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The Motor Vehicle Issue

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President's Column

Dedicated Motor Vehicle Law Issue

BRIAN RAYHILL*

As President of the Defense Association of New York for our 2013-2014 term, it is my great pleasure to present to our members this dedicated Motor Vehicle Law DEFENDANT issue. This is our third DEFENDANT journal of the year and the DEFENDANT is clearly one of the cornerstone benefits of DANY membership. This dedicated Motor Vehicle Law issue is both authoritative and cutting edge. Member feedback has requested an update on new developments in this practice field and we know this all encompassing series of articles will be well received and a constant resource for our DANY members. We would like to thank DANY Director Colin Morrissey for his efforts in coordinating and overseeing this issue. We would also like to recognize the many authors and our Insurance Law Committee for devoting their time and expertise in bringing about this comprehensive publication.

2013-2014 has been a strong year for the Defense Association of New York. We are especially proud of the many accomplishments that continue to demonstrate DANY's commitment to improving the services of the legal profession and elevating the standard of trial and appellate practice in our courts. Importantly, DANY has presented 6 broad based CLE programs over the past year:

- **ETHICAL CONSIDERATION FOR THE USE OF SOCIAL MEDIA IN LITIGATION.**
- **DRUG ADDICTION AS A DEFENSE,**
- **EXAMINATION OF WITNESSES, PRACTICAL TIPS ON CONDUCTING DIRECT AND CROSS EXAMINATION.**
- **UNDERSTANDING ATTORNEY PROFESSIONAL CONDUCT & MISCONDUCT.**
- **2014 CPLR UPDATE.**
- **THE CUTTING EDGE 2014: UNDERSTANDING BRAIN INJURIES AND BUILDING THE BEST DEFENSE.**

DANY continues to demonstrate strength in the legal community through its vibrant committees. Besides the CLE committee, our Amicus Committee led by Andrew Zajac and Dawn DeSimone is gaining statewide and national attention for its Amicus briefs on important issues confronting our highest appellate court. Our Amicus Committee recently submitted its brief to the Court of Appeals in the 1st Department Powers v, 31 E.31 LLC case. The issue in that case involves foreseeability where the plaintiff fell from a setback ledge. Our next Amicus project focuses on the Saint v. Syracuse Supply case. The 4th Department held that changing the face of a billboard is not a Labor Law 240 activity, and the Court of Appeals granted leave. Many thanks to our Amicus Committee for all their time, effort and stellar appellate work on behalf of DANY

The DANY Scholarship Committee Project was recently rolled out. Director Glenn Kaminska is piloting a "Student Perspective" writing competition in each edition of the DEFENDANT. Law students will submit legal articles to our committee for review. The article chosen to be published in the DEFENDANT grants the winner a $500.00 cash "scholarship" from the DANY Scholarship Fund and a "by line" with some personal attributes, The winner will also receive free registration to all DANY CLEs for the coming year.

The DANY Diversity Initiative is front and center. DANY Incoming President Gary Rome is chairing this important initiative. The rollout is targeted for September 2014 with DANY providing assistance to 24 diverse attorneys in developing leadership, mentoring and rainmaking skills. The program will consist of 10 monthly 3 hours sessions. Mentoring, professional coaching and financial support are all necessary for the success of this program. Please reach out to us if you are able to devote your time and/or resources.

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Does a Coupling Qualify as a "Safety Device" under the Labor Law?

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DANY prides itself on meaningful relationships with the judiciary, other bar associations, insurers, the plaintiff's bar and the business community. This was on full display at our most recent Thirty-Ninth Annual Charles C. Pinckney Awards Dinner Program on April 24, 2014 at the Downtown Marriot Hotel. The turnout was excellent with our bar colleagues being treated to a very enjoyable evening. **Hon. Robert J. Miller, Associate Justice–Appellate Division Second Department was honored with the Charles C. Pinckney Award; Hon. Barbara R. Kapnick, Associate Justice – Appellate Division First Department was honored with DANY'S Distinguished Jurist Award; Thomas F. Segalla – Goldberg Segalla, Partner and Vice Chair of Commercial Litigation was honored with the James S. Conway Award for Outstanding Service to the Defense Community; and Peter James Johnson, Jr. – President, Leahey & Johnson, P.C. and Legal Analyst for the Fox News Channel was honored with the DANY Public Service Award.** DANY was especially proud to welcome the 31 members of the Judiciary who attended our Awards Dinner and contributed to the success of the program.

Our members constantly comment that participation in DANY provides attorneys with the opportunity to develop long lasting relationships that promote their own practice. If you are not already a DANY member, please consider joining and involving yourself in one of the passionate DANY committees such as; Education (CLE), Judiciary, Legislative, Publications, Program (Dinners and Awards), Amicus, Insurance Law, ADR, Employment Law, Medical Malpractice, Diversity and Inclusion and Young Lawyers. Your membership also provides the opportunity to author legal articles for our DEFENDANT Journal. You can be assured that DANY will welcome all new members and entertain project ideas that are in line with DANY's mission.

Please browse our website at **defense associationofnewyork.org** for our CLE and event calendar and DANY publications. The legal content and legal news section of our website is also updated regularly through our collaboration with DRI. Your other contact point is our Executive Director Tony

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The Defendant Welcomes Contributors
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The Use of Police Reports During Trial

JOHN J. MCDONOUGH, ESQ. *

Over eighty years ago, the New York State Court of Appeals established the prevailing majority view regarding the use of police reports under the rule against the admission of hearsay. *See Johnson v. Lutz,* 253 N.Y. 124 (1930). Despite the apparent simplicity of the holding in Johnson, which directed the consideration of police reports under the business record exception to the hearsay rule, a constant volume of appellate activity in this area underscores the continuing development of these rules.

At common law, English judges defined hearsay as evidence which depends on the credibility of someone who cannot be cross-examined for its probative value. The Federal Rules of Evidence (hereinafter "FRE") provide a more technical definition as follows:

Rule 801. Definitions

a) Statement: A "statement" is (1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by him as an assertion.

b) Declarant. A "declarant" is a person who makes a statement.

c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Although New York law is in accord with the above definitions, it should be noted that there is presently no codification of the full hearsay rule in New York. *See People v. Edwards*, 47 N.Y.2d 493 (1979). Further, New York courts also add non-verbal conduct not intended as an assertion, sometimes referred to as evidence of silence, to the hearsay analysis. *See Thomson Co. v. Int'l Compositions Co., Inc.*, 191 A.D. 553 (1st Dep't 1920) (holding that evidence of non-parties' failure to lodge complaints was inadmissible as "purely hearsay evidence").

The New York codification of the business record exception is found in CPLR § 4518(a), which provides, in pertinent part:

> (a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.
>
> . . .
>
> All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

Thus, in order to be admissible under this section, the judge must find that the writing or record was:

1) made in the regular course of business; and
2) it was the regular course of such business to make such record.

In *Johnson*, the Court of Appeals read into the statute a third requirement not set forth therein. 253 N.Y. at 128. There, the Court held that the observer/reporter must have acted in the regular course of a business, or have been under a business duty to supply the information to the police officer/recorder. The subject police report was based on hearsay statements of third parties present at the accident scene when the officer arrived. The Court held that it was clearly the officer's duty to report what he was told, and the entry he made satisfied the statute. However, those entries in the police report which were based on statements by observers, with no business duty to report them, were excluded as hearsay that did not satisfy any exception. Id. at 128. The Court reasoned as follows:

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The New York No-Fault "Serious Injury" Threshold: Evaluating Proposed Reform - Based On Accident & Motor-Vehicle Lawsuit Data

COLIN F. MORRISSEY*

The "serious injury threshold" aspect of the state's No-Fault system, enacted in 1973, has been the subject of recurrent controversy. It has been the target of legislative Bills proposing 'reform' in recent years, and these proposals have consistently aimed at lowering the threshold -- by adding new definitions of serious injury, or broadening existing definitions. The current pending bills – S00880 and A02362 – are the most drastic proposals yet.[1]

The proposed bills would enact changes that would plainly increase the number of suits which ultimately surpass the threshold. More alarming, is judges would not be permitted to make any determination at all as to the prima facie issue of "causation" of any alleged injury – either on summary judgment or at trial. (Apparently, the state's judiciary cannot be trusted with determining the minimum sufficiency of expert medical opinion evidence… when it comes to motor-vehicle injury cases?) The familiar refrain from the Trial Lawyers is that too many legitimate claims are being dismissed under the current law, and proposals such as these would eliminate abuse by an "aggressive" defense bar, as well as "misapplication" of the law by the judiciary.[2] Neither contention is accurate.

It is fair to ask whether "serious injury" threshold reform is needed at all; and, if so, should it be aimed at lowering the "serious injury" threshold? In order to answer these questions, legislators need to be able to reliably estimate the number of motor-vehicle lawsuits that should be legitimately expected in the state's courts, in any given year, under the current "serious injury" definitions. They also need some measure of the impact the existing "serious injury threshold" is having on actual filed motor-vehicle personal injury lawsuits. To make such an assessment, legislators should look for reliable statistical information. Legislators should avoid reliance on advocacy opinions premised on anecdotal perception of a few allegedly unjust results. This article will attempt to provide some reliable statistical data to help provide such perspective, in order to assist in gauging the need for proposed reform.

Historical Background

Academics in the 1960's championed the idea of No-Fault auto insurance as a better system to promptly move fair compensation to accident victims, while generating savings for taxpayers and reducing insurance rates for consumers, by eliminating tort lawsuits. In designing New York's statutory framework[3], there was an implicit "trade-off" between the guarantee of first party benefits, and the right to bring a tort lawsuit for injuries. The "trade-off" provision came in the form Insurance Law 5104(a) – which states, "…there shall be no right of recovery for non-economic loss, except in the case of a serious injury…"[4], with "serious injury" being defined under Insurance Law 5102(d). The existing definitions are familiar to most personal injury practitioners.

The original "serious injury" threshold definition [in what is now Insurance Law 5102(d)] was primarily a monetary threshold, which defined "serious injury" as any case in which the cost of medical treatment exceeded $500.[5] By 1977 this monetary threshold was being criticized as ineffective, as it was allegedly not achieving the intended goal of dramatically reducing filed lawsuits. In practice, it was asserted that the monetary threshold amount became a target – such that a concerted effort by doctors and plaintiff lawyers quickly led to a significant increase in the number of cases with treatment exceeding the $500 limit. Critics claimed that prior to enactment

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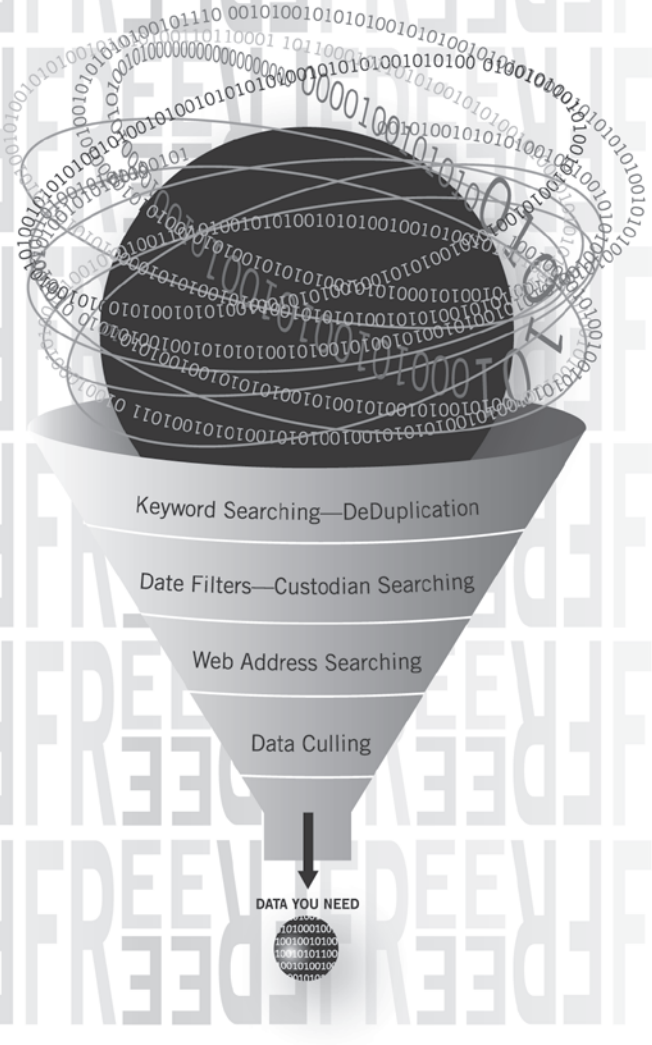

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The New York No-Fault "Serious Injury" Threshold: Evaluating Proposed Reform - Based On Accident & Motor-Vehicle Lawsuit Data

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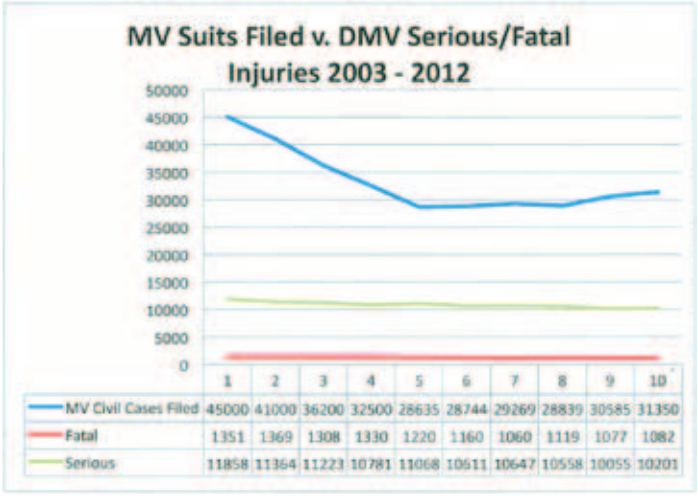
in 1973, 65% of all cases involved medical treatment bills totaling less than $500, but that by 1978 motor-vehicle lawsuits had only been reduced by 50%. This perceived failure in the statutory scheme resulted in an amendment adopted in 1978.[6] Instead of simply increasing the monetary amount to satisfy the threshold, the legislature instead enacted a purely "verbal" threshold, defining "serious injury" as specific anatomic damage[7], or alternatively defining injury in terms of resulting functional limitations caused by some anatomical damage/injury.[8] This new provision has since been amended one time – in 1984 – to add the "loss of fetus" definition.[9]

The legislature intended that the "serious injury threshold" would substantially deter and reduce the filing of motor-vehicle personal injury suits.[10] Yet, by adoption of the verbal threshold in 1978, the legislature clearly invited more claimants to file lawsuits and challenge the "serious injury" threshold definitions, which in effect lowered the deterrent effect and encumbering the judiciary with judicial construction problems.[11] Under the monetary threshold, a lawyer would not even take a case in which the medical bills had not exceeded the limit, and this was easily discerned before filing. Under the verbal threshold, a potential plaintiff with alleged injuries has an incentive to file suit, and challenge the verbal threshold. So the 1978 amendment already diminished the impact of the "serious injury" threshold on lawsuits filed. These new proposals seek to lower it even further.

The question for current New York legislators is whether there is any truth to the claims that the current "serious injury threshold" is eliminating too many motor-vehicle personal injury cases from the court system. To answer that question, legislators need reliable data on motor-vehicle accidents from which to draw reasonable estimates for the total number of motor-vehicle accidents that involve serious injuries, each year. They can compare this estimate with the number of lawsuits actually being filed. In an ideal world, the two numbers would be relatively close.

New York State DMV Accident/Injury Data & OCA MV Lawsuit Data

The NYS Department of Motor Vehicles maintains statistical data on motor-vehicle accidents in New York. On its website, the agency reports the total number of accidents, individuals involved, and the number injured, in each accident year. In addition, they measure the level of injury incurred, based on a conservative rating scale.[12] This data gives legislators a reliable basis to estimate the total number of people that incur a "fatal" or "serious" injury in motor-vehicle accidents in the state, each year.[13] The New York Office of Court Administration maintains data on the total number of motor-vehicle personal injury lawsuits filed in the Supreme Courts each year. While this is not published data, it can be obtained from their information office by written request.[14] Compiling these statistics together, and super-imposing them, results in the following chart: (Figure 1: data points 1-10 represent years 2003-2012)



As Figure 1 indicates, we need only compare the total number of persons rated by the DMV with "fatal" or "serious" injury in car accidents each year, to the total number of motor-vehicle lawsuits filed each year. Figure 1 shows that the number of fatal and serious injured has diminished from just over 13,000 in 2003, to just over 11,000 in 2012 – a more than 15% drop. This alone is a reliable statistical (rough) estimate of the number of potential legitimate

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The New York No-Fault "Serious Injury" Threshold: Evaluating Proposed Reform - Based On Accident & Motor-Vehicle Lawsuit Data

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"serious injury" lawsuits, which legislators should expect in the court system each year. It also (very) conservatively presumes that every single person in that group would file a lawsuit – which is certainly not the case. It is apparent from the chart that in every year (2003-2012) the number of motor-vehicle personal injury lawsuits filed in the state vastly exceeded the number of fatal and serious injured, and not by a little bit. The cases filed have been two or three times the reasonable expectation of "legitimate" claims. It is certainly noteworthy that the number of lawsuits filed significantly decreased from 2003 to 2007, a time during which the Courts were generally viewed as more active in enforcing the threshold.[15] Yet, from 2008-2012, that trend has dramatically reversed. From 2008-2012 lawsuits increased by 10%, while during that same timeframe the population of fatal/serious injured fell 15%. Regardless, it is apparent that all the suits above the DMV's fatal and serious injury total are questionable claims that are challenging the "serious injury" threshold.

