82%) and *plaintiff* (17%) while exonerating Botex from liability."[42] Following that sentence is a footnote (fn 1) recounting that the jury had not made a liability finding concerning DeLeon. After a supplemental charge, the jury found him 1% negligent. The landowners challenged the propriety of this, wanting a finding sufficient to allow apportionment and liability limitation under article 16. However, the Court of Appeals concluded the charge "was adequate to allow the jury to apportion liability as required by CPLR 1601."[43]

This brings us to the aforementioned 2006 opinion in *Frank v Meadowlakes Development Corp.*,[44] wherein the plaintiff prevailed under Labor Law 240. While that 240 recovery qualified the plaintiff for a CPLR 1602 exception, it did not render 1601 completely irrelevant. *Frank* holds that a party with 50% or less liability can limit exposure for indemnification under 1601, even if the plaintiff has a 1602 exception.

If a jury assigns a plaintiff a fault share, it is excluded under *Frank* when determining whether a party has limited indemnification liability. This seems appropriate because a plaintiff does not cause or contribute to indemnification liability. There is no phrasing in *Frank* about "culpability" or "liability" that warrants excluding a plaintiff's fault in other types of cases, although many cite *Frank* for that position.

Also noteworthy, *Frank* comments extensively about whether CPLR 1602(2)(ii)[45] excepts 1601 application to an indemnification contest. It concludes that 1602(2)(ii) is not an exception to 1601, but rather "a savings provision intended to ensure the courts do not read article 16 as altering or limiting the preexisting right of indemnification."[46] This parallels the result reached in *Rangolan* and *Faragiano* concerning 1602(2)(iv) and non-delegable duty.

The Court of Appeals' most recent citation of article 16 happened in 2009, in *Cunha v. City of New York*.[47] *Cunha* confirmed the long-standing rule that a defendant can reach a reasonable settlement with a plaintiff, and then seek indemnification from a wrongdoer. Article 16 then came into play since the indemnification target, Haks, wanted to limit exposure to its equitable share. Haks lost that initiative since no other person could be liable for indemnification in that matter. *Cunha* does not add to this review of how a plaintiff's fault should be handled.

Let's look now at three Court of Appeals cases involving CPLR 1411.[48] Again, stay mindful of the thought that a plaintiff is not a "person causing or contributing to the total liability," at least where CPLR 1601 is concerned.

In *Humphrey v. State*,[49] the estate of a person killed in a drunken driving accident accused the State of failure to adequately warn about conditions on a dead-end highway segment. The State considered the decedent solely responsible for his death. The Court of Appeals affirmed a jury's allocation of fault as between the decedent and the State. Summarizing the trial outcome, the Court of Appeals stated "*liability* was assigned 60% to the State and 40% to *decedent*."[50]

Adamy v. Ziriakus[51] addressed whether a defendant restaurant, Friday's, was liable under GOL 11-101 for selling alcohol to Ziriakus, a visibly intoxicated person. Ziriakus ultimately drove drunk

Continued on the next page

and killed another motorist, who was speeding. That prompted this lawsuit by the decedent's estate. Describing the jury's verdict, the Court of Appeals remarked that "Ziriakus was 40% liable, Friday's 30% liable and *decedent* 30% *liable*."[52]

Soto v. New York City Transit Authority[53] concerned a plaintiff pedestrian who strayed from a station platform; he was struck by a train while running along a catwalk adjoining the train tracks. The Transit Authority contended that the plaintiff's conduct was the sole legal cause of his injuries. In discussing the jury's findings, the Court of Appeals noted that the Transit Authority was assigned 25% of the fault, and "[t]he jury allocated the remaining 75% of *liability* to *plaintiff*."[54]

As seen from *Humphrey, Adamy, Peralta*, and *Soto*, the Court of Appeals several times has indicated culpable plaintiffs as being "liable" or having "liability." Given that background, the notion that a plaintiff cannot contribute to "total liability" for CPLR 1601 application seems questionable.