Gathering Threshold Statistics

What is the impact of the current "serious injury" threshold? How many cases are being dismissed under this law? That data is not a statistic reported by OCA. Moreover, I am unaware of any quantified data compiled by any Courts, or any private agency, measuring the impact of New York's verbal threshold.[16] Lacking any such public data, I turned to my own practice experience in motor-vehicle personal injury cases in the New York City area. By recapitulating this case information, I was able to compile a data table which provided some reliable measure of how many cases, if any, had actually being dismissed under the current verbal threshold. In the process of gathering this data on the individual suits, motions, and dispositions in our casework, I focused on the ten year period between 2003-2012. This data table comprised of over 10,000 motor-vehicle personal injury cases in which some good faith "serious injury" threshold question was present, among over 20,000 suits filed. While the data is plainly limited, it is nevertheless a sizable sample, and can therefore provide an approximate estimate of what has occurred in a statistically significant sampling of cases. This certainly has some general utility --- especially in the absence of any such comprehensive metrics kept by the court system or any state agency. [17]

A short summary of the overall totals and averages is all that is needed for purposes of this discussion – which is aimed at "rough estimates". Among 20,000 plaintiffs in lawsuits filed during that ten year time frame, slightly more than 10,000 were evaluated to have legitimate "serious injury" issues. (This 50% figure is consistent with the DMV injury rating data and the OCA case data - which show that far more than 50% of claims likely involved only minor or moderate injury) In the end, 15% of these 20,000 cases were ultimately dismissed as a result of a threshold motion. In that 15%, approximately 5% were dismissed on default, with 10% dismissed on the merits. Tangentially, it is important to note that in approximately 7% percent of those 20,000 cases, settlements were made when the threshold motion was pending – which is a significant effect in itself. It must also be noted that the current trend is a drastic reduction in dismissals -- dipping to the lowest in the ten year period – at 10% total in 2012 - 50% off the average for the decade.

Comparing Data

Comparing this 15% (rough) estimate of the current impact of the "serious injury threshold", against the data provided by the state agencies (in Figure 1) , gives clear perspective on the need for reform. It is apparent that approximately 13,000 accidents are likely to involve a fatal or a "serious" injury (as per Figure 1), yet roughly 30,000 lawsuits can be expected each year (and those numbers have been increasing for the past 5 years). If only 15% are likely to be dismissed under the current threshold, it is readily apparent that there will remain vastly more suits in the courts than comport with the reasonable expectation of 13,000 legitimate "serious" injury claims in the state. If 4,500 suits were dismissed in

a year with 30,000 suits filed (15%), that would still leave double the reasonable expectation of 13,000 seriously injured. (and again – that "reasonable estimate" figure conservatively presumes that every fatal/serious injured person filed lawsuits) In other words, anyone proposing that too many lawsuits are being dismissed, or that the current verbal threshold is still too draconian – will find no support for the proposition in the available statistical data. The public statistical data indicate that the Courts are entertaining a huge caseload of moderate and minor injury claims – and my estimate of the threshold impact indicates that more of them pass the current "serious injury" threshold than should.

Evaluating Oca Data By County

It is very interesting to scrutinize the more recent OCA data on motor-vehicle case filings between 2008-2012, because this is the period that my data indicated dismissals dropped from the 15% average, to the low of 10%. During this time, across the state, there was a 10% increase in motor-vehicle case filings, with nearly 3,000 more motor-vehicle cases put into suit. Yet during the same time the total number of fatal and serious injured in car accidents fell 10%. When we look at precisely where (geographically) these additional 3,000 filings occurred – it is apparent that nearly 100% occurred in Kings, Queens, and Bronx counties. (See following - Figure 2)

OCA MOTOR VEHICLE CASE FILING DATA 2008-2012					
	2008	2009	2010	2011	2012
New York State	28744	29269	28839	30585	31350
NYC	17612	18411	18753	19786	20699
Kings	6693	7014	7063	7693	7893
Bronx	3735	3798	3925	4149	4590
Queens	4979	5371	5603	5806	6028
New York	1439	1437	1397	1377	1386
Richmond	766	791	765	761	802

Whatever the explanation is for why the number of motor-vehicle cases increased during this time period, despite the fact that fewer people were injured, the answer is somewhere in these three counties. The economy would certainly be the prime suspect. Regardless, it is clear that the effects of these trends: more motor-vehicle lawsuits and fewer "threshold" dismissals, will be felt most by the residents of these three counties. Because of these trends, the residents of Brooklyn, Queens, and Bronx counties can apparently expect to see more crowded dockets in their courts, more jury summonses in their mailboxes, and more delays for adjudicating legitimate claims. They should also expect increasing auto premiums, because one of the prime factors in calculating auto premium rates is the loss experience incurred from lawsuits – based on the geographic location of the insured's residence. To the extent these proposed reforms will have significant effects on caseloads, the data indicate those effects will be felt almost exclusively (and unfairly) by the residents in these counties.

Conclusions On Threshold Reform

It would appear from the statistical viewpoint, that if reform of the current "serious injury" threshold is needed, it should be aimed at making the statute stricter, not more lenient. A two judge dissent in the most recent Court of Appeals decision on the "serious injury threshold", acknowledged the well documented amount of abuse in the no-fault system, and presciently cautioned that the Court's decision… "lowers the barriers… against baseless… claims."[18] Local elected officials have similarly noted the extent and effect of this questionable medical element. In hearings last year, City Council members and a top prosecutor in a District Attorney's office decried the fact that it sometimes costs more to insure a car in New York City, than does to buy one; and that insurance rates for the city residents are unfairly high – because of the exaggerated claims.[19] The legislature has not seen fit to make any recent changes in the "serious injury" threshold, yet the courts seem to be 'lowering' the threshold of their own accord – over the last five years. Those New Yorkers residing in Kings, Queens, and the Bronx counties certainly deserve an equal and consistent application of the state's no-fault "serious injury threshold", yet the data appear to indicate that they

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Exploring Causation And The Emergency Doctrine In An Automobile Liability Case

DAWN C. DESIMONE*

It is well settled that in order for a plaintiff to present a prima facie case of negligence, a plaintiff must establish: (i) a duty owed to the plaintiff by the defendant, (ii) a breach of that duty by the defendant, and (iii) that the defendant's breach of that duty proximately caused the plaintiff's injuries.[1] We also know that without a duty there can be no breach and therefore no liability.[2] But what about proximate cause? It is equally necessary for a plaintiff to establish that the defendant's breach of duty was a proximate cause of his injuries.[3] This article hopes to explore proximate cause issues in automobile liability case in both practical and analytical terms to give the defense practitioner a better sense of how to approach a case analysis, succeed on a motion for summary judgment, or successfully get an appropriate jury charge at the time of trial.

a. The Breach Of The Duty As Being "A" Cause Of, As Opposed To "The" Cause Of, The Accident

Proximate cause serves to limit the responsibility of an actor for the consequences of his or her conduct.[4] In order for a plaintiff to establish a prima facie case on the issue of causation, a plaintiff must show that the defendant's act was a substantial cause of the events which produced the injury.[5] What is worthy to note, however, and a concept the appellate courts remind us of in their decisions, especially in automobile liability cases, is that there can be more than one proximate cause of an accident.[6] Therefore, a defendant moving for summary judgment, at least in the Appellate Division, Second Department, must establish that he or she was free from comparative negligence as a matter of law. A review of some cases on this point is helpful.

For example, in Jones v. Vialoa-Duke,[7] which arose from an intersection collision accident, it was undisputed that the plaintiff failed to yield the right of way. On appeal, however, the grant of summary judgment to the defendant was reversed. Noting that there can be more than one proximate cause of an accident, the Appellate Division-Second Department stated that a "driver who has the right-of-way may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in an intersection."[8] The court continued that "[i]ndeed, a movant seeking summary judgment is required to make a prima facie showing that he or she is free from fault."[9] Because in Jones the deposition transcripts submitted by the defendant raised an issue of fact as to what actions the defendant took in order to avoid the collision, summary judgment was denied to that defendant.

This is the case, despite the well-documented law that a violation of the Vehicle and Traffic Law constitutes negligence as a matter of law.[10] In Adobea v. Junel, the Appellate Division held that even where there is evidence that another driver involved in an accident was negligent as a matter of law due to a violation of the Vehicle and Traffic Law, nonetheless the movant on a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law. Again the court reasoned that this was because the driver with the right of way (despite the law which says such a driver has the right to anticipate that others will follow the law) may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident. Notably, in Adobea, the deposition transcripts established that the defendant-movant, the vehicle operator with the right of way, was free from fault in the happening of the accident and that the other driver's negligence was the sole proximate cause of the accident. The testimony established that the other vehicle suddenly, and without signaling attempted to merge from the parking lane into the

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Exploring Causation And The Emergency Doctrine In An Automobile Liability Case

movant's lane and that the movant only saw that other vehicle "for a second" before the impact. Because a driver with the right-of-way who only has seconds to react to a vehicle that has failed to yield is not comparatively negligent for failing to avoid the collision, the movant met his burden in Adobea. The burden then shifted to plaintiff, who failed to create an issue of fact.

It is important to remember that in moving for summary judgment, it is generally not enough to merely point to another party's negligence to establish the movant's entitlement to summary judgment. Rather, because there can be more than one proximate cause of an accident, the movant must also establish your client's freedom from comparative negligence as a matter of law. The failure to establish freedom from comparative fault will require the denial of the motion, regardless of the sufficiency of any opposing papers.[11]

Having set down the general rule, here's a caveat: The Appellate Division, First Department has not always agreed. For example, Tselebis v. Ryder Truck Rental, Inc.[12] Tselebis involved a two-vehicle accident at an intersection controlled by a traffic light. The defendant was operating a truck in a westerly direction. The plaintiff was riding his motorcycle in a northerly direction. The defendant entered the intersection against a red light. The lower court in Tselebis denied the plaintiff's motion for summary judgment. The First Department reversed, and specifically stated that the plaintiff was entitled to summary judgment on the issue of liability "despite the fact that his own negligence might remain an open question."[13] The Court went on to hold that

> A plaintiff's culpable conduct no longer stands as a bar to recovery in an action for personal injury, injury to property or wrongful death. Under CPLR 1411, such conduct merely acts to diminish the plaintiff's recovery in proportion to the culpable conduct of the defendants. This statute, enacted in 1975, substituted the notion of comparative fault for the common-law rule that barred a plaintiff from recovering anything if he or she was responsible to any degree for the injury (Alexander, McKinney's CPLR Practice Commentaries C1411:1). Here, plaintiff's own negligence, if any, would have no bearing on defendant's liability. Stated differently, it is not plaintiff's burden to establish defendants' negligence as the sole proximate cause of his injuries in order to make out a prima facie case of negligence (see Kush v. City of Buffalo, 59 N.Y.2d 26, 32-33 (1983]). To establish a prima facie case, a plaintiff "must generally show that defendant's negligence was a *substantial cause* of the events which produced the injury" (Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 315 [1980][emphasis added]).
>
> We note that opinions by this Court and others suggest that freedom from comparative negligence is a required component of a plaintiff's prima facie showing on a motion for summary judgment (see e.g. Palmer v. Horton, 66 A.D.3d 1433 [2009]; Cator v. Filipe, 47 A.D.3d 664 [2008]; Thoma v. Ronai, 189 A.D.2d 635 [1993], affd 82 N.Y.2d 736 [1993]). These opinions cannot be reconciled with CPLR 1411 if the statute is to be given effect. Canh Du v. Hamell (19 A.D.3d 1000 [2005]) is distinguishable because it was a vacatur of a determination that a defendant's negligence was the sole proximate cause of an accident, a finding we do not purport to make. Parenthetically, CPLR 1412 makes culpable conduct claimed in diminution of damages under section 1411 an affirmative defense to be pleaded and proved by the party asserting it. In this regard, Melendez and Tom Cat offer only speculation in support of their assertion that plaintiff failed to use reasonable care to avoid the collision.[14]

Although Tselebis was decided in 2010, the First Department has more recently declined to follow that precedent,[15] noting that "binding precedent of the Court of Appeals holds that the plaintiff in a negligence action cannot obtain summary judgment as to liability if triable issues remain as to the plaintiff's own negligence and share of culpability for the accident."[16]

For defendants, the best course in moving for summary judgment is to establish freedom from comparative negligence.

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Exploring Causation And The Emergency Doctrine In An Automobile Liability Case

Continued from page 11

b. Furnishing The Occasion Of The Occurrence As Opposed To Being A Cause Of The Accident

"Although, in general, the issue of proximate cause is for the jury . . . liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes."[17] In the context of an auto liability case, the issue of whether a defendant's actions merely furnished the occasion of the occurrence or was a cause of the accident generally arises where there are multiple accidents, where automobiles become disabled or where vehicles are illegally parked. However, it does arise in other situations as well, some of which will be addressed herein.

As to what factual circumstances can be said to "furnish the occasion" of the accident, but are not the legal cause of the injury-producing event, again it is best to look at developed cases on the issue. Lets first start by looking at parked and disabled vehicles in the roadway. Does the determination here turn on whether the vehicle as legally parked or why the vehicle was stopped or disabled in the roadway? Not always.

For example, in Borbone v. Pescoran,[18] the Appellate Division, First Department reversed the grant of summary judgment to a defendant in a case where the issue was whether the defendant's illegally double parked truck was a proximate cause of the accident. In so doing, the court held that "[b]ut for the position of that truck, plaintiff's vehicle would not have had to make the lane change that purportedly precipitated the accident."[19] A similar result was reached by the Appellate Division, Second Department in Yankera v. New York City,[20] where that court also held that questions of fact remained as to whether a double-parked truck was the proximate cause of a subsequent motor vehicle accident. This seems to make sense, but not every such similar case lends itself to the same result.

For example, Dauber v. Stone,[21] involved a multi-vehicle accident which took place in the eastbound direction of Sunrise Highway in Nassau County. A tractor-trailer was double-parked on Sunrise Highway such that it extended into the right eastbound lane of traffic. The truck was double-parked in front of a store to which its driver (Stone) was making a delivery. Dauber, a driver leaving a driveway to the west of the store, turned into the right eastbound lane. She immediately, however, began to move to the center lane. At the exact same time, however, Schwartz, who was operating her vehicle in the left lane, began to move into the center lane. The Stone and Schwartz vehicles collided and both vehicles were propelled in the direction of the double-parked truck. Dauber was killed. While it would seem that the conclusion could be reached, as it was in Borbone and Yavkina that because of the position of the truck the plaintiff's vehicle would not have had to make the abrupt lane change, based on the facts before it in Dauber, the Second Department instead concluded that the parties opposing the summary judgment motion failed to raise an issue of fact as to whether the location of the double-parked tractor-trailer was a proximate cause of the accident.[22]

What about when vehicles stop in the roadway, either because they are disabled, or for some other unexplained reason? In Iqbal v. Thai,[23] the plaintiff's decedent was seated in a car that was struck in the rear while it was stopped "for reasons unknown" on the shoulder of the road (here, the eastbound shoulder of the Long Island Expressway). That driver of the vehicle admittedly fell asleep at the wheel. In Iqbal the defendant driver attempted to argue that plaintiff was not entitled to summary judgment on liability because of the positioning of plaintiff's vehicle on the road's shoulder. The Appellate Division rejected that argument finding that the location of the decedent's car merely furnished the condition for the accident and was not a proximate cause of the decedent's injuries and death. Here the sole proximate cause was the defendant driver falling asleep.[24]

In another example, the vehicle operated by the defendant in Esposito v. Rea,[25] apparently ran out of gas, resulting in the defendant pulling the vehicle over to the side of the road into a non-stopping zone. The plaintiff's decedent was a passenger in that vehicle and was killed when struck by yet another vehicle as plaintiff's decedent "gratuitously chose to stand in the roadway while the car was being fueled," rather than on the available sidewalk.[26] There, the Second Department held that "even if the appellant

was negligent in permitting her automobile to run out of gas and pulling over to the side of the road, this was not the proximate cause of the death of plaintiff's decedent. Rather, at most the appellant merely furnished the condition for the occurrence of the accident.[27]

Similarly, in Gleason v. Reynolds Leasing Corp.,[28] the defendant's trailer was parked on the street, in violation of City regulations. The plaintiff's vehicle was struck in the rear by an unidentified vehicle, which resulted in the plaintiff's vehicle being pushed into the defendant's trailer. The Second Department awarded summary judgment to the defendant, explaining that even if the trailer was parked in violation of the applicable regulations, the violation was not the proximate cause of the accident.[29] Since the plaintiff failed to establish that defendant's "alleged negligence was a substantial cause of the events which resulted in his injuries," defendant was entitled to summary judgment.

Whether something furnishes the occasion as opposed to being a cause arises in the context of multiple accidents as well. Here, time factors come into play. For example, in Agurto v. Dela,[30] there were two accidents. It was alleged that the first accident was caused by Dela in the negligent operation of his vehicle. Ten minutes after that accident, the two plaintiffs were standing on the shoulder of the roadway. At that time, another driver, in an attempt to avoid a slowing 18-wheel tractor-trailer, struck the two plaintiffs, killing one and injuring the other. Here, the Appellate Division, First Department noted that even assuming Dela was negligent in the first accident and that the negligence was a proximate cause of the first accident, "[a]t most, that negligence merely furnished a condition or occasion of the occurrence of the [second] accident."[31] In granting summary judgment to Dela, the Court held that "[t]his second accident was a superseding or intervening event severing whatever causal connection there might have been between any negligence of Dela and plaintiff's injuries."[32]

In addition to time, another consideration is whether the first accident was readily perceived. For example, in Cuccio v. Ciotkosz,[33] the first accident occurred at 4:00 a.m. on Sunrise Highway at its intersection with Locust Avenue, which was northbound. One of the vehicles came to a rest obstructing the left northbound travel lane of Locust Avenue. However, at least one lane of travel remained open and unobstructed. Five minutes later, the plaintiff was driving northbound on Locust Avenue and, nothing obstructed his view. He saw the car that was disabled in one of the northbound lanes and people in the area. The front of his vehicle struck the other vehicle. Here, the Second Department held that the first collision merely furnished the occasion for the occurrence of plaintiff's accident.[34] Rather, the sole proximate cause of the plaintiff's accident was his failure to see what was there to be seen.