An Interesting Development Concerning Non-Delegable Duty

Again, CPLR 1601 can benefit a delegator with a nondelegable duty vis-á-vis joint tortfeasors who were not his delegates. However, 1601 did not alter the rule that such a delegator has vicarious liability for any negligence of his delagatee. Consequently, he cannot rightfully contend that because his delagatee is mostly at fault, his exposure is limited under 1601.

While such is long settled, appellate courts had not decided the inverse issue of whether a delagatee seeking 1601 protection can have a delagator's fault share counted. This past December, the Appellate Division / First Department addressed this. In *Belmer v. HHM Assoc., Inc.*,[55] a 3-2 majority of justices held that a delagatee can invoke 1601, even when the undertaken duty was non-delegable. Moreover, they ruled that a jury should determine whether a non-party municipality, lacking prior written notice and never sued, is culpable and to be assigned a fault share.

In *Belmer*, the plaintiff was injured when the tire of a bus she was driving rolled into a hole. A defendant, HHM, had contracted with non-party City of New York to replace sewer mains. The plaintiff's theory at trial was that HHM left the hole in the roadway, and it was there for at least a month. HHM proposed a verdict sheet with interrogatories as to whether there was City negligence that was a substantial factor in causing plaintiff's injuries. HHM also sought an apportionment of culpability among itself, City and plaintiff. The trial court declined to reference City, however. That precluded assignment of a City fault share, and made a CPLR 1601 liability limitation for HHM impossible.

Several issues were presented on appeal. Among them were whether evidence of City culpable conduct existed, and whether prior written notice to City was required for a fault share finding under CPLR 1601. Moreover, there was the broader issue of whether a delegatee of a non-delegable duty may apportion liability under 1601 between itself and a culpable delegator.

The appellate majority considered the 1+ month duration of the hole to be evidence of constructive notice to City. Further, City has had a non-delegable duty to maintain streets in a reasonably safe condition. Consequently, there was potential for a City culpable conduct finding for purposes of HHM's limited liability defense under CPLR 1601.[56]

In the majority's view, the absence of evidence of prior written notice to City did not dictate a different result. The written notice requirement of N.Y.C. Administrative Code 7-201[c][2] applies to actions maintained against City. Here, City was not a party, so 7-201[c][2] did not affect HHM's interest in having the jury determine City's culpability.[57]

On the non-delegable duty subject, the majority opinion notes the *Rangolan* holding that CPLR 1602(2)(iv) is a savings opinion, rather than an exception. It also acknowledges that a municipality having a non-delegable duty cannot apportion liability with a delagatee. "However, the fundamental difference here is that HHM, like any other agent, is not responsible to third parties for the tortious acts of its principal, the City."[58] "*Rangolan* stands for the proposition that CPLR 1602(2)(iv) does not preclude a party, such as HHM, from seeking apportionment between itself 'and other tortfeasors for whose liability [it] is not answerable.'"[59]

It seems proper that a delegatee can apportion vis-ˆ-vis a culpable delegator, even when a non-

Continued on the next page

delegable duty is involved. In that context, the CPLR 1602(2)(iv) purpose is to make clear that 1601 does not affect a delegator's vicarious liability for negligence of a delegatee. Conversely, 1602(2)(iv) has no relationship to a delegatee, who necessarily cannot have vicarious liability for a delegator.

CONCLUSION

Generally, a defendant would want a plaintiff's fault be included in CPLR 1601 liability share allocation, as that would improve odds of obtaining a 50% or less share. Occasionally, an underinsured defendant might prefer a plaintiff's fault not to be counted, to increase likelihood that a deep pocket co-defendant does not obtain a 1601 limitation. With the December 2012 change in the PJI, the exclusion view now has more visible support.

With that said, my belief is that the earlier PJI position, calling for inclusion of a plaintiff's fault, is more compelling. The Legislature probably intended protection for any defendant whose wrongdoing was not more than a 50% cause of an occurrence. And, if a cumbersome extrapolation were necessary to accomplish the Legislature's will, it surely would have prescribed that calculation and how to do it.