Several other cases bear discussion on this point. In Gil v. 75-89 Assocs.,[35] the infant plaintiff and his mother exited a parked car. According to them, they were forced, due to the impassable condition of the sidewalk abutting the defendant's property, to walk in the street. The infant plaintiff was struck by a car. The defendant-abutting sidewalk owners moved for summary judgment and that motion was denied. The First Department affirmed the denial of the motion, holding that "[n]either the conduct of the infant plaintiff's mother in electing to alight from a vehicle parked next to the subject sidewalk, nor the offending driver's actions are superseding causes of the infant plaintiff's harm as a matter of law, and since the very purpose of a sidewalk is to provide safe passage along a roadway, the defective sidewalk did not merely furnish the occasion for the happening of the accident."[36] On the other hand, however, the doctrine has successfully been advanced by defendants on motions for summary judgment in situations involving lane closures on roadways[37] and the design and construction of the parking lots.[38]

The "furnished the occasion" doctrine tends to be a fact driven in its application, but can be a means to obtain a favorable outcome. Its application should be explored in any case where causation may be an issue.

c. The Emergency Doctrine

The emergency doctrine provides that an automobile operator facing a sudden and unexpected circumstance, which he or she did not create and

which leaves little or no time for reflection, or reasonably causes him or her to be so disturbed such that he or she is compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if his or her actions in responding to that emergency are reasonable and prudent in the context of the emergency. What kinds of situations amount to a qualifying emergency? A crossover? Likely. An uncontrolled skidding on ice? Maybe not. Unexpected sun glare? Apparently not. This portion of the article hopes to explore those issues.

Must the emergency doctrine be plead as an affirmative defense? Not necessarily. While some cases have held that emergency doctrine should be pleaded as an affirmative defense.[39] There are others that have held this is not necessary.[40] The issue here turns on whether plaintiff would be surprised by the emergency doctrine being asserted in any given case.

The emergency doctrine defines the actor's duty of care. In those cases where the court finds the emergency doctrine applicable, the PJI (§2:14) provides the following charge:

> PJI: Common Law Standard of Care – Emergency Situation
>
> A person faced with an emergency and who acts without opportunity to consider the alternatives is not negligent if (he, she) acts as a reasonably prudent person would act in the same emergency, even if it later appears that (he, she) did not make the safest choice or exercise the best judgment. A mistake in judgment or wrong choice of action is not negligence if the person is required to act quickly because of danger. This rule applies where a person is faced with a sudden condition, which could not have been reasonably anticipated, provided that the person did not cause or contribute to the emergency by (his, her) own negligence.
>
> If you find that (defendant, plaintiff) was faced with an emergency and that (his, her) response to the emergency was that of a reasonably prudent person, then you will conclude that (defendant, plaintiff) was not negligent. If, however, you find that the situation facing (defendant, plaintiff) was not sudden, or should reasonably have been foreseen, or was created or contributed to by (defendant's plaintiff's) own negligence or that (defendant's, plaintiff's) conduct in response to the emergency was not that of a reasonably prudent person, then you may find that (defendant, plaintiff) was negligent.

In Khan v. Canfora,[41] the court stated that "[u]nder the emergency doctrine, when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context."[42] As an initial matter, when a defendant attempts to invoke the emergency doctrine, the defendant must establish that there is a qualifying emergency. The relevant issue is whether the nature of the circumstances surrounding a particular accident warrants an instruction on a reduced duty of care.

In Caristo v. Sanzone,[43] the Court of Appeals reviewed the doctrine noting that "more than a century ago, this Court first considered the reasonableness of an actor's conduct when confronted with an emergency situation."[44] In Caristo, the defendant had lost control of his motor vehicle on an icy roadway and skidded into the plaintiff's vehicle. While, upon first glance, skidding on an icy roadway during a storm might appear to be a qualifying emergency, the Court held, under further scrutiny, that it was a foreseeable occurrence under the existing conditions. As such, there was no "qualifying emergency" and no reason to instruct the jury as to the emergency doctrine. The Court noted that the defendant was aware of the weather conditions and the fact that the weather was becoming worse and had no legitimate argument that the presence of ice on the hill could be deemed a sudden and unexpected emergency.

The New York Court of Appeals recently had occasion to review the emergency doctrine in a situation where the defendant alleged that he had been temporarily blinded by the glare of the sun. In Lifson v. City of Syracuse,[45] the plaintiff's decedent was hit as she was crossing the street, by the defendant driver Klink, who claimed that he was temporarily blinded by sun glare. Klink specifically testified that

he was aware that there were pedestrians crossing the street to his left but he looked in that direction and "cleared the road" before making a left turn. Klink looked to his right and then back to his left, when he was suddenly in mid-turn blinded by the sun. His reaction to being blinded by the sun was to look down to his right and when he looked up the first thing he saw the plaintiff's decedent. Although Klink applied the brakes, he was unable to avoid hitting her. The plaintiff commenced the action against Klink, as well as the City of Syracuse (alleging causes of action in negligence and failure to study/plan for pedestrian traffic). Klink requested, and was given, over the plaintiff's objection, the emergency doctrine instruction. The jury returned a verdict finding the City 15% and plaintiff's decedent 85% liable. Klink was found not negligent and the action against him was dismissed. On appeal, the Appellate Division affirmed, in a 4-1 decision, holding that the emergency instruction was properly given. The New York Court of Appeals granted plaintiff leave to appeal and reversed, holding that the emergency doctrine charge should not have been given. The Court of Appeals determined that there was no qualifying emergency since it was well-known that the sun can interfere with one's vision as it nears the horizon at sunset, particularly when one is heading west. Such a situation could not be considered a sudden and unexpected circumstance such that the emergency doctrine would be warranted.

The dissent in the Court of Appeals noted that in determining whether the emergency instruction was properly given, the issue is not whether the emergency was foreseeable, it is whether it was sudden and unexpected. Here, according to the dissent, viewing the record most favorably to Klink, as the court needs to do in such an evaluation, Klink was entitled to the charge. Klink was driving on a city street where buildings sometimes do, and sometimes do not, block the sun. Klink was unfamiliar with the route. Thus, the dissent concluded, the jury could surely have found that Klink did not calculate the direction of his travel, the time of day and the time of year so precisely that he expected to find the sun in his eyes when he turned.

It should be noted that the majority opinion, written by Justice Lippman, does indicate that the decision should not be read to hold that "sun glare can never generate an emergency situation" but found that this was a very case-specific decision.

The Appellate Division, Fourth Department considered an unusual fact pattern in the case of Kizis v. Nehring,[46] where the plaintiff was a passenger in a vehicle being operated by the defendant. The defendant admitted to having crossed the double yellow center line of a two-lane highway into the path of the plaintiff's vehicle so as to avoid hitting a "large brown what appeared to be a bird that was either flying or running toward her vehicle."[47] The trial court granted the defendant's application for the emergency doctrine charge and the jury returned a defense verdict. The Supreme Court denied the plaintiff's motion to set aside the verdict and, on appeal, the Appellate Division, Fourth Department reversed. The court agreed with the plaintiffs that the emergency doctrine charge was error given "the vagueness and equivocation in the explanations of [the defendant] concerning the circumstances that allegedly caused her to cross into the opposing lane of travel."[48] The Court concluded that there was no "qualifying emergency (i.e., a sudden and unforeseeable occurrence) that would have made it reasonable and prudent for [the defendant] to react by swerving into the opposing lane of travel and collide head on with an oncoming vehicle."[49] The Court continued by noting that even if the emergency doctrine charge was proper, the jury's verdict could not be supported by any fair interpretation of the evidence. Specifically, the court noted that "a driver confronted with an emergency situation may still be found to be at fault for the resulting accident where his or her reaction is found to be unreasonable or where the prior tortious conduct of the driver contributed to bringing about the emergency."[50] The court found that the defendant's own testimony established that she swerved directly into the path of oncoming traffic and remained there for "seconds" while looking in her rearview mirror when the head-on collision occurred. The Court concluded that her actions were "an unreasonable and imprudent reaction."[51]

Two judges dissented from the majority, believing that there was qualifying emergency given the appearance of this large brown bird in the defendant's path and believed it should have been

left to the jury to determine whether an emergency actually presented.[52]

Application of the emergency doctrine is frequently seen in crossover situations.[53]

However, it is applied in other contexts as well. For instance, the emergency doctrine is often invoked when a motor vehicle is caused to stop short for one reason or another. For example, in Tallent v. Grey Line N.Y. Tours, Inc.,[54] a bus owned by the defendant proceeded forward from a stop at a red light and was traveling at approximately 5 miles per hour when a cab suddenly cut in front of the bus driver, causing the driver to apply the brakes with "medium" pressure. Conversely, plaintiff, a standing passenger on the double-decker bus confirmed that the bus was traveling at approximately 5 miles per hour but claimed that the defendant driver slammed on his brakes and stopped abruptly. The appellate court affirmed the lower court order granting summary judgment to the defendant based on the emergency doctrine since the plaintiffs failed to present any evidence that the bus driver created the emergency or could have avoided a collision with the cab by doing anything other than applying his brakes. The court specifically noted that the plaintiffs failed to establish "that the stop was unusual or violent, and different from the jerks and lurches normally associated with urban bus travel."[55]

The case of Pelletier v. Lam,[56] is an interesting one. The issue in Pelletier was whether the charge was properly given at trial. The facts in Pelletier are as follows: On the date of the accident, the defendant driver, Brittany was operating her father's vehicle with four passengers (all 19 years old). They were driving home from a day at the beach. During the drive home, one of the passengers, Brandon, "playfully" pulled the strings of Brittany's bikini top and Brittany reacted by taking her hands off the steering wheel and covering herself. The vehicle began to veer right and Brittany tried to regain control of the vehicle but could not. The car struck the center divider, vaulted over the guardrail and overturned. The issue on the appeal was whether it was an error for the trial judge to have given the emergency doctrine charge. The Second Department majority determined it was not. As an initial matter, the court noted that the inquiry the trial court must engage in when deciding to give the charge is whether there is some reasonable view of the evidence supporting the occurrence of a qualifying emergency.[57] Here the court had that "Brittany's general awareness that [Brandon] had engaged in certain distracting conduct while in the car could not preclude a jury from deciding that Brittany did not anticipate that he would suddenly pull the strings on her bikini top, thereby causing the top to fall and her breasts to be exposed.[58] The dissent disagreed, noting that Brittany had 15-20 minutes to reflect on Brandon's behavior.

As to what the defendant driver knew and when, reference is made to the Appellate Division, Fourth Department decision in Barnes v. Dellapenta,[59] There, the Appellate Court determined that the emergency doctrine instructions was warranted in a case where the accident occurred on a cold, clear day when strong winds caused a sudden and temporary white out. Here, the Fourth Department noted that the charge was applicable despite the fact that the defendant driver had previously experienced whiteouts at that location, since "such experience does not negate the applicability of the emergency doctrine as to the events in issue in this case."[60]

The emergency doctrine has been held inapplicable where a defendant driver was aware of icy road conditions and should have accounted for them properly.[61] However, where the slide on ice is precipitated by an attempt to avoid a disabled vehicle, the emergency doctrine will at least create an issue of fact on the issue.[62]

All in all, a defendant is entitled to the charge when a reasonable view of the evidence warrants it. Its application should be considered both at trial and in motion practice.

Any views and opinions expressed in this article are solely those of its author. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

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1 Benitez v. New York City Board Of Educ., 73 N.Y.2d 650, 656, 543 N.Y.S.2d 29, 32 (1989)

2 Pulka v. Edelman, 40 N.Y.2d 781, 390 N.Y.S.2d 393 (1976)

3 Sheehan v. City of New York, 40 N.Y.2d 496, 501, 387 N.Y.S.2d 92, 95 (1976)

[4] Levitt v. Lenox Hill Hosp., 184 A.D.2d 427, 429, 585 N.Y.S.2d 401, 403 (1st Dep't 1992)
[5] Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 169 (1980)
[6] See, e.g. Spadaro v. Parking Systems Plus, Inc. 113 A.D.3d 833, 979 N.Y.S.2d 627 (2nd Dep't 2014)
[7] 106 A.D.3d 1052, 966 N.Y.S.2d 187 (2nd Dep't 2013)
[8] Id. 106 A.D.3d at 1053, 966 N.Y.S.2d at 188,
[9] Id.
[10] See, Adobea v. Junel, 114 A.D.3d 818, 980 N.Y.S.2d 564 (2nd Dep't 2014); see also, Delgado v. Martinez Family Auto, 113 A.D.3d 426, 979 N.Y.S.2d 277 (1st Dep't 2014) (a violation of traffic law, absent an excuse, constitutes negligence); Baker v. Joyal, 4 A.D.3d 596, 771 N.Y.S.2d 269 (3rd Dep't 2004)("only an unexcused violation of the Vehicle and Traffic Law constitutes negligence per se")
[11] Lui v. Seirone, 103 A.D.3d 620, 959 N.Y.S.2d 270 (2nd Dep't 2013); Thoma v. Ronai, 82 N.Y.2d 736, 602 N.Y.S.2d 323 (1993)
[12] 72 A.D.3d 198, 895 N.Y.S.2d 389 (1st Dep't 2010)
[13] Id. 72 A.D.3d at 200, 895 N.Y.S.2d at 391,
[14] Id.
[15] See, Maniscalco v. New York City Transit Auth., 95 A.D.3d 510, 943 N.Y.S.2d 486 (1st Dep't 2012); Calcano v. Rodriguez, 91 A.D.3d 468, 936 N.Y.S.3d 185 (1st Dep't 2012)
[16] Calcano, 91 A.D.3d at 468, 936 N.Y.S.2d at 186
[17] Ely v. Pierce, 302 A.D.2d 489, 489, 755 N.Y.S.2d 250, 257 (2nd Dep't 2003)(citations omitted); Roman v. Cabrera, 113 A.D.3d 541, 979 N.Y.S.2d 310 (1st Dep't 2014)
[18] 73 A.D.3d 502, 900 N.Y.S.2d 296 (1st Dep't 2010)
[19] 73 A.D.3d at 502, 900 N.Y.S.2d at 297
[20] 60 A.D.3d 669, 874 N.Y.S.2d 235 (2nd Dep't 2009); see also, Adams v. Lemberg Enterprises, Inc., 44A.D.3d 694, 843 N.Y.S.2d 432 (2nd Dep't 2007)
[21] 76 A.D.3d 699, 907 N.Y.S.2d 291 (2nd Dep't 2010)
[22] Id. 76 A.D.3d at 700, 907 N.Y.S.2d at 294
[23] 83 A.D.3d 897, 920 N.Y.S.2d 789 (2nd Dep't 2011)
[24] 83 A.D.3d at 898, 920 N.Y.S.2d at 790; see also, Lee v. D. Daniels Contracting, Ltd., 113 A.D.3d 824, 978 N.Y.S.2d 908 (2nd Dep't 2014); Katz v. Klagsbrun, 299 A.D.2d 317, 750 N.Y.S.2d 308 (2nd Dep't 2002); Williams v. Envelope Transit Corp., 186 A.D.2d 797 589 N.Y.S.2d 345 (2nd Dep't 1992) (stalling of defendant's vehicle (wholly within a moving lane of traffic may have furnished the occasion of the accident, it was not one of its causes) Dunlap v. City of New York, 186 A.D.2d 782, 589 N.Y.S.2d 343 (2nd Dep't 1992).
[25] 243 A.D.2d 536, 537, 665 N.Y.S.2d 287, 287-288 (2nd Dep't 1997)
[26] 243 A.D.2d at 537, 665 N.Y.S.2d at 288
[27] 243 A.D.2d at 537, 665 N.Y.S.2d at 287
[28] 227 A.D.2d 375, 376, 642 N.Y.S.2d 79, 679 (2nd Dep't 1996)
[29] 227 A.D.2d at 376, 642 N.Y.S.2d at 80
[30] 44 A.D.3d 362, 843 N.Y.S.2d 31 (1st Dep't 2007)
[31] Id. 44 A.D.3d at 363, 843 N.Y.S.2d at 33
[32] Id.
[33] 43 A.D.3d 850, 841 N.Y.S.2d 686 (2nd Dep't 2007)
[34] 43 A.D.2d at 851, 841 N.Y.S.2d at 687
[35] Id. 289 A.D.2d 5, 735 N.Y.S.2d 3 (1st Dep't 2001)
[36] Id. 289 A.D.2d at 5-6, 735 N.Y.S.2d at 51
[37] See, e.g., Batista v. City of New York, 101 A.D. 3d 773, 956 N.Y.S.2d 85 (2nd Dep't 2012); LaSpina v. City of New York, 22 A.D.3d 528, 803 N.Y.S.2d 662 (2nd Dep't 2005)(conduct complained of . . . did nothing more than furnish the condition or occasion for the accident but did not put in motion the agency by which the injuries were inflicted")
[38] Castillo v. Amjack Leasing Corp., 84 A.D.3d 1298, 924 N.Y.S.2d 156 (2nd Dep't 2011)(any negligence in design or management of parking lot where worker was struck by truck did not proximately cause accident; sole proximate cause was the negligence of the truck driver in failing to use a lookout when backing the truck up.
[39] Franco v. Michael Cab Corp., 71 A.D.3d 1082, 1083, 898 N.Y.S.2d 186, 187 (2nd Dep't 2010) (holding that the defendant "failed to plead the emergency doctrine as an affirmative defense in its answer, and the facts relating to the emergency were known only to the defendant . . . , [so] the motion raised new issues of fact not appearing on the fact of the pleadings, which resulted in unfair surprise to the plaintiff.")
[40] Mendez v. City of New York, 110 A.D.3d 421, 972 N.Y.S.2d 242 (1st Dep't 2013)
[41] 60 A.D.3d 635, 874 N.Y.S.2d 243 (2nd Dep't 2009)
[42] Id. at 635-636, 874 N.Y.S.2d at 244 (citation and internal quotation marks omitted)
[43] 96 N.Y.2d 172, 726 N.Y.S.2d 334 (2001)
[44] Id. at 174, 726 N.Y.S.2d at 335
[45] 17 N.Y.3d 492, 934 N.Y.S.2d 38 (2011)
[46] 27 A.D.3d 1106, 811 N.Y.S.2d 509 (4th Dep't 2006)
[47] Id. 27 A.D.3d at 1107, 811 N.Y.S.2d at 510
[48] Id. at 1107, 811 N.Y.S.2d at 510
[49] Id.
[50] Id. at 1108, 811 N.Y.S.2d at 511
[51] Id.
[52] See, also, Frutchey v. Felicita, 11 N.Y.3d 764, 866 N.Y.S.2d 594 (2008); Herbert v. Morgan Drive-A-Way Inc., 84 N.Y.2d 835, 617 N.Y.S.2d 127 (1994) rev'g 202 A.D.2d 886, 609 N.Y.S.2d 407 (3rd Dep't 1994); Ardila v. Cox, 88 A.D.3d 829, 931 N.Y.S.2d 120 (2nd Dep't 2011); Lonergan v. Almo, 74 A.D.3d 902, 904 N.Y.S.2d 86 (2nd Dep't 2010); and Cascio v. Metz, 305 A.D.2d 354, 759 N.Y.S.2d 502 (2nd Dep't 2003)
[53] See, e.g., Lopez v. Young, 96 A.D.3d 724, 945 N.Y.S.2d 728 (2nd Dep't 2012); Sullivan v. Mandato, 58 A.D.3d 714, 873 N.Y.S.2d 96 (2nd Dep't 2009)
[54] 67 A.D.3d 497, 889 N.Y.S.2d 562 (1st Dep't 2009)
[55] 67 A.D.3d at 498, 889 N.Y.S.2d at 562
[56] 111 A.D.3d 807, 975 N.Y.S.2d 135 (2nd Dep't 2013)
[57] Id. 111 A.D.3d at 808, 975 N.Y.S.2d 135 at 138
[58] Id.
[59] 111 A.D.3d 1287, 974 N.Y.S.2d 707 (4th Dep't 2013)
[60] Id. 111 A.D.3d at 1287, 974 N.Y.S.2d at 708
[61] Williams v. Kadri, 112 A.D.3d 442, 976 N.Y.S.2d 460 (1st Dep't 2013)
[62] Mitchell v. City of New York, 89 A.D.3d 1068, 933 N.Y.S.2d 405 (2nd Dep't 2011)

The Rights And Obligations Of Motorists When Dealing With Cyclists And Pedestrians

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Although many of us do our best to avoid them, it is likely that anyone in possession of a driver's license will find themselves involved in some sort of motor vehicle accident at some point in their lives. While any sort of motor vehicle accident is unfortunate, it can be particularly harrowing when a motorist strikes a pedestrian. The laws governing the duties of motorists vary from state to state, and the duties themselves differ according to the type of accident at issue. As defense attorneys, it is important to understand the actual duties of a motorist, and how to mitigate any potential damages stemming from a breach of those duties. This article will deal specifically with the duties of motorists under the New York State Vehicle and Traffic Laws, in addition to those of pedestrians and cyclists, the interactions between them, and potentially helpful angles with which to consider a case involving an accident between a motorist and pedestrian or cyclist.

As a general matter, lawsuits regarding motor vehicle accidents sound in negligence. A plaintiff in such a case, therefore, is required to satisfy the elements of negligence; namely, that (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty of care; and (3) that defendant's breach proximately caused plaintiff's injuries. As with any other negligence case, it is possible for a plaintiff/pedestrian to have contributed to its own injuries.

There are two primary duties imposed on motorists in New York State. The first is a statutory duty, set forth in the New York State Vehicle and Traffic Law § 1146. This statute states that motorists have a duty to "exercise due care to avoid colliding with any…pedestrian…upon any roadway."[1] Although the term "due care" is not defined within the statute, courts have chosen to define it as simply "reasonableness under the circumstances."[2] While any "reasonableness" standard is notoriously subjective, courts have acknowledged that even the most reasonable of motorists may find themselves involved in an accident. The Court in Matter of Russell v. Adducci noted in its opinion that "due care is that which is exercised by reasonably prudent drivers…it is not that degree of care which guarantees that a driver will avoid any accident no matter what the circumstances might be."[3]

The second duty imposed upon motorists in New York State is the common-law duty "to see that which should have been seen through proper use of the senses." Again, the idea of what "should have been seen" is extremely subjective, and lends itself to any number of applications. From a defense standpoint, it can be very difficult to argue against an accusation that this duty was breached, and the Courts have generally ruled in favor of plaintiffs, even where defendants testified that they never saw the person they ultimately hit. In Larsen v. Spano, a defendant/motorist was found negligent after a plaintiff/pedestrian stepped off of the curb and into traffic while defendant was attempting to merge lanes. The court found that the fact that defendant/motorist never saw the plaintiff did not excuse the defendant/motorist from liability.[4]

Taken together, these two duties of care can be applied to any number of situations. It is frequently easy for plaintiff's attorneys to find some method of establishing that a driver "reasonably" would have done this, or "should have" been aware of that. Of the two duties, the duty imposed by VTL §1146 supersedes the common law, and courts have held

[1] Vehicle and Traffic Law § 1146

[2] Matter of Russell v. Adduci, 140 A.D.2d 844 (3rd Dept. 1988)

[3] *Ibid*

[4] Larson v. Spano, 35 A.D.3d 820, 827 (2nd Dept. 2006)

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that any violation of this statutory duty constitutes negligence per se. [5] As a result, establishing a winning defense in favor of a motorist who has collided with a pedestrian can prove very challenging. However, it is not impossible to defend your client against such a charge. Although the law may favor the plaintiff/pedestrian, there are mitigating factors that may help alleviate any damages your client is facing.

As in any negligence action, the plaintiff/pedestrian in a motor vehicle accident may see their damages reduced if it can be established that they were contributorily negligent. Pedestrians are not without their own duties and obligations, and are as responsible for their own negligent conduct as anyone else. Therefore, in defending a motorist who has collided with a defendant, it is necessary to consider to what extent the plaintiff has contributed to his own damages, and if any of his own negligence might rise to the level of proximate cause.

Like motorists, pedestrians too have a duty to see what is there to be seen. Although a pedestrian plaintiff may be the one hit by the vehicle, if they were being careless themselves at the time, they may be found contributorily negligent. The ways in which a pedestrian may be contributorily negligent are complicated, and made more so in a city like Manhattan, where it is highly commonplace to have pedestrians walking virtually anywhere except on the sidewalk. A general duty of care is imposed upon pedestrians by Vehicle and Traffic Law § 1151, which states that a pedestrian must use due care in light of all circumstances.[6] It is clear from the multitude of rulings against motorists, however, that the "due care" standard to act as a "reasonable person" is much, much less stringently applied. For example, although it is unlawful in New York State for a pedestrian to walk along an adjacent roadway where sidewalks are provided,[7] there is case law stating that this law is not effective in the City of New York.[8] In Manhattan, it is not uncommon for pedestrians to walk in the streets and outside of crosswalks. Although this may sound like the sort of contributory negligence that would proximately cause one's injury, it more appropriately serves as an example of the how differently the duty of care is applied to motorists.

Pedestrian actions within crosswalks can be particularly problematic. It would not seem unreasonable for a motorist to believe that the crosswalk is where the pedestrians should be; theoretically, if there are no pedestrians in the crosswalk, it must be safe to proceed. However, if the motorist is not taking note of the area surrounding the crosswalk, and becomes involved in an accident, he will be violating his duty to "see what there is to be seen," and will likely be found negligent. VTL §1111 states that pedestrians have the right of way when crossing with the light in a crosswalk.[9] However, regardless of the right of way, a pedestrian has a duty not to leave the curb or place of safety, and enter the path of a vehicle when the vehicle is so close that it would be impossible for the driver to yield.[10] Under VTL §1152(a), every pedestrian crossing a roadway any point outside of a marked crosswalk shall yield the right of way to all vehicles.[11] Simultaneously, however, the driver must exercise due care to avoid collision.[12] Although the VTL addresses numerous crosswalk issues, courts have held that it is not prohibited for a pedestrian to cross outside of a crosswalk.[13] Furthermore, crossing outside of a crosswalk does not constitute negligence.[14] However, to counter this position, courts have held that VTL §1152 implies that the pedestrian who does not utilize a crosswalk is chargeable with additional vigilance.[15]

Despite the leniency toward pedestrian plaintiffs, courts have, and do, recognize that a degree of contributory negligence may exist. In Schmidt v. Flickinger Co., 88 A.D.2d 1068 (1982), the Court found that, although the driver had been negligent, it was necessary to examine whether plaintiff had, in any way, proximately contributed to the accident. The Court stated that plaintiff, like the defendant driver, was "chargeable with seeing what was there

[5] Coogan v. Torrisi, 47 A.D.3d 669 (2nd Dept. 2008)
[6] Vehicle and Traffic Law § 1151
[7] Vehicle and Traffic Law § 1156
[8] Barbosa v. Dean, 55 A.D.2d 573 (1st Dept. 1976)
[9] Vehicle and Traffic Law § 1111
[10] Rudolf v. Kahn, 4 A.D.3d 408 (2nd Dept. 2004)
[11] Vehicle and Traffic Law § 1152(a)
[12] Vehicle and Traffic Law § 1154
[13] Chandler v. Keene, 5 A.D.2d 42 (3rd Dept. 1957)
[14] Dietz v. Huibregtse, 25 A.D.3d 645 (2nd Dept. 2006)
[15] Hogeboom v. Protts, 30 A.D.2d 618 (3rd Dept. 1968)

do be seen," essentially imposing upon the plaintiff pedestrian the same common law duty attributable to the defendant driver.[16]It cannot be overstated how difficult, if not impossible it may be to obtain a full defense verdict in a case involving a motor vehicle accident with a pedestrian. As stated above, by virtue failing to see what is in front of them, and therefore by hitting anyone, a motorist is in violation of the Vehicle and Traffic law, and consequently guilty of negligence per se. However, with the proper usage of the Vehicle and Traffic Laws, the case may ultimately be defendable by focusing on the conduct of the pedestrian, and using their actions to determine a level of comparative negligence that may – hopefully – exonerate your client driver.

If your New York State motor vehicle accident also involves a bicycle, you may have to check the Vehicle and Traffic Law, the Rules of the City of New York and the Administrative Code of the City of New York for exceptions to the general rule that bicyclists have the same rights, and are subject to the same general rules of the road as apply to automobile drivers.[17] Most quoted is the Vehicle and Traffic Law which provides that anyone bicycling (or skating, or gliding on in-line skates) is granted all of the rights and is subject to all of the duties applicable to motor vehicles,[18] with certain exceptions.

Both motorists and bicyclists are required to obey the statutes governing traffic and are entitled to assume that the other also will do so.[19] Just as a car must obey a stop sign, so too, a bicycle must stop and yield the right of way to an approaching vehicle, or be found negligent as a matter of law.[20] They are not to be considered pedestrians. Similarly, a motorist stopped at a stop sign is required to yield the right of way to a bicyclist who has already entered the intersection from another street.[21] The principles of comparative negligence thus apply to accidents between motorists and bicycles.[22] [23]

Unique to bicyclists, they need not give extended hand and arm signals for 100 feet before turning, due to the obvious adherent dangers in so doing; but they are not excluded from all required hand signals before turning;[24]

Motorists must keep a reasonably vigilant lookout for bikes and to sound a horn to warn a bicyclist of danger. However, not every driver who comes upon a bicyclist must sound a horn and, even if negligent, the failure to do so may not be the proximate cause of an accident with a bicycle.[25]

Bicyclists are to use given bicycle paths or lanes unless they are preparing for a turn at an intersection or into a private road or driveway; or unless "reasonably necessary to avoid conditions" (such as fixed or moving objects, motor vehicles, bicycles, pedestrians, pushcarts, animals or surface hazards) that make it unsafe to continue within such bike path or lane.[26] Outside of New York City, a bicyclist's location is governed by VTL 134 which states that "if there was no usable path, to be near the right hand curb or edge of roadway or upon a usable right hand shoulder in such a manner as to prevent undue interference with the flow of traffic, except when preparing for a left hand turn or when reasonably necessary to avoid conditions that would make it unsafe to continue along the right hand curb or edge. A violation of the statute is prima facie evidence of negligence." In Ziparo v. Hartwells Garage, 75 A.D.2d 997, a 15 year old bicyclist prevailed after he was struck by a tractor trailer making a right hand turn, while he was standing straddling his bicycle on the gravel shoulder of a highway – which was where he had a perfectly legal right to be.

16 Schmidt v S. M. Flickinger Co., Inc., 88 AD2d 1068 (3rd Dept. 1982); see also Parady v Phillips, 07 CIV. 3640 JCF, 2008 WL 591868 (SDNY Mar. 5, 2008)

17 8B N.Y. Jur. 2d Automobiles § 1137.

18 Vehicle and Traffic Law § 1231.

19 Palma v. Sherman, 55 A.D.3d 891 (2nd Dept. 2008)

20 *See* Trzepacz v. Jara, 11 A.D.3d 531 (2nd Dept. 2004); Rosenberg v. Kotsek, 41 A.D.2d 573 (2nd Dept. 2007)

21 People v. Marr, 187 Misc. 2d 280 (Just. Ct. 2001)

22 Redcross v. Statz, 241 A.D.2d 787 (3rd Dept. 1997)

23 Barchella v. Moser, 156 A.D.2d 324 (2nd Dept. 1989); Gibbs v. U.S., 886 F.Supp 239 (N.D.N.Y. 1995)

24 *See* Blistzin v. Capital District Transportation Authority, 81 A.D.2d 981 (3rd Dept. 1981); Secor v. Kohl, 67 A.D.2d 358 (2nd Dept. 1979)

25 Palma v. Sherman, 55 A.D.3d 981 (2nd Dept. 2008); Rivas v. NYCTA, 103 A.D.3d 414 (1st Dept. 2013); Vehicle and Traffic Law § 1146; Paul v. Ulrich, 19 Misc. 838 (N.Y. City Ct. 1948)

26 34 RCNY § 4-12(p); See too Doubrovinskaya v. Dembitzer, 20 Misc.3d 440 (Sup. Ct. 2008) rev'd 77 A.D.3d 609, 908 N.Y.S.2d 730 (2nd Dept. 2010)

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A bicyclist is required to use reasonable care for his or her own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself in a dangerous position.[27] Culpable conduct of a bicyclist does not bar recovery, but as between any two operators, it affects the amount of damages to be recovered. Merely by the act of bicycle riding, one does not assume the risk that he or she may be hit by an automobile.[28]

Bicyclists do have certain obligations to act reasonably. They may not attach themselves to another vehicle[29] - a violation of this statute may also constitute negligence as a matter of law. In Weiss v. Lazore, [30] a bicyclist's wrongful death case was dismissed where he was wearing dark clothes at night, operating a bicycle without the statutorily required lights and failing to drive on the right side of the road. Bicyclists must ride the right way on one way streets.[31]

Of note, the failure of a bicyclist to wear protective headgear has been held not to be contributory negligence or an assumption of risk, such that it does not preclude or diminish damages.[32]

Motorists must assure that they, and their passengers, properly alight from their vehicles. No person shall exit a vehicle from the side facing on the traveled part of the street in such a manner as to interfere with the right of an operator of an approaching vehicle or bicycle, a/k/a "dooring".[33]

The Administrative Code makes it a misdemeanor

[27] Finn v. NYS Dept. Mental Hygiene, 49 A.D.2d 995 (3rd Dept. 1975); Ortiz v. Kinoshitat & Co., 30 A.D.2d 334 (1st Dept. 1968)

[28] Palma v. Sherman, 55 A.D.3d 891 (2nd Dept. 2008); Vehicle and Traffic Law § 1146; Story v. Howes, 41 A.D.2d 925 (1st Dept. 1973)

[29] Vehicle and Traffic Law § 1253; Concolino v. Kunzelman, 234 A.D.729 (4th Dept. 1931)

[30] Weiss v. Lazore, 99 A.D.2d 919 (3rd Dept. 1984)

[31] Vehicle and Traffic Law § 1127(a)

[32] Vehicle and Traffic Law § 1238(7)

[33] 34 RCNY § 4-12(c)

to ride a bicycle on a sidewalk in a manner that endangers any other person.[34] A "sidewalk" is defined as the portion of the street "whether paved or unpaved, between the curb lines or the lateral line of a roadway and the adjacent property line, intended for the use of pedestrians. When it is not clear which section is intended for the use of pedestrians, the sidewalk will be deemed to be that portion of the street between the building line and the curb."[35] A bicycle is also defined there as a "two or three wheeled device upon which a person or persons may ride, propelled by human power, through a belt, a chain or gears, with such wheel a tandem or tricycle, except that it shall not include a device having solid tires and intended for use only on a sidewalk by a child, i.e. a person less than 14 years old."[36] The N.Y.C. Traffic Rules and Regulations specify that there is to be no driving of bicycles on sidewalks unless a sidewalk allows, or the wheels are less than 26 inches in diameter and the rider is 12 years or younger.[37]

In the City of New York, there is to be no parking, standing or stopping of vehicles within or otherwise obstructing bike lanes.[38]

The driver of a bicycle must always have a hand on the steering device/handlebar. Riders must keep at least one hand on handlebars when carrying packages, and are required to use hand signals to turn, to stop and to decrease speed. A rider can use either hand to signal a right turn.[39]

A bicyclist is obliged to report to the Police Department any accident resulting in death or injury to a person, or damage to property, and must stop at the scene, providing one's name, address and insurance information.[40]