Moreover, counting a plaintiff's fault is better justice. The more culpable a plaintiff, the more appropriate that an endowed defendant have limited exposure, and that plaintiff bear the risk of a co-defendant's insolvency. Yet, the extrapolation position illogically favors a more negligent plaintiff over one less negligent or fault free, as Professor Siegel and others have noted.

Finally, we've seen that the Court of Appeals has labeled culpable plaintiffs as being liable or having liability. Therefore, it seems a plaintiff can indeed contribute to liability for 1601 purposes.[60]

We should stay watchful for appellate argument and decision on the plaintiff fault issue, or a legislative amendment as proposed. Until then, DANY members may wish to keep both views in mind.

1 *Siegel's New York Practice [5th Ed.]* §168A.

2 *Id.*

3 *CPLR 1601* states:

1. Notwithstanding any other provision of law, when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable or in a claim against the state and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss; provided, however that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action (or in a claim against the state, in a court of this state); and further provided that the culpable conduct of any person shall not be considered in determining any equitable share herein to the extent that action against such person is barred because the claimant has not sustained a "grave injury" as defined in section eleven of the workers' compensation law.

2. Nothing in this section shall be construed to affect or impair any right of a tortfeasor under section 15-108 of the general obligations law.

4 *Morales v. County of Nassau,* 94 N.Y.2d 218, 224, 703 N.Y.S.2d 61 (1999).

5 *Rangolan v. County of Nassau*, 96 N.Y.2d 42, 46, 725 N.Y.S.2d 611 (2001).

6 *Siegel's New York Practice [5th Ed.]* §168A.

7 *CPLR 1602(6).*

8 *CPLR 1602(8).*

9 Since the contractor is not held liable by reason of a motor vehicle of "his," CPLR 1602(6) does not except 1601 from applying to him.

10 *CPLR 1602(2)(ii)* states, in part: "The limitations set forth in this article shall ... not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict ... any immunity or right of indemnification available to or conferred upon any defendant for any negligent or wrongful act or omission."

11 *CPLR 1602(2)(iv).* Under that provision, the limitations of CPLR 1601 shall not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict any liability arising by reason of a non-delegable duty or the doctrine of respondeat superior.

12 See *Frank v. Meadowlakes Development Corp.*, 6 N.Y.3d 687, 816 N.Y.S.2d 715 (2006).

13 See *PJI 2:275 [3d Ed.], Westlaw version page 17.*

14 See *Belmer v. HHM Assoc., Inc.*, 101 A.D.3d 526, 957 N.Y.S.2d 16 (1st Dept 2012).

15 *Siegel's New York Practice [5th Ed.]* §168B.