In New York City, bicycles are prohibited on expressways, drives, highways, interstate routes, bridges and thruways, unless so authorized by signage.[41] They must use the bike path/lane, if provided, except for access, safety, turns, etc. and they may use either side of a 40 foot wide one-way roadway.[42] While bikes can be walked through parks, they may only be ridden in park locations specifically designated for bicycle riding.[43]

If a bicycle is being used for a commercial purpose, such as the making of deliveries, there are a number of regulations now in place: the operator shall wear a helmet provided by the business; must wear upper body apparel with the business' name and operator's name on the back and must carry, and produce on demand, a numbered identification card with his/her photograph, name, home address and the business' name, address and telephone number.[44] The business must provide a helmet in accordance with A.N.S.I. or Snell standards; must be identified on the bike by name and identification number and must maintain a log book including the name, identification number and place of residence of each bicycle operator; the dates of employment and discharge; information on daily trips (the operator's identification number and name, and name and place of origin and destination); and must file an annual report for the police department, identifying the number of bicycles it owns and the identification numbers and identity of any employees.[45]

A bicycle lane is defined by the VTL as "a portion of the roadway which has been designated by stripping, signage and pavement markings for the preferential exclusive use of bicycles,"[46] whereas a "bicycle path" is one physically separated from motorized vehicle traffic by an open space or barrier and either within the highway right-of-way, or within an independent right-of-way, and which is intended for use of bicycles.[47] Otherwise, bicyclists must ride on the right side of the roadway.[48]

Those riding on a bicycle must do so on a

[34] N.Y.C. Admin. Code § 19-176 (c)
[35] N.Y.C. Admin Code § 19-176(2)
[36] N.Y.C. Admin Code § 19-176 (1), (3) 34 N.Y.C. Traffic Rules and Regulations § 4-01(b) (providing that the definition does not apply to "pre-teenage children.")
[37] 34 N.Y.C. Traffic Rules and Regulation § 4-07(c)(3)
[38] 34 N.Y.C. Traffic Rules and Regulations § 4-08 (e)(9)
[39] 34 N.Y.C. Traffic Rules and Regulations § 4-12(c); see too Vehicle and Traffic Law § 1235, § 1237
[40] 34 N.Y.C. Traffic Rules and Regulations § 4-12(h)
[41] 34 N.Y.C. Traffic Rules and Regulations § 4-12(o)(1)
[42] 34 N.Y.C. Traffic Rules and Regulations § 4-12(p)
[43] 34 N.Y.C. Traffic Rules and Regulations § 4-14(c)
[44] N.Y.C. Admin Code § 10-157
[45] N.Y.C. Admin Code § 10-157
[46] Vehicle and Traffic Law § 102 (a)
[47] Vehicle and Traffic Law § 102 (b)
[48] Vehicle and Traffic Law § 1234 (recall conditions and exceptions in 34 N.Y.C. Traffic Rules and Regulations § 4-12)

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Scope and Applicability of the "Seatbelt Defense"

JOSEPH HOROWITZ*

The "seat belt defense" is a commonly asserted affirmative defense in auto liability cases. At its core, the defense alleges that plaintiff was not wearing a seat belt at the time of the accident. This article will address the scope and applicability of this defense.

The Vehicle and Traffic Law ("VTL") provides that all drivers of motor vehicles[1] and front seat passengers under age 16[2] must be "restrained" by a safety belt. That same statute describes the consequences for non-compliance with this requirement. "Non-compliance with the provisions of this section shall not be admissible as evidence in any civil action in a court of law in regard to the issue of liability but may be introduced into evidence in mitigation of damages, provided the party introducing said evidence has pleaded such non-compliance as an affirmative defense."[3]

The duty incumbent on a plaintiff to mitigate his or her damages is typically applied to post-accident conduct, such as failing to seek medical treatment after sustaining an injury. However, the "seatbelt defense" is different from the usual situation because it provides a driver and passenger the ability to minimize his or her damages prior to the accident.[4]

The vast majority of cases addressing the "seat belt defense" track the language of this VTL provision explaining that plaintiff's failure to buckle up is "not relevant to the issue of liability" and is relevant only in determination of damages.[5] Despite this common refrain found in most decisions, there may be situations where the seatbelt defense is available even in the liability portion of a trial. A brief review of the historical development of the "seatbelt defense" illustrates the circumstances where this defense impacts plaintiff's liability.

Although it was decided 40 years ago, *Spier v. Barker*[6] remains the most important decision from the Court of Appeals involving the "seat belt defense."[7] In that case, the Court reasoned that the mere fact that a plaintiff was not using his or her seatbelt did not cause the accident. A defendant is thus unable to raise the "seatbelt defense" during the liability portion of the trial. The decision, however, was not a complete victory for the plaintiff's bar. The Court went on to point out that failing to use a seatbelt is not "reasonable conduct" and thus, consideration of the nonuse of a seatbelt is to be taken into account in mitigation of plaintiff's damages.[8]

In footnote 4, the Court observed that "not involved in this case, and not considered, is an issue in which the failure to wear a seatbelt is an alleged cause of the accident."[9] By including this footnote, it is evident that the Court of Appeals would likely permit a defendant to raise the "seatbelt defense" even in the liability portion of a trial in limited circumstances, namely – where plaintiff's failure to wear a seatbelt is the cause of the accident.

Once such example is *Curry v. Moser*,[10] where plaintiff was not wearing a seatbelt while seated in the front seat of defendant's car. Defendant's vehicle was turning when the front passenger-side door suddenly opened and plaintiff fell out of the car, onto the roadway. Plaintiff was struck by a passing car and sustained injuries. Relying on footnote 4 in the *Spier* decision, the Second Department in *Curry* acknowledged that the unexplained opening of the door may well have been a cause of the accident. However, "had plaintiff been sitting properly in her seat with the seat belt fastened, this cause might have had no effect in terms of the plaintiff having sustained any injuries."[11] Therefore, as the accident was caused by plaintiff's failure to wear a seatbelt, the court ruled that the "seatbelt defense" was properly submitted to the jury in the liability phase of the trial.

Curry was decided in 1982, two years prior to the passage of the VTL section mandating seatbelt use. However, several decisions issued after the

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statute's enactment have found that the "seatbelt defense" can be raised as to liability where the cause of the accident is attributable to plaintiff's failure to use a seatbelt. In *Roach v. Szato*,[12] plaintiff was a passenger seated on the open tailgate of the defendant's vehicle. He fell off the tailgate and sustained injuries. Both plaintiff and defendant had "consumed some alcoholic beverages" before the accident.[13] Relying on *Curry*, the court held that plaintiff's conduct in failing to use a seat belt could be considered on the issue of liability.

A similar example is seen in *Muzammil v. Singh*.[14] While the decision does not describe the facts of the case, the appellate brief of defendant[15] explains that plaintiff was a wheelchair-bound patient who was being transported in the defendant's ambulette. Defendant testified that after clamping the wheelchair, plaintiff refused to wear a seat belt. During the trip, plaintiff slipped out of his wheelchair and sustained injuries. The court ruled that plaintiff was not entitled to summary judgment under these facts since the cause of the accident was the alleged nonuse of a seatbelt.

The VTL requires all drivers of motor vehicle to use a seatbelt.[16] Additionally, all front- seat passengers age 16 and under must be restrained by a safety belt.[17] The statutory language is strictly interpreted and the requirement to use a seat belt is not extended to include an adult passenger who is seated in the rear of the vehicle. One example is *Thurel v. Varghese.*[18] At the time of the accident, Magalie Thurel was sitting in the rear seat of a car driven by her husband while holding her two-month old son in her arms. As a result of a collision with another car, the infant was thrown from his mother's arms through the car window and onto the pavement, sustaining injuries that resulted in his death. The Court held that Ms. Thurel, the child's mother, could not be held liable for the child's death because the VTL imposed no obligation upon her as a rear-seat passenger.[19]

Under what circumstances can the plaintiff move for dismissal of the seatbelt defense? In the typical scenario, plaintiff will testify at the deposition that he or she was seat-belted at the time of the accident. If the defendant cannot present evidence to rebut that testimony, the plaintiff is entitled to dismissal of this affirmative defense.[20]

The police accident report is one option available to a defendant seeking to rebut plaintiff's claim that he or she was using a seat belt. Box number 10 on the standard MV-104A report indicates what safety equipment was used by the drivers and passengers involved in a collision. Where there is an indication that plaintiff was not using a seatbelt, this could be effective to raise a triable issue of fact and preserve the affirmative defense. One avenue a practitioner may wish to explore in ensuring that the police accident report is considered by the court is to seek a certified copy of the report, and ensure that the officer's entry is admissible.[21] Alternatively, an affidavit from the reporting officer that plaintiff was not seat-belted would likely raise a triable question of fact to defeat plaintiff's motion seeking to dismiss the seatbelt defense.

What must a defendant establish to have the question of plaintiff's failure to use a seat belt submitted to a jury? The defendant must demonstrate, by competent evidence, the causal connection between plaintiff's nonuse of a seatbelt and the injuries sustained.[22] In *Spier*, the seatbelt defense was properly submitted to the jury since defendant relied on the expert testimony of a mechanical engineer who had also been employed as a consulting engineer in the field of accident analysis and reconstruction.[23]

However, without expert evidence linking the nonuse of a seatbelt to the injuries, the seatbelt defense will not be presented for the jury's consideration. For example, in *Schrader v. Carney*,[24] the lower court submitted the question of plaintiff's failure to buckle up to the jury. The jury reduced plaintiff's verdict by 25% on the basis of his failure to use a seatbelt. On appeal, that reduction was ruled improper because defendant had failed to present evidence tying the extent of plaintiff's injuries to the fact that plaintiff failed to use an available seatbelt.

In conclusion, the "seatbelt defense" is one of the more powerful tools available to counsel in defending motor vehicle accident cases. The defense is generally limited to mitigate plaintiff's damages. However, under limited circumstances there is precedent that where plaintiff's conduct in failing to use a seatbelt caused the accident, plaintiff's nonuse of a seatbelt is considered on the issue of liability. This article also addresses the need for defendant to establish a

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causal link, by expert testimony, between plaintiff's nonuse of a seatbelt and the injuries sustained.

[1] Vehicle and Traffic Law § 1229-c (3)
[2] Vehicle and Traffic Law § 1229-c (2)
[3] Vehicle and Traffic Law § 1229-c (8)
[4] *Spier v. Barker,* 35 N.Y.2d 444, 363 N.Y.S.2d 916 (1974)
[5] *See e.g., Brabham v. City of New York*, 105 A.D.3d 881,883, 963 N.Y.S.2d 332,334 (2nd Dep't 2013)
[6] 35 N.Y.2d 444, 363 N.Y.S.2d 916 (1974)
[7] In fact, the case has been cited over 750 times.
[8] *Id.* at 451, 363 N.Y.S.2d at 921
[9] *Id.*
[10] 89 A.D.2d 1, 454 N.Y.S.2d 311 (2nd Dep't 1982)
[11] *Id.* at 7, 454 N.Y.S.2d at 315
[12] 244 A.D.2d 470, 664 N.Y.S.2d 101 (2nd Dep't 1997)
[13] *Id.* at 471, 664 N.Y.S.2d at 102
[14] 275 A.D.2d 398, 712 N.Y.S.2d 875 (2nd Dep't 2000)
[15] Available at 2000 WL 35525563
[16] Vehicle and Traffic Law § 1229-c (3). *But see*, *Ruiz v. Rochester Telephone Co.*, 195 A.D.2d 981, 600 N.Y.S.2d 879 (4th Dep't 1993) (tractor-trailer driver's failure to wear seat belt is considered in mitigation of damages even though there is no legal requirement for tractor trailer operator to use seat belts)
[17] Vehicle and Traffic Law § 1229-c (2)
[18] 207 A.D.2d 220, 621 N.Y.S.2d 633 (2nd Dep't 1995)
[19] *See also, Horan v. Brown,* 43 A.D.3d 608, 842 N.Y.S.2d 597 (3rd Dep't 2007) (although operator of motor vehicle is statutorily obligated to ensure that child passengers are properly restrained, a parent who is a passenger has no independent legal duty to ensure compliance with the seat belt laws)
[20] *Stickney v. Alleca*, 52 A.D.3d 1214, 860 N.Y.S.2d 352 (4th Dep't 2008)
[21] *Cheul Soo Kang v. Violante,* 60 A.D.3d 991, 877 N.Y.S.2d 354 (2nd Dep't 2009) (police accident report did not qualify under the business records exception because it was not certified and no foundation testimony established its authenticity); *Hazzard v. Burrowes*, 95 A.D.3d 829, 943 N.Y.S.2d 213 (2nd Dep't 2012) (police accident report was inadmissible as it was not certified as a business record)
[22] *Spier v. Barker,* 35 N.Y.2d 444, 363 N.Y.S.2d 916 (1974); *See also, Dowling v. Dowling*, 138 A.D.2d 345, 525 N.Y.S.2d 636 (2nd Dep't 1988) (seatbelt defense was properly submitted to the jury where testimony of defendant's properly qualified expert established a causal connection between plaintiff's nonuse of an available seatbelt and the injury sustained)
[23] *Id.* at 447
[24] 180 A.D.2d 200, 586 N.Y.S.2d 687 (4th Dep't 1992)

Any views and opinions expressed in this article are solely those of its author. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

The New York No-Fault "Serious Injury" Threshold

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are bearing all the brunt of the increase in lawsuits, and certainly many exaggerated injury claims among them. Residents of those constituencies can expect more jury summonses and auto-premium rate increases, just because of their geographical location, if the current court trends continue. The proposed legislative "reforms" – aim to increase these problems. If enacted, they would only add to the disproportionate burden felt by City residents and courts. In this light, informed by reliable statistical information and estimates, it would seem that change should be aimed at making the "serious injury" threshold higher, not lower.

[1] These Bills mirror each other, and can be viewed on the websites for the NYS Senate - nysenate.gov/legislation and the NYS Assembly - asssembly.state.ny.us/leg; In short, they propose to expand and broaden definitions of 'serious injury' to include any alleged injury which receives surgical treatment, as well almost any alleged injury identified by diagnostic imaging. They further propose that the judiciary be barred from making any decision as to the prima facie issue of causation of injury – on motion or at trial.
[2] See NYLJ, January 11, 2012, Letters to the Editor – 'Perl' Sends Clear Message to Insurance Defense Bar, by Michael Jaffe – NYSTL President (elect). See Also, NYLJ, March 12, 2012, Outside Counsel – 'Perl Clarifies Issues of Proof in 'Serious Injury' Cases', by R. Greenstein and A. Kokar.
[3] Consolidated Laws of New York, Chapter 28, Article 51 – Comprehensive Motor Vehicle Insurance Reparations Act. The original Article was re-codified in 1984 – with minor changes. (Formerly Ch.13 [1073] N.Y. Laws 56)
[4] Insurance Law s.5104(a) – Causes of action for personal injury
[5] St. John's Law Review (1977) "Legislature Amends New York's No-Fault Statute," *St. John's Law Review: Vol.52: Iss. 1, Article 13., at 170, note 149. (available at:* scholarship.law.stjohns.edu/lawreview/vol52/iss1/13) In addition to the $500 limit, the original "serious injury" provision also included the "specific" injuries still present in the statutory definitions today: "death; dismemberment; significant disfigurement…" as well as, "permanent loss of use of a body organ, member, function or system…."; and a similar - but narrower - fracture provision, "… a compound or comminuted fracture".
[6] St. John's Law Review (1977), at 170, note 151-152
[7] Insurance Law 5102(d): death, dismemberment, significant disfigurement, fracture, loss of fetus

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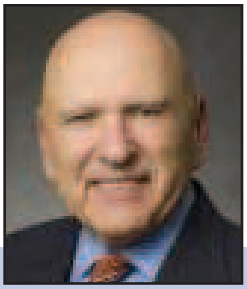

The Hybrid Quagmire Medicare Advantage Organizations and General Obligations Law § 5-335

HOWARD NEWMAN, ESQ.* & JEANNE M. LANE, ESQ. **

It is generally true that General Obligations Law ("GOL") § 5-335, New York's Anti-Subrogation Statute, prohibits a health care insurer from asserting a subrogation, lien, or reimbursement claim against funds a claimant or plaintiff receives in a personal injury settlement. However, when that health care insurer is Medicare, GOL § 5-335 does not apply, and Medicare can recover conditional payments made on behalf of its insured.[1] Private health care insurers should be so lucky. To a certain extent, depending on the contractual language in a Medicare Advantage plan, perhaps they are.

A Medicare-eligible individual may elect to receive Medicare coverage "from private insurers, called MA organizations, rather than from the government."[2] These organizations offer Medicare Advantage insurance plans ("MA plans"), which "must provide the same (or more) benefits and services that the enrollee would receive under traditional Medicare."[3]

Logistically, the Medicare Advantage program works as follows: A private insurer, known as a Medicare Advantage ("MA") organization, contracts with the center for Medicare and Medicaid Services ("CMS"), which pays the MA organization "a fixed amount for each enrollee, per capita, and the MA organization must provide the same (or more) benefits and services that the enrollee would receive under traditional Medicare."[4] In this way, an MA organization functions as a hybrid public-private benefit provider.

Because an MA plan exists through Medicare, a governmentally-funded and administered benefit program, the question of whether an MA organization can assert a right to reimbursement against personal injury settlement proceeds in the same way as so-called traditional Medicare necessarily arises. That is, whether a hybrid public-private entity that functions under the Medicare law has the same rights as a wholly public benefit program. The case law in New York State is just developing on this issue.

Preliminarily, it is helpful to understand the reimbursement rights that traditional Medicare enjoys under the Medicare Act, which is part of the Social Security Law. Federal law imbues Medicare with a statutory right of reimbursement coupled with an express preemption provision – the golden standard of recovery rights – as part of the Medicare Secondary Payer provisions.[5] In part, it gives the Medicare Trust Fund a statutory right to assert a claim against another insurer for payments made by Medicare that should have been made by that another insurer or benefit provider, the "primary payer."[6] This "broad, express preemption clause" trumps any state law that may hinder or extinguish this reimbursement right, such as General Obligations Law § 5-335.[7]

For instance, in New York State, when Medicare pays for a personal injury claimant's health treatment related to a motor vehicle accident, it can seek reimbursement from the automobile insurer whose policy should have been administering No Fault benefits to cover the cost of health care treatment relating to the alleged injury. In this situation, Medicare's payments are referred to as "conditional" or "secondary" payments; the liability insurer is the "primary" payer.

If Medicare Advantage organizations enjoy this same right to recovery, then, they will be immune from the operation of GOL§ 5-335. However, because of Medicare Advantage's public-private hybrid, the analysis of the extent of an MA organization's recovery rights is more complicated than traditional Medicare analysis. This is further complicated by the language of the Medicare Act, which provides an MA organization with the opportunity to create

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The Hybrid Quagmire - Medicare Advantage Organizations and General Obligations Law § 5-335

a statutory right of reimbursement but does not automatically provide one.

Only one Appellate court in the State of New York has addressed this issue.[8] In *Trezza v. Trezza*, the Second Department held that a MA organization's right to recovery is qualified in that it exists only if the MA organization's contract with its insured – the "MA plan" – contains contractual language preserving the right to reimbursement.[9]

In *Trezza*, plaintiff Janine Trezza commenced a personal injury action following an automobile accident in which she allegedly sustained serious injuries under Insurance Law § 5102(d).[10] The Rawlings Company LLC served her with a notice of Lien / Claim / Right of Reimbursement in September 2008, asserting a claim for reimbursement in accordance with Medicare Secondary Payer provisions on behalf of Oxford Health Plans, her MA organization, then called Medicare+Choice. The reimbursement claim was rooted in the fact that Oxford paid for Ms. Trezza's medical treatment after she exhausted her No Fault benefits.

After her personal injury action settled for $75,000, Ms. Trezza moved to extinguish Oxford's claim of reimbursement.[11] The trial court granted her motion, relying on GOL § 5-335(a), which, at the time directed that "it shall be conclusively presumed that [a personal injury] settlement does not include any compensation for the cost of health care services . . . to the extent those losses or expenses have been or are obligated to be paid or reimbursed by a benefit provider, except for those payments as to which there is a statutory right of reimbursement."[12] The Court found that Oxford had no statutory right to reimbursement.

The Second Department reversed, holding that "General Obligations Law § 5-335, insofar as applied to Medicare Advantage organizations, is preempted by federal law because it restricts the contractual reimbursement rights to which those organizations are entitled pursuant to the provisions of . . . . the Medicare Act."[13]

The Second Department found that the Medicare Act's provisions "supersede any State laws, regulations, contract requirements, or other standards that would otherwise apply to [Medicare Advantage] plans."[14] State legislation, therefore, cannot extinguish an MA organization's right to reimbursement under Federal law and the [Medicare Secondary Payer] regulations to bill, or to authorize providers and suppliers to bill, for services for which Medicare is not the primary payer."[15]

However, the Court found that the MA organization's right to reimbursement is not equivalent to the unqualified right of traditional Medicare. Instead, the Medicare Act provides the "statutory authorization for insurers[,the MA organizations,] . . . to include reimbursement provisions in their agreements[, the MA plans,] with enrollees."[16] Thus, the statutory right to reimbursement is triggered when an MA plan contains language claiming a right to reimbursement, and this right preempts State law.

In New York State, then, an MA organization can assert a claim for reimbursement against settlement proceeds usually protected by GOL § 5-335 as long as the MA plan contains language triggering the reimbursement provision. The natural inference is that without such contractual language, an MA organization has no statutory right to reimbursement and is precluded from recovering under GOL § 5-335.

Although the *Trezza* analysis provides some clarity regarding the rights of an MA organization relating to settlement funds, the decision begs certain questions. For instance, what if the contractual language contained in the MA plan creates a right of reimbursement but limits that right by enumerating the individuals from whom the MA organization can seek reimbursement? In this situation, does the the MA organization enjoy the full statutory recovery right of traditional Medicare, or has the MA organization, by its own hand, limited the application of the reimbursement right? If state contract law controls the interpretation, will we end up with a situation where an MA organization's rights differ in Pittsburgh and Poughkeepsie? And, if we do, how does this ensure that Medicare, as a federal program, provides uniform coverage throughout the Union?

As we await further clarification on these issues, at least one thing is clear: When an MA organization demands reimbursement of conditional payments,

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Surgical and Radiological Record Divergence and Its Use in Trial and Negotiation

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Introduction:

After several years of empirical research, as well as actual selected trial implementations, we have developed an analytical process to identify and utilize the unexplained frequent disparity between radiologic and surgical 'Findings'[1]. This simple process and its practice wide significance[2] is easily utilized to great effect in many types of injury cases. While the focus of this article is mostly claimed knee injury, the argument may be applied to the shoulder or potentially any operative situation. Indeed, while further applications may require varying degrees of medical sophistication to implement, the basic concept remains simple and direct.

Often when reviewing medical records on a surgical claim, especially proliferating arthroscopic procedure claims[3], the radiological (usually MRI) readings indicate a pathological finding ('signal change' or 'tear') in one anatomical structure, but the operative report indicates pathology in another anatomical structure. We term this incongruence a *"Divergence"*. As applied to a particular surgeon, we term it the *"Divergence Index"*[4]. Further, there is virtually never any explanation by the treating surgeon for any such Divergence. This we term the *"Divergence Void"*[5]. The Divergence void is significant because it sets the treating radiologist's 'Impression' and the operating surgeon's 'Findings' at odds. The following two case examples outline this concept:[6]

Case Examples:

CASE #1:

Plaintiff "A" = Left knee injury from MVA - with arthroscopy (D/O/A: 10/25/11)

MRI Impression	versus:	Post-operative Diagnosis
Anterior & Posterior horn tears-Lateral Meniscus		**No tears** - Lateral Meniscus
Posterior horn tear - Medial Meniscus		**Anterior** horn tear - Medial Meniscus
No tears - Collateral ligaments		**Partial tear** – ACL 30-40%

In this instance the divergence was 100%. Everywhere the MRI indicated a tear, the surgeon confirmed there was no tear. Everywhere the surgeon identified a tear, the MRI indicated no tear.

Plaintiff "B" = Right knee injury from MVA with arthroscopy (D/O/A: 10/25/11)

MRI Impression	versus:	Post-operative Diagnosis
Anterior horn tear - Lateral Meniscus		**No tear** - Lateral Meniscus
Posterior horn tear - Medial Meniscus		**Anterior** horn tear - Medial Meniscus
No tears – Collateral ligaments		**Partial tear** - ACL 30-40%

In this second plaintiff – in the same accident – the divergence was again 100%. Everywhere the MRI indicated pathology, the surgeon found none. Everywhere the surgeon found pathology, the MRI indicated none. Striking in this Case #1 is that even with two (2) separate individuals, there was nevertheless complete contradiction between radiology and surgical findings. Such empirical and anecdotal findings may portend a larger Divergence prevalence than might be initially expected.

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CASE#2[8]

Plaintiff "A" = Left shoulder injury from MVA with arthroscopy (D/O/L: 9/10/11)

MRI Impression	versus:	Post-operative Diagnosis
Supraspinatus tear & Hill-Sachs deformity[9]		**No tear** – Rotator cuff intact (including supraspinatus) Impingement syndrome

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Plaintiff "B" = Right shoulder injury from MVA with arthroscopy and Left knee injury from MVA with arthroscopy (D/O/L: 9/10/11)

MRI Impressions:	versus:	Post-operative Diagnosis:
Supraspinatus tear supraspinatus)		**No tear** – Rotator cuff intact, (including Impingement syndrome
Posterior horn tear - Medial Meniscus		**No tear** – Medial Meniscus plica[10]

In this second case example, the Divergence was essentially to normalcy and/or a pre-existing condition.

Discussion:

The common cross-exam rebuttal, and a legitimate medical response, is that a surgeon must treat what is found upon "direct arthroscopic examination", regardless of any prior radiologic "Impression". True, however, the surgeon should then explain any significant Divergence from the pre-operative radiological Impression. [11] Either way, this can be utilized as an inescapable common-sense argument: *'Which is the accident related "serious injury" in this case - the one the surgeon didn't treat, or the one the radiologist didn't see?'* This pits the treating surgeon against the treating radiologist – to dramatically minimize the impact of either opinion.

Empirically, we have found this technique applicable in about half of the surgical cases studied. The actual application may well be more than that. Indeed, in approximately 5-6% of the cases studied, we have encountered the radiologist and surgeon focus on opposite joints (MRI right knee but surgery left knee) which we term contra-lateral Divergence that defies any logical medical explanation.

Of course, counsel or the surgeon can question the accuracy of a specific radiologic reading , or *'MRI's'* in particular, but that is generally counter-intuitive. Indeed, the fact that counsel universally proclaim the utter reliability of 'MRI's', *in cases where their client has not had a surgery,* can be comically pointed out to any court or hearing officer.

At trial cross-exam, in addition to the argument *"which is the serious injury..."* mentioned above, counsel can also challenge the surgeon's opinion about radiological (MRI) validity. If the surgeon concedes that MRIs are generally reliable to identify pathology, that surgeon will be at odds with the radiologist to explain the divergence in the case. If the surgeon does not concede the validity of radiological study (MRI's) then that surgeon will be at odds with the general medical community. In either case, that surgeon's credibility is vulnerable.

Finally, this analytical process does not require the cost of an expert in most cases, and can be employed at any stage during litigation - after the complete subject medical record has been adequately reviewed. It generates fertile ground for cross-examination, fodder for negotiation, and above all - substantive confidence in a legitimate defense strategy.

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1 For example - Findings referenced as radiological "Impressions" and "Post-operative diagnosis".

2 This process not only has obvious trial use implications but, amongst other uses, also can be employed in motions, negotiations, mediations and arbitrations.

3 Of note, prior to becoming a trial attorney with over twenty years' experience practicing in the New York metropolitan area, this author was a practicing NYS Board Certified Registered Nurse Anesthetist and provided anesthesia for well over one hundred (100) arthroscopic procedures in the mid to late 1980's. Obviously, motor vehicle accidents were also occurring in the 1980's and

1990's - all while the arthroscopic procedure was well known and utilized. Yet, not until the early to mid-2000's did the procedure curiously make its way into a significant number of legal claims. Accident related arthroscopic treatment has now grown into one of the most common claims made in New York courts today. Interestingly, the demise of the "whiplash" spinal claim happens to almost precisely intersect with the exponential growth of the accident related arthroscopic claim. Indeed, one might argue the new 'micro-discectomy' appears to be on the same trajectory.

[4] The "Divergence Index" is the percentage of time a particular surgeon diverges or operates upon a different structure(s) than referenced in the pre-operative MRI (or other radiological reading) as pathological. (Obviously, in the usual litigation course, both the reading ('treating') radiologist and treating surgeon attribute said pathology to the subject incident or accident at issue in the lawsuit.)

[5] The "Divergence Void" is the failure of the treating surgeon to explain or even address the radiological and operative pathologic divergence apparent from the said subject's radiologic and operative reports.

[6] Obviously, there are often even more significant divergences as well, including surgery upon completely different structures than those radiologically "identified" as injured from the subject accident.

[7] Curious here is that not only did two separate individuals tear the exact same structure (ACL or anterior cruciate ligament) to the exact same degree (30%-40%) in *contralateral* knees - while in the exact same motor vehicle and under the exact same forces – but this was all 'missed' by the reading radiologist, apparently.

[8] Of note is that the defense had a Trauma Expert review the EMS/ER records for both plaintiffs. In both case examples, there were no acute knee or shoulder traumatic findings except a sole complaint of mild left knee pain in Case#2 Plaintiff "B" (who had a prior MVA lawsuit, with the same attorney, and the subject knee having had an arthroscopy as part of that lawsuit). However, no knee diagnosis whatsoever was rendered at the ER visit in this case.

[9] "Hill Sachs deformity" is a type of impact fracture commonly associated with dislocation.

[10] "Plica" is a ridge or a fold in a tissue.

[11] Where a plaintiff alleges only those findings identified and treated by the surgeon, there is always an argument that those findings could not have been significant – by the mere fact that they were not radiologically detectable.

[12] This is done usually without any medical foundation supporting their argument in the reading report itself.

[13] Often cited by counsel in rebuttal to a divergence defense is that the "direct visualization" of an arthroscopy is diagnostically superior to any pre-operative radiologic "Impression". First, such a theory is patently illogical from a diagnostic point of view as both are useful and well utilized procedures for specific, if often different, reasons. Much more importantly, as discussed above, the same counsel who will so vehemently argue the "known inaccuracy" of a pre-operative MRI reading when it diverges will nonetheless incredulously insist upon the accuracy of that very same MRI when surgical treatment is not part of that attorney's case.

The Rights And Obligations Of Motorists When Dealing With Cyclists And Pedestrians

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permanent seat with feet on the pedals. A bicycle can only carry the number of persons for which it is designed and equipped.[49] A baby under the age of one is not permitted to ride on a bicycle, but a child between one and five years old may do so if wearing an approved helmet and if carried in a properly affixed child carrier. Over five years of age, an approved helmet is required.[50]

Bicycles are to be equipped with a white headlight, a red tail light, reflectors (to be used between dusk and dawn), and must have a bell or other audible signal and if new, the bike should be equipped with reflective tires.[51]

Cyclists may not wear more than one earphone attached to a radio, tape player, or other audio device.[52]

Formerly, many assumed that the pedestrian was always in the right, and no one quite knew what to do with bicyclists, until they recently proliferated and their use became more regulated as set forth above. In the end however, despite efforts to put all parties on a more equal footing, there will always be the elephant in the room, the knowledge that motor vehicles are far more dangerous in terms of mass and power, such that when there is contact between a motor vehicle and either a bicycle or a pedestrian, one should expect the sympathies to follow accordingly.

[49] Vehicle and Traffic Law § 1232
[50] Vehicle and Traffic Law § 1238
[51] Vehicle and Traffic Law § 1236 (a)-(e)
[52] Vehicle and Traffic Law § 375 (24)(a)

Recovery For Bystanders In Automobile Cases For Negligent Infliction Of Emotional Distress

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

Whether emotional damages may be recovered by plaintiffs who witness injuries to another arising out of an automobile accident has long been misunderstood. Can these plaintiffs recover if they do not themselves suffer a "serious injury" as defined under New York's No Fault Law or are they in a special class exempt from the serious injury threshold?

The Court of Appeals first visited this issue in 1969 in the case of *Tobin v. Grossman*[1] where the mother of a two year old child was at a neighbor's house when she heard the screech of automobile brakes. She immediately went out of the house to the scene of the accident and saw her severely injured child lying on the ground.

After acknowledging some New York precedent and a California case which allowed recovery for the mother's emotional injuries when an accident occurred in her presence, the Court categorically rejected any award for emotional injuries since the plaintiff did not view the accident. The Court found that although case law allowed for a cause of action for mental trauma induced without physical impact, the concept of a duty in tort should not be extended to third persons.

In 1984, the Court of Appeals reversed *Tobin* and finally recognized a right to recover for emotional distress when a plaintiff witnessed serious injury or death to a member of their family in the case of *Bovsun v. Sanperi*.[2] In *Bovsun*, the plaintiff father exited the family vehicle, which was parked on the shoulder of a highway, while his wife and daughter remained in the car. The father went around to the rear of the vehicle to inspect the tailgate window. He was seriously injured when he was pinned between a vehicle which struck his vehicle in the rear. Neither mother nor daughter actually saw the accident, however, they were instantly aware of the impact and feared for their husband/father's safety and immediately observed his serious injuries.

The companion case of *Kugel v. Westchester Industrial Park*[3] involved an automobile accident where plaintiffs, a father and mother, were riding with their one-year old daughter in the front seat on the mother's lap and a four year old in the back seat. The plaintiffs' car was struck by the defendants' vehicle, which was being operated at an excessive speed, and the infant plaintiff died a few hours after the accident as a result of his injuries.

The Court of Appeals, for the first time, adopted the "zone of danger rule," (at the time the majority rule in the nation), which allows a person to recover for emotional distress resulting from viewing the death or serious injury of a member of his or her immediate family and who is threatened with bodily harm due to a defendant's negligence. The Court held that the emotional disturbance suffered must be "serious and verifiable" and the emotional distress must be tied to the observation of a serious injury or death of "a family member."

It is significant to note that *Bovsun* was decided in 1984. In 1973, the Legislature had passed the No-Fault Statute, Insurance Law §5104(a)[4], (amended in 1977 to reflect a "verbal threshold"), which provided that no action to recover "non-economic loss" (pain and suffering) by a covered person may be maintained "except in the case of serious injury." In defining "serious injury", Insurance Law §5102(d)[5] listed threshold injuries necessary to commence a lawsuit. The categories of injuries do not include psychological damages. Remarkably, the Court of Appeals in *Bovsun* never touched upon this issue. Four years later, New York Supreme Court Judge Edward Lehner ruled upon whether one must establish a serious physical injury in order to recover for emotional distress.

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Recovery For Bystanders In Automobile Cases For Negligent Infliction Of Emotional Distress

Serious Injury Requirement

The facts of *Delosevic v. City of New York*[6] are nightmarish (as is the situation with most of these cases as the injuries must be "serious and verifiable"). Plaintiff, Fatima Delosevic, was walking a stroller across the intersection of Seventh and Greenwich Avenues in New York City. She had a three-month old infant in the stroller and a five-year old and two-year old holding on to the carriage. A 14 wheel tractor trailer owned by the defendant struck the stroller killing the five-year old and two-year old. The plaintiff, Mrs. Delosevic, was unhurt. The jury awarded Mrs. Delosevic $9.5 million for emotional distress.