Continued on the next page

16 See Report at pages 35-37.
17 On this point, the Committee cites *Risko v. Alliance Builders Corp.*, 40 A.D.3d 345, 835 N.Y.S.2d 551 (1st Dept 2007), and *Robinson v. June*, 167 Misc.2d 483, 637 N.Y.S.2d 1018 (Sup. Ct. 1996). *Risko* and *Robinson* are discussed later in this writing. As will be seen, there is also a basis for the converse proposition.
18 Report at page 36.
19 *Id.*
20 See C1601:5, "Effect of Plaintiff's Contributory Fault."
21 *Id.*
22 The December 2010 PJI was to the same effect.
23 See e.g. Dillon, *The Extrapolation of Defendants' Liabilities Under CPLR Article 16 Where the Plaintiff is Contributorily Negligent,* 73 Albany Law Review 79 (2009).
24 *Risko v. Alliance Builders Corp.,* 40 A.D.3d 345, 835 N.Y.S.2d 551 (1st Dept 2007).
25 6 N.Y.3d 693, 816 N.Y.S.2d 719.
26 40 A.D.3d 346, 835 N.Y.S.2d 552. We are approaching *Risko's* sixth anniversary, yet there is no published case citing it. As noted, it is referenced in the present PJI 2:275 Comment. Interestingly, *Risko* is not mentioned in the PJI 2:275 Comments of the prior two years.
27 With *Frank*, the Court of Appeals shared the view of the dissenting Appellate Division justices below that CPLR 1602(2)(ii) does not preclude CPLR 1601(1) limitation of indemnification liability of a sued party found to be 50% or less liable. The jury had assigned fault as 10% to the plaintiff, 10% to the indemnitor, and 80% to another party. The Appellate Division dissenters opined that the indemnitor's exposure should be limited to 10% of the judgment. Accordingly, they did not extrapolate and thus believed a plaintiff's fault should be counted, even vis-ˆ-vis indemnification where a plaintiff's recovery is not at stake. This further evinces that reasonable legal minds can differ about whether to count a plaintiff's fault.
28 *The Extrapolation of Defendants' Liabilities Under CPLR Article 16 Where the Plaintiff is Contributorily Negligent,* 73 Albany Law Review 92.
29 167 Misc.2d 483, 637 N.Y.S.2d 1018 (Sup Ct 1996).
30 79 N.Y.2d 540, 583 N.Y.S.2d 957.
31 89 N.Y.2d 955, 655 N.Y.S.2d 855 (1997).
32 93 N.Y.2d 34, 687 N.Y.S.2d 598.
33 94 N.Y.2d 218, 703 N.Y.S.2d 61.
34 94 N.Y.2d 224.
35 96 N.Y.2d 42, 725 N.Y.S.2d 611.
36 96 N.Y.2d 776, 725 N.Y.S.2d 609.
37 *Faragiano*, 96 N.Y.2d 777-778, 725 N.Y.S.2d 611.
38 *Rangolan*, 96 N.Y.2d 47, 725 N.Y.S.2d 615.
39 *Id.*
40 98 N.Y.2d 270, 746 N.Y.S.2d 657.
41 100 N.Y.2d 139, 760 N.Y.S.2d 741.
42 100 N.Y.2d 142, 760 N.Y.S.2d 743.
43 *Id.*
44 6 N.Y.3d 687, 816 N.Y.S.2d 715.
45 See footnote 10 above.
46 6 N.Y.3d 693, 816 N.Y.S.2d 719.
47 12 N.Y.3d 504, 882 N.Y.S.2d 674.
48 CPLR 1411 is titled "Damages recoverable when contributory negligence or assumption of risk is ßestablished." It states: "In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages."
49 60 N.Y.2d 742, 469 N.Y.S.2d 661 (1983).
50 60 N.Y.2d 743, 469 N.Y.S.2d 662.
51 92 N.Y.2d 396, 681 N.Y.S.2d 463 (1992).
52 92 N.Y.2d 400, 681 N.Y.S.2d 464.
53 6 N.Y.3d 487, 813 N.Y.S.2d 701 (2006).
54 6 N.Y.3d 491, 813 N.Y.S.2d 704.
55 101 A.D.3d 526, 957 N.Y.S.2d 16 (1st Dept 2012).
56 See 957 N.Y.S.2d 16.
57 See 957 N.Y.S.2d 20.
58 957 N.Y.S.2d 19.
59 *Id.*, quoting from *Rangolan*, 96 N.Y.2d 47, 725 N.Y.S.2d 611.
60 But see *Risko v. Alliance Builders Corp.*, supra.

The Quadripartite Relationship: Remedies of The Excess Insurer

Continued from page 26

jurisdictions "that have permitted a direct action by an excess insurer against a primary carrier, rather than limited to only those rights available to a subrogee of the insured. (Citation omitted). By establishing direct fiduciary duties between excess insurers and primary insurers, New York has evidenced the strength of its concern that the parties responsible for defense of an underlying claim be held accountable to excess insurers for wrongdoing.

Id. at 201.

Clearly, it behooves counsel and claims professionals to be aware of the increasing significance of the quadripartite relationship and the duties and obligations flowing therefrom.

1 See Restatement of the Law Governing Lawyers. American Law Institute Reporters Draft of Comment f to §215 of the Restatement.

Social Media and Cell Phone Requests: Not a LOL Matter

Continued from page 16

requests for cell phone records will only be granted if narrowly tailored and a showing of their relevance is established.