The defendants raised the argument that the emotional distress claim could not be upheld unless the claimant had sustained a "serious injury" as defined by the No-Fault Law. Judge Lehner, in rejecting defendants' arguments, reasoned that since the Court of Appeals did not discuss this argument in *Bovsun* in 1984, they declined to raise physical injury as a pre-requisite to recovering for negligent infliction of emotional distress. "Notwithstanding the [*Bovsun*] court's statement that it was not creating a new cause of action, the relief it authorized was not recognized at the time of the enactment of no-fault in 1973, or when the verbal threshold was adopted in 1977. Since the intent of the No-Fault Statute was to require a person to sustain a physical injury, a "non-struck plaintiff [did] not have a recognized claim until *Bovsun*."

Additionally, the Court upheld the plaintiff's husband's loss of consortium claim for $5,000,000 based solely on his wife's emotional distress injuries.

The First Department affirmed without discussion.

Defendants continued to seek dismissals of cases involving psychological injuries where plaintiffs had questionable No-Fault claims. In *Peguero v. L & M Bus Corp.*,[7] plaintiff Anna Peguero and her eight year old son Manuel were crossing Martense Avenue in Queens. The bus driven by the defendant struck both mother and son. The mother pushed her son out of the way and screamed "my son, my son." The Court held that there was no question that as pedestrians walking hand in hand both mother and son were in the same "zone of danger" and the mother could recover for emotional injuries.

Contemporaneous Awareness

A novel defense was raised in opposition to the summary judgment motion by the defendants in *Cushing v. Seemann*.[8] The plaintiff's mother sought to recover for emotional images for the death of her seven year old son who was in her automobile when it was struck by the defendant's truck. The court refused to grant summary judgment to the defendant on the serious injuries allegedly suffered by the plaintiff's mother. Defendants argued that the mother could not recover emotional damages because she did not actually "observe the impact on her son. " The Fourth Department clarified that the observation requirement is satisfied as long as there is a "contemporaneous awareness of injury or death." Actual observation is unnecessary.

In *Lopez v. Gomez*,[9] the parents were riding with their seven year-old child and 15 day-old son when an automobile accident occurred. Two hours after the accident, the newborn was brought to the hospital "changing colors," "trying to breathe," "his forehead was becoming swollen," "his eyes were different" and "he was full of blood." The Court affirmed dismissal of plaintiff's mother's cause of action for emotional distress caused by the death of the infant. The Court reasoned that although there was ample evidence that the horrific consequences of the accident caused both parents emotional distress, there was no evidence that either had any contemporaneous awareness of the seriousness of either child's injuries.

The contemporaneous awareness issue was again the key factor in the dismissal of the plaintiff's case in *Stamm v. PHH Veh. Mgt. Servs., LLC.*[10] Plaintiff's mother was seriously injured due to a car accident that left her permanently disabled and under the supervision of caretakers when her children were four years old and 16 months old, respectively.

Although the now adult plaintiffs had serious psychodynamic issues, the court found that they were attributable to growing up with a permanently disabled mother, who required round the clock nursing care, and troubled relationships with their father and a series of caretakers. The then-four-year

old boy only had a vague, child-like, fragmented, non-linear recollection of the accident. The then-16 month-old had no independent recollection of the accident. Both causes of action were dismissed since there was no triable issue of fact that either infant had a contemporaneous observation of the accident and their mother in an injured state.

Proof Of Injury

The Third Department in *Bissonette v. Compo*[11] (echoing *Bovsun*) stated that the causally related emotional injury must be "serious and verifiable." The Court granted defendant's motion for summary judgment where plaintiff sued for witnessing serious injuries suffered by her brother and father when a vehicle they were riding struck a tree. The plaintiff's sister was unhurt physically, but claimed she was "quieter and not as outgoing." No psychologist, psychiatrist or other medical expert had examined her since the accident. The court held that there was no objective medical evidence and no examination, diagnosis, or treatment of any emotional or psychological condition and, therefore, the sister's cause of action must be dismissed.

Family Member Defined

The State's highest Court addressed the "zone of danger" issue once again in 1993 in the case of *Trombetta v. Conkling*.[12] Darlene Trombetta and her aunt Phyllis Fisher were crossing Wurz Avenue in Utica, New York. Plaintiff Darlene noticed a tractor trailer bearing down on them. She realized the truck was not going to stop and she attempted to pull her aunt out of the truck's way by grabbing her hand. The truck ran over her aunt killing her instantly. The plaintiff Darlene Trombetta was not physically injured. Adding to the emotional elements in this case were that plaintiff's mother had died when she was 11 and her aunt had become the maternal figure in her life and they lived close by and enjoyed activities together on a daily basis. Plaintiff's aunt was 59, plaintiff was 37.

The Court reasoned that a recovery for bystanders based on negligent infliction of emotional distress was very circumscribed. The Court refused to extend the boundaries of immediate family to an aunt and niece relationship. Citing *Tobin*, the Court stated:

> Every injury has ramifying consequences, like the rippling of the waters without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.

On firm public policy grounds, the Court stated that the plaintiff was not within the deceased's "immediate family as defined and limited by both."

The Second Department addressed this issue in *Jun Chi Guan v. Tuscan Dairy Farms*[13]. The plaintiff was pushing a stroller with her two year old grandson, the decedent Jackie Guan, when both were struck by a Tuscan Dairy Farms truck "tossed up and dropped on the ground." Her grandson Jackie was killed immediately. The plaintiff argued that based on the culture of the Chinese family and the fact that the grandmother was with the infant during most of his waking hours, the grandmother was within the infant's "immediate family" within the definition of *Bovsun*. The Second Department refused to extend the class absent further direction from the Court of Appeals or the New York State Legislature arguing that the outer limits of "immediate family" are persons who are married or related in the first degree of consanguinity.

The Second Department again addressed this issue with similar results in February 2013 with a decision in the case of *Thompson v. Dhaiti*[14].

In *Thompson*, the plaintiff was the decedent's stepdaughter and witnessed an accident in which one of the vehicles jumped onto the sidewalk, struck the decedent and crashed through the front door of a barbershop, pushing the decedent through the window and pinning him against a chair in the shop. The plaintiff's stepdaughter sued for the emotional distress caused by her having witnessed the decedent's death while being in the zone of danger.

Although plaintiff's decedent was not the plaintiff's biological father, the plaintiff argued that she was part of the decedent's immediate family because she had lived with him since she was four years old, he had financially supported her for the majority of her life, had acted as her father and he was the only person that she had ever known as a father figure.

The Second Department, citing the Court of

Appeals' decision in *Trombetta*, refused to extend the definition of "immediate family" to include plaintiff's stepfather.

The Court noted that in *Trombetta* the Court of Appeals refused to extend the definition of immediate family to include the plaintiff's aunt, a blood relative. There was no blood relationship in the *Thompson* case even if there was a similar quality of the relationship that a parent had with his or her biological child. In light of the strong public policy limiting liability under the zone-of-danger rule in "favoring an objective defined class of individuals who fall within the immediate family", the Second Department concluded that stepchildren are not immediate family members.

In *Sullivan v. Ford Motor Co.*, 2000 U.S.Dist. Ct. Lexis 4114[15], the Southern District, apparently unconstrained by the New York State Court of Appeals, held that an aunt and nephew were immediate family members with a close relationship allowing for recovery under the zone of danger theory.

In *Sullivan*, the plaintiff was driving a leased vehicle with her nephew Salim in the front passenger seat. Co-defendant's vehicle attempted to make a left turn and struck plaintiff's vehicle. The force of the collision forced the airbags to deploy and caused the death of her nephew who was partially decapitated by the airbag's deployment.

The Court noted that the plaintiff was the infant decedent's aunt and legal guardian at the time of his death and also his "de facto" mother. The plaintiff had cared for her nephew since he was 12 months old and assumed all the duties and responsibilities of a mother and father. She was granted legal custody of her nephew by New York State Family Court.

The District Court discussed the *Trombetta* case and found that the *Sullivan* case "presents a far more compelling argument in favor of recovery" than in *Trombetta*. Here, Sullivan's nephew and legal charge was of tender years---he was seven years old at the time of his death. She was the only family member Salim had come to rely upon and the only family with whom he shared his life on a daily basis from the time he was an infant of 12 months until his death.

The Court also noted that permitting someone in the position of Sullivan to maintain a cause of action for bystander negligent infliction for emotional distress would not open the Court to the potential of sweeping liability, nor would it transform the "narrow avenue [of liability into] a broad concourse impeding reasonable or practicable limitations." [Citing *Trombetta*]. Further, *Sullivan* "plainly falls into an imminently foreseeable and clearly discrete class of potential plaintiffs and is exactly the type of plaintiff who should be permitted to recover under the bystander negligent infliction of emotional distress cause of action."

Justice Joseph J. Maltese of Richmond County has written two opinions dealing with this issue of immediate family. In the first one, *Shipley v. Williams*,[16] a brother and sister were in an automobile accident. The sister witnessed her brother's tremendous pain after suffering severe injuries which ultimately resulted in his death. Defendant moved to dismiss the sister's claim for emotional distress on the basis that brother and sister were not closely related and could not be considered members of the "immediate family." Justice Maltese cited eight statutes including the Penal Law, the Public Health Law and Rent Codes holding that brothers and sisters are immediate family. The Court ruled that to hold that a brother and sister, who lived together in the household at the time of the accident, are not members of the "immediate family" is contrary to the definition established by the state legislature and legal reasoning.

In direct contravention of his own Appellate Department's decision in the *Jun Chi Guan* case, Justice Maltese held in the case of *Motelson v. Ford Motor Co.*[17] that grandchildren may recover emotional damages upon witnessing the death of a grandparent. In *Motelson*, father and son, both Boy Scout leaders, were returning home from Boy Scout Camp with two sons and grandchildren respectively and a family friend when the SUV that they were riding in rolled over several time. The grandfather and one grandson died immediately. All other passengers suffered serious injuries.

The Court allowed the infant plaintiff to recover for emotional distress as a result of witnessing his grandfather's and brother's death. Judge Maltese cited

Recovery For Bystanders In Automobile Cases For Negligent Infliction Of Emotional Distress

Shipley (his case) and concluded that after reviewing numerous State statutes defining "immediate family" (as he had done in the *Shipley* decision) that the term always included siblings and most of them also included grandparents.

Conclusion

What appears to be simply a concept of "zone of danger" is actually more complicated upon review. The appellate law seems to be that an immediate family member only includes spouses, parents and children and only they may recover for emotional injury upon contemporaneously witnessing death or serious injury to their loved ones in an automobile accident, although Richmond County and the Southern District have extended the immediate family to include siblings and grandparents and an aunt and nephew.

The requirement of observation has been broadly interpreted and requires only a contemporaneous awareness of injury not actual observation. However, the injuries must be serious and verifiable and the plaintiff must be in the zone of danger and exposed to the real possibility of physical injury.

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1 *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419 (1969).

2 *Bovsun v. Sanperi*, 61 N.Y.2d 219, 461 N.E.2d 843 (1984).

3 *Id*.

4 N.Y. Ins. Law § 5104(a) (McKinney 2012). Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.

5 N.Y. Ins. Law §5102(d) (McKinney 2012). "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred 8 eighty days immediately following the occurrence of the injury or impairment.

6 *Delosovic v. City of New York*, 143 Misc. 2d 801, 541 N.Y.S.2d 685, (Sup. Ct. N.Y. County 1989) aff'd sub nom. *Delosevic v. City of New York*, 174 A.D.2d 407, 572 N.Y.S.2d 857 (1991).

7 *Peguero v. L & M Bus Corp.*, 24 Misc. 3d 1202(A), 889 N.Y.S.2d 506 (Sup. Ct. Kings County 2009)

8 *Cushing v. Seemann*, 247 A.D.2d 891, 893, 668 N.Y.S.2d 791 (App. Div. 4th Dep't 1998).

9 *Lopez v. Gomez*, 305 A.D.2d 292, 761 N.Y.S.2d 601 (App. Div. 1st Dep't 2003).

10 *Stamm v. PHH Vehicle Mgmt. Servs.*, LLC, 32 A.D.3d 784, 822 N.Y.S.2d 240 (App. Div. 1st Dep't 2006).

11 *Bissonette v. Compo*, 307 A.D.2d 673, 762 N.Y.S.2d 849 (App. Div.3rd Dep't 2003).

12 *Trombetta v. Conkling*, 82 N.Y.2d 549, 626 N.E.2d 653 (1993).

13 *Jun Chi Guan v. Tuscan Dairy Farms*, 24 A.D.3d 725, 806 N.Y.S.2d 713 (App. Div. 2d Dep't 2005).

14 *Thompson v. Dhaiti*, 103 A.D.3d 711, 959 N.Y.S.2d 522, A.D.2d 2013) 9

15 U.S.D.C. 2000.

16 *Shipley ex rel. Shipley v. Williams*, 14 Misc. 3d 682, 826 N.Y.S.2d 882, (Sup. Ct. Richmond County 2006)

17 *Motelson v. Ford Motor Co.*, 20 Misc. 3d 1140(A), 873 N.Y.S.2d 235 (Sup. Ct. Richmond County 2008) aff'd in part, rev'd in part, 101 A.D.3d 957, 957 N.Y.S.2d 341 (2012)

The Hybrid Quagmire

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always look to the language of the MA plan.

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1 General Obligations Law § 5-335 (LexisNexis current through March 2014).

2 *Potts v. Rawlings,* 897 F.Supp.2d 185, 189 (S.D.N.Y. 2012)

3 *Id*.

4 *Id*.

5 Secondary Payer provisions are codified at 42 U.S.C. § 1395y(b)(2).

6 *See* 42 U.S.C. § 1395y(b)(2)(B).

7 *Potts v. Rawlings,* 897 F.Supp.2d at 197.

8 *Trezza v. Trezza*, 104 A.D.3d 37, 957 N.Y.S.2d 380(2d Dep't 2012).

9 *Id*.

10 *Trezza v. Trezza*, 32 Misc.3d 1209(A), **1, 2011 NY Slip Op 51237(U) (Kings County 2011).

11 *Id*.

12 *Id*. Since this decision, the language of GOL § 5-335 has been amended. See GOL § 5-335.

13 *Trezza*, 104 A.D.3d at 38, 957 N.Y.S.2d at 328. Language stating as much is now part of GOL § 5-335, added as GOL § 5-335(c) in late 2013.

14 *Trezza*, 104 A.D.3d at 47, 957 N.Y.S.2d at 388.

15 *Id*.

16 *Trezza*, 104 A.D.3d at 45, 957 N.Y.S.2d at 386.

New TLC Leadership, "Vision Zero" and Black Box Technology

PROFESSOR MATTHEW W. DAUS, ESQ.*

I was honored when chosen by NYC Mayor Bill de Blasio to participate in his transition process for the identification and selection of Commissioners from several city agencies, including the NYC Taxi and Limousine Commission (TLC). I was most involved in this selection process due to my prior experience serving at the TLC for about 14 years – as Commissioner/Chair/CEO and General Counsel. I helped to create the job description, as well as to identify and vet many qualified and experienced candidates. I could not be more pleased with the Mayor's appointment of former TLC General Counsel Meera Joshi as the new TLC Commissioner/Chair. Ms. Joshi previously served at a number of NYC agencies, including as TLC General Counsel. I have known Ms. Joshi to be fair, smart and even tempered with industry stakeholders, and she truly understands the many complex regulations, policy issues and nuances which must be skillfully navigated to ensure a smooth transition. I am hopeful that her tenure will be peaceful, innovative and successful.

Our new TLC Commissioner/Chair will be primarily focusing on the Mayor's "Vision Zero" plan, which is the latest trend in transportation safety policy. The "Vision Zero" movement started in Sweden and has taken on various forms and designations in several other cities and countries, including Chicago, San Francisco and New York. The concept is to develop a comprehensive transportation policy plan to reduce traffic fatalities to zero by a certain year in the future. The policy plans vary, and some include technology solutions and for-hire ground transportation policies promoting reduced speeds and other safety measures. For instance, New York City's current proposals include the use of black box technology, in-vehicle cameras, speed and red light cameras, and the ability to use such data to track and prosecute drivers, as well as to shut the meter off when speeding. The TLC and the City of New York have been holding stakeholder meetings and town hall events to solicit feedback on how to implement the series of recommendations set forth in the Mayor's plan.

Among some of the initiatives proposed for the TLC are to create a TLC safety enforcement squad, equipped with speed radar equipment, to enforce speed and safety regulations; increase penalties for unlicensed activities; and to create an honor roll of safe TLC drivers. The New York City Council has proposed "Vision Zero" legislation affecting the TLC including "Coopers Law," named after a boy who was struck and killed by a taxicab, which would allow for the automatic suspension of the TLC license of any driver involved in a crash with a pedestrian where a summons is issued by the police. Also, the Council has introduced a bill requiring the TLC to begin a black box pilot program by January 1, 2015.

When I was TLC Chair, I recall obtaining Commission approval for a pilot program involving black box technology that was voluntary in nature. Unfortunately, while many insurance companies and industry owners were interested, many drivers – given the choice – refused to work for companies who tracked their driving behavior. The black box devices range in data collection and functionality, but the most common device is one with forward facing and internal cameras that trigger video recording upon certain "G-force" vehicle movements or impacts detected by a device connected to the vehicle and its computer. There is a wide range of data that can be used to help identify fault, reduce fraud, and in turn, reduce legal

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costs associated with an insurer's duty to defend such suits. Most claims end up settling outside of court, and black car/limousine companies who have been using these systems for over a decade have reported upwards of a 50% decrease in claims and accidents. While this all seems like a "no brainer," in a predominantly independent contractor driver market, these programs are unlikely to gain widespread use absent a regulatory mandate or significant incentives (such as tax credits or insurance discounts). New York State Senator Martin Golden has introduced legislation to obtain such credits, and the TLC is slated to approve and proposed several pilot programs this summer.