The mere fact that a party was in possession of a cell phone at the time of an accident without testimony that the phone was being used does not warrant the grant of a discovery request. Queens County Supreme Court stated such in Morano v. Slattery Skanska, Inc. and also stated that observed use of a cell phone after the accident would not satisfy the threshold. Plaintiff, however, submitted an affidavit indicating that he observed the defendant with " 'her hand held to her head' *immediately*" prior to the accident, which gave him the impression that plaintiff was holding a cell phone. The court determined that plaintiff was entitled to defendant's cell phone records "limited to the estimated time of the subject accident." The court stated that the records were to be reviewed in camera to protect defendant's privacy while also revealing if any calls were made close to the time of the accident, which would be relevant to the issue of negligence. Courts will, nevertheless, deny discovery of cell phone records if in camera review reveals that the phone did not receive or place any calls on the day of or in close proximity to the time of the accident.

Most recently, Kings County Supreme Court permitted defendants to present evidence of cell phone records of a pedestrian plaintiff involved in a motor vehicle accident. In Miller v. Lewis, the court explained that the use of a cell phone "might have led to inattentive or distractive behavior" relating to contributory negligence on the part of the pedestrian plaintiff. Although research indicates that individuals check their social media websites from their cell phones nine times a day, the court stated that evidence relating to texting or emailing was irrelevant and inadmissible because the defendant's argument related to plaintiff *speaking* on her phone. Furthermore, the court stated that evidence from other witnesses regarding "their conduct while walking and talking on a cell phone" would be impermissible because "what other individuals have observed or have experienced themselves regarding the dangers of cell phone use and inattentiveness in the street have no relevancy upon [plaintiff's] conduct on the day of the accident." Nevertheless, the court stated that defendant could present "general evidence" of how "inattentiveness in any manner," including while using a cell phone, can constitute negligence.

Although requests for records may be granted, requests for physical cell phones have been denied. In *AllianceBernstein L.P. v. Atha*, the First Department held that a request for an iPhone was beyond the scope of discovery. Plaintiff alleged that defendant, a past employee of the plaintiff, had in his possession a cell phone that contained confidential business information. The court denied plaintiff's request for the iPhone comparing the production of an iPhone which has applications and access to the Internet, to the production of a computer. Nevertheless, the court allowed for in camera review of the phone and its records for the discovery of relevant, non-privileged information.

CONCLUSION

Recently, the United States District Court of New Jersey applied the spoliation doctrine to a plaintiff who deleted his Facebook account in the midst of litigation. The court held that "[d]efendants [were] prejudiced because they [] lost access to evidence that [was] potentially relevant to [p]laintiff's damages and credibility." Although New York courts have yet to address this specific issue, it is just one example of why lawyers practicing in New York need to know what can be discovered, how they can go about demanding it and how to prevent their clients from getting into trouble. Lawyers practicing in New York should keep four things in mind:

1. Check what is publicly available on an opposing parties' social media profile;
2. Mere utilization of a social media website or possession of a cell phone is not enough;
3. A factual predicate needs to be established, such as a photograph that contradicts a claim in the complaint or an affidavit that states an individual was observed using his or her cell phone at the time of the accident; and
4. Requests must be narrowly tailored and relevant to the claims, as overbroad requests may constitute an invasion of privacy.

As social media websites become more prevalent and as cell phone use increases to send emails, play games and check social media websites, it is ever more important for lawyers to stay plugged in.

THE DEFENSE ASSOCIATION OF NEW YORK
P.O. Box 950
New York, NY 10274-0950

DEFENDANT

Application for Membership

THE DEFENSE ASSOCIATION OF NEW YORK
P.O. Box 950
New York, NY 10274-0950

I hereby wish to enroll as a member of DANY.

I enclose my check/draft $_____

Rates are $50.00 for individuals admitted to practice less than five years; $190.00 for individuals admitted to practice more than five years; and $750.00 for firm, professional corporation or company.

Name _____

Address _____

_____

Tel. No. _____

I represent that I am engaged in handling claims or defense of legal actions or that a substantial amount of my practice or business activity involves handling of claims or defense of legal actions.

***ALL APPLICATIONS MUST BE APPROVED BY THE BOARD OF GOVERNORS.**