I am optimistic that this time, due to the Mayor's and the NYC Council's commitment to the "Vision Zero" safety plan, that these pilot programs may lead to a mandate or significant incentives once the technology is tested and approved. While a number of high profile tragic taxicab accidents have cast a media and public policy spotlight on this issue, the political will is there like never before. We can expect change that will certainly lead to safer NYC streets and reduced risks in the taxicab and for-hire vehicle industries.

President's Column

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Celentano who may be reached at (212) 313-3618 or dany.exec@msn.com. Tony is available to accept enrollment registrations for our programs and answer any questions.

In closing, I wish to extend special thanks to our DANY Officers and Board Members who through collaboration and dedication have made this a very fulfilling and rewarding year and most importantly, a value added year for our members. I again encourage you to take full advantage of DANY as we are committed to being a relevant resource for our members. As a DANY member, you have much to look forward to with our CLE programs; DEFENDANT Journal; awards ceremonies; networking receptions; brief bank; scholarship platform; and diversity initiative. Recent DANY Presidents Andrew Zajac, Tim Keane, Julian Ehrlich, Tom Maroney, Lawton Squires and Jim Begley have all set in place the sound DANY platform. I am grateful to have carried on this tradition and we look forward to Gary Rome becoming our next DANY President. You can be assured that DANY is committed to continuing its legacy of providing meaningful benefits to its members.

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What Constitutes Reversible Error ?

FRANK SCAHILL* & ANDREW MUNDO**

The rigors of a Civil Trial are not for the faint of heart. The time between the event which lead to the lawsuit and the jury verdict can be years. The expense of expert witnesses, the time to prepare, the variables of the venue, the jury pool, the conduct and competency of counsel, and the vicissitudes of the Trial Judge are the stuff of nightmares for every Trial Attorney. What you have spent months preparing, can be torn down in minutes by your own witness. You can step on the toes of the Trial Judge with your motion in limine that is summarily denied, and face his or her wrath for the entire trial. Your prized expert decides to take a two week jaunt to Aruba, exactly at the time your case is marked "Final" to select in a hostile venue with an impatient Trial Assignment Judge. As Hyman Roth said in the Godfather II, "This is the Business we've chosen".

So what are the pitfalls? What have the Appellate Courts found to be fatal errors by the Court or counsel that require a new trial? Over the last ten years the Appellate Divisions of New York State have required a new trial in hundreds of cases. The mistakes of the past are worthy of a hard look. Things to avoid, for sure, but just as important, what to look out for.

Jury Instructions

The Court's charge to the jury is an area where the Appellate Courts often find reversible error. A few cases of note follow:

Rivera v. Americo, 9 A.D.3d 356 (2d Dept. 2004)

In a premises liability case, the plaintiff sued the owner of a home when a step on a stairway collapsed.[3] The plaintiff's expert testified that a handrail was required pursuant to section 713.1(f)(1) of the State Uniform Fire Prevention and Building Code and concluded that a handrail would have helped the plaintiff maintain his balance when the step collapsed.4 The trial court, in charging the jury stated, "This Court has determined as a matter of law that the lack of a handrail at the subject premises or subject steps is not a substantial factor in bringing about the accident and should not be considered by you to be a substantial factor."[5] The jury eventually found that the defendants were negligent in the maintenance of the stairway, but that negligence was not a proximate cause of the accident.[6] The Appellate Division found that the failure to charge a statutory violation warrants reversal when a reasonable view of the evidence could support the finding that such violation was a proximate cause of the accident.[7]

McGloin v. Golbi, 49 A.D.3d 610 (2d Dept. 2008)

Reversible error existed, and a new trial was granted, because the trial court (1) gave the jury a missing document charge regarding plaintiff's failure to produce a driver log which the plaintiff's partner prepared the day of the accident, when no evidence was brought forward that the document existed or was requested through discovery, (2) wrongly precluded the plaintiff from introducing its MV-104 accident report, when it should have been admissible to combat the defendant's recent fabrication charge, and (3) erroneously instructed the jury that if the defendants were found negligent, the common-law standard of negligence must apply, when, in fact, if the jury found grounds for the emergency doctrine, the standard of care should have been "reckless disregard".[8] The Court found that a new trial must take place because of the cumulative effect the errors had upon the outcome of the trial.[9]

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Sadhwani v. New York City Transit Authority, 66 A.D.3d 405 (1st Dept. 2009)

The First Department held that, even if the defendant properly preserved its right to appeal, giving a Noseworthy charge to the jury was not "so fundamental that it preclude[d] consideration of the central issue upon which the action is founded", because the record showed ample evidence that a jury could reasonably find that the defendant was 100% liable.[10]

Thomas v. Samuels, 60 A.D.3d 1187 (3rd Dept. 2009)

In a medical malpractice action, the respondent conceded that the trial court's jury instruction regarding the defendant's habit was an error, but it was harmless error not warranting a new trial.[11] The defendant's habit evidence was not relied upon during opening or closing arguments, and additional evidence provided throughout the trial supported the jury's finding for the defendant. Furthermore, it was mere speculation that such a jury instruction had confused the jury.[12]

Wild v. Catholic Health System, 85 A.D.3d 1715 (4th Dept. 2011)

In a medial malpractice action, the Appellate Division found that even though the loss of chance jury instruction (NY PJI3d 2:150) was inappropriate for the commission theories, it was harmless error.[13] Furthermore, even if it was not harmless, the Appellate Division would still not reverse the judgment based on that error. Although defendants' attorney conceded at oral argument that the instruction on causation was proper for the omission theories, he argued that reversal was nevertheless required because the jury returned only a general verdict, and it therefore was unclear whether the verdict was based on the omission or commission theories.[14] Generally, a new trial would be warranted under such conditions because it would be speculative to assume the jury's thought process from a general verdict sheet. Yet, here, the defendants, as the parties asserting an error resulting from the use of the general verdict sheet, failed to request a special verdict sheet or to object to the use of the general verdict sheet.[15] Therefore, the defendants were not permitted to rely on the use of the general verdict sheet as a basis for reversal.[16]

Giovannelli v. Gottlieb, 73 A.D.3d 853 (2d Dept. 2010)

The trial court committed a reversible error when it failed to charge the jury with VTL 1229(a), stating "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway" when evidence showed the defendant was unable to stop her vehicle from a speed of 5 mph without rear-ending the vehicle ahead of it.[17]

Ferguson v. Iqbal, 33 A.D.3d 657 (2d Dept. 2006)

It was not reversible error for the trial court to fail to inform the jury that any comparative or contributory negligence of the plaintiff mother could not imputed to the infant plaintiff, because the jury never had to determine contributory or comparative negligence and the defendants were not found to be negligent at all.[18]

How the trial Judge deals with the Jury can also be a fatal misstep.

Relieving Jury Members

Spano v. Bertocci, 22 A.D.3d 828 (2d Dept. 2005)

After jury deliberations began, one juror came forward stating that another juror had violated the court's instructions.[19] The court eventually dismissed both the accuser and juror who violated to the court's instructions.[20] Since the accuser had done nothing improper, aside from acting rude to other jurors during deliberations, and was discharged without consent of the plaintiff's attorney, the Second Department found reversible error and ordered a new trial.[21]

Gallegos v. Elite Model Management Corp., 28 A.D.3d 50 (1st Dept. 2005)

The Court found that there was reversible error in placing two alternative jurors into the actual jury after deliberations had begun.22 Even telling the jury as a whole to begin its deliberation from the beginning would not suffice.[23] The issue in this case was whether or not the defendant preserved its right to

appeal the action. At first, the defendant's counsel said he had no problem during a conversation regarding keeping the alternates, though defendant's counsel stated that was unsure of the law.[24] Once the court stated that it believed inserting alternative jury members into the actual jury after deliberations had begun could be reversible error, the defendant's counsel, voiced its hesitance in keeping or using the alternates and would not unequivocally consent.[25] The Appellate Division found that although the defendant's counsel did not initially state clearly his objection, once the court stated that it may be a reversible error, the defendant did not consent to keeping or using the alternate jury members.26

What your expert says can also sink your case. See below:

Expert Testimony

Berger v. Tarry Fuel Oil Co., 32 A.D.3d 409 (2d Dept. 2006)

Although the trial court is granted great discretion regarding the admissibility of expert testimony, where the defendant's expert was permitted to testify on the ultimate issue as to whether or not the defendant was negligent, and the expert's testimony did not "exceed the scope of common knowledge", the admission of such evidence constituted reversible error.27

The Direct examination of a witness on trial can also lead to an appeal.

Direct Examination

Myers v. New York City Transit Authority, 50 A.D.3d 263 (1st Dept. 2008)

When plaintiff called a mechanical engineer employed by the defendant, the trial court erred in not allowing the plaintiff to ask leading questions of the adverse party's employee.28 Yet, the error did not deprive the plaintiff of access to favorable evidence otherwise or otherwise prejudice her, so it was not found to be reversible error.[29]

Jackson v. Montefiore Medical Center, 109 A.D.3d 762 (1st Dept. 2013)

The trial court did not commit reversible error in limiting the plaintiff's use of leading questions upon direct examination of the adverse party's witnesses.30 The trial court is vested with "broad authority to control the courtroom" and the witnesses did not display any hostility or evasiveness prejudicing the plaintiff from extracting necessary information.[31]

The Summary Judgment standard and decisions of the Trial Courts in New York have launched more decisions, than the fleet of ships Helen of Troy set sail. On appeal, the Appellate Divisions have also varied widely in their approach to the broad power of the Trial Judge to decide a case as a matter of law.

Summary Judgment

Airobaia ex rel. Severs v. Park Lane Mosholu Corp., 74 A.D.3d 403 (1st Dept. 2010)

The motion court found that defendants were entitled to summary judgment because, as the plaintiff testified, the doors to the building were propped open when she arrived at the building.[32] The motion court found that since plaintiffs could not produce any evidence as to when the doors were propped open, or when the assailant entered the building, it was equally as likely that the assailant entered the building through the open doors as it was that he gained entrance because the locks were broken, and, thus, plaintiffs could not establish a causal connection between the broken locks and the attack.[33] This argument, however, was first raised in defendants' reply papers, and should not have been considered by the court in coming to its decision.[34]

Quizhpe v. Luvin Construction, 70 A.D.3d 912 (2d Dept. 2010)

The Supreme Court erred in granting summary judgment on a completely unrelated theory than that made within the defendant's cross-motion.[35] The Court searched the record when deciding the motion and found that on a workers' compensation theory, the cross-moving defendant was one-in-the-same as another defendant, and therefore must be granted summary judgment in order to avoid double jeopardy.[36] The Appellate Division found reversible error, because searching the record on a theory completed unrelated to the motion for summary judgment deprived the non-moving party the opportunity to

oppose the motion based on that theory.[37]

What evidence is admitted at Trial can also be the grounds for appeal and the reason a new trial is ordered.

Admissible Evidence

Rivera v. New York City Transit Authority, 22 A.D.3d 554 (2d Dept. 2005)

The Appellate Division found reversible error where, in a torts action, a photograph taken of the subway staircase in question was improperly authenticated and admitted into evidence.[38] There was no testimony dating the photograph from anytime in the previous eight years since the injury occurred, and there was no testimony confirming that the stairwell, which was heavily traveled each day, was a fair and accurate representation of the condition at the time of the injury.[39]

Clevenger v. Mitnick, 38 A.D.3d 586 (2d Dept. 2007)

The Appellate Division found reversible error in the trial court's act of admitting MRI and EMG reports into evidence.[40] The authors of the reports were not made available to be cross-examined, and the treating physician's mere testimony that he found the results to be accurate was insufficient.[41] Additionally, the respondents contention that it was harmless error, because the defendant was given notice that the reports would be put into evidence still failed to give the defendant an opportunity to cross-examine the contents of the report.[42]

Noakes v. Rosa, 54 A.D.3d 317 (2d Dept. 2008)

The Appellate Division found it to be reversible error to admit the police report, which contained multiple hearsay statements into evidence at trial.[43] Since the statements did not fit into a hearsay exception, and they bore on the ultimate issue to be determined by the trier of fact, the Appellate Court found it to be prejudicial requiring a new trial.[44]

Boyce v. Gumley-Haft, Inc., 82 A.D.3d 491 (1st Dept. 2011)

Trial court committed reversible error when it permitted plaintiff to testify that he overheard a non-party witness comment that the defendant "[didn't] want any (N_____ [working] in the building."[45] This statement was inadmissible hearsay. Although the plaintiff argued that it had no bearing on the outcome of the action, the Appellate Division granted a new trial, because the even if it was harmless error, the slur could have, if nothing else, prejudiced jury members against the defendant.[46]

A trial is a minefield with danger at every step. One wrong question, one stupid remark, one Judge with a hair pin trigger or another drunk with power can smash your case against the rocks in an instant. Why one attorney can be given all the deference in world and the other given a short leash in front of the jury is all based on human nature. Navigating these hostile waters requires a steady hand and years of experience. We all start at some point, however, and the best way to learn what not to do is to study the advance sheets, study the cases, and learn from the mistakes of others.

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1 *Rivera v. Americo*, 9 A.D.3d 356, 356 780 N.Y.S.2d 27 (2d Dept 2004).
2 *Id*. at 356, 357.
3 *Id*. at 357.
4 *Id*.
5 *Id*.
6 *McGloin v. Golbi*, 49 A.D.3d 610, 610–11, 2008 N.Y. Slip Op. 02117, at *1, *2 (2d Dept. 2009).
7 *Id*.
8 *Sadhwani v. New York City Transit Auth.*, 66 A.D.3d 405, 405–06, 890 N.Y.S.2d 458 (3rd Dept. 2009).
9 *Thomas v. Samuels*, 60 A.D.3d 1187, 1188, 875 N.Y.S.2d 326 (3rd Dept. 2009).
10 *Id*.
11 *Wild v. Catholic Health Sys.*, 85 A.D.3d 1715, 1716- 17, 927 N.Y.S.2d 250 (4th Dept. 2011) aff'd, 21 N.Y.3d 951, 991 N.E.2d 704 (2013).
12 *Id*. at 1717.
13 *Id*. at 1718.
14 *Id*.
15 *Giovannelli v. Gottlieb*, 73 A.D.3d 853, 853–54, 899 N.Y.S.2d 888 (2d Dept. 2010).
16 *Ferguson v. Iqbal*, 33 A.D.3d 657, 657–58, 823 N.Y.S.2d 180 (2d Dept. 2006).
17 *Spano v. Bertocci*, 22 A.D.3d 828, 829, 803 N.Y.S.2d 702 (2d Dept. 2005).
18 *Id*.
19 *Id*.
20 *Gallegos v. Elite Model Mgmt. Corp.*, 28 A.D.3d 50, 54, 807 N.Y.S.2d 44 (1st Dept. 2005).
21 *Id*. at 56.
22 *See id*. at 57–58.
23 *See id*. at 58–59.

What Constitutes Reversible Error ?

[24] *Id*. at 59.
[25] *Berger v. Tarry Fuel Oil Co.*, 32 A.D.3d 409, 409, 819 N.Y.S.2d 556 (2d Dept. 2006).
[26] *Myers v. New York City Transit Auth.*, 50 A.D.3d 263, 263, 854 N.Y.S.2d 697 (1st Dept. 2008).
[27] *Id*.
[28] *Jackson v. Montefiore Med. Ctr.*, 109 A.D.3d 762, 763, 971 N.Y.S.2d 528 (1st Dept. 2013) leave to appeal denied, 22 N.Y.3d 858 (2013).
[29] *Id*.
[30] *Alrobaia ex rel. Severs v. Park Lane Mosholu Corp.*, 74 A.D.3d 403, 404, 902 N.Y.S.2d 63 (1st Dept. 2010).
[31] *Id*.
[32] *Id*.
[33] *Quizhpe v. Luvin Const.*, 70 A.D.3d 912, 914, 895 N.Y.S.2d 490 (2d Dept. 2010).
[34] *Id*.
[35] *Id*.
[36] *Rivera v. New York City Transit Auth.*, 22 A.D.3d 554, 554, 802 N.Y.S.2d 247 (2d Dept. 2005).
[37] *Id*. at 555.
[38] *Clevenger v. Mitnick*, 38 A.D.3d 586, 587, 832 N.Y.S.2d 73 (2d Dept. 2007).
[39] *Id*.
[40] *Id*.
[41] *Noakes v. Rosa*, 54 A.D.3d 317, 318, 862 N.Y.S.2d 573 (2d Dept. 2008).
[42] *Id*. at 318–19.
[43] *Boyce v. GumleyHaft, Inc.*, 82 A.D.3d 491, 492, 918 N.Y.S.2d 111 (1st Dept. 2011).
[44] *Id.* at 493.

The New York No-Fault "Serious Injury" Threshold

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[8] Insurance Law 5102(d): permanent consequential limitation, significant limitation, curtailment for 90/180
[9] The "loss of fetus" amendment was in response to a particular case – See, Raymond v. Bartsch, 84 A.D.2d 60 (3r d Dept. 1981)
[10] See Licari v. Elliot, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982)
[11] St. John's Law Review (1977), Ibid. at 171.
[12] The injury severity key includes fatal, serious, moderate and slight injury ratings. Fatalities include deaths within 30 days following the accident. Serious injuries include visible signs of injury, as well as any person removed from the scene with assistance. (i.e. all EMS evaluated transports to Emergency Rooms); Moderate and Slight injury ratings include "lumps", "abrasions", and "complaints of pain with no signs of injury".
[13] (www.nysdmv.com/statistics) See Figure 1 – data chart summarizing these totals.
[14] I compiled estimated totals from percentages reported in the CJA's annual reports for 2003-2006, and data tables on 2007-2012 caseload obtained directly from the OCA information office.
[15] The 2003-2006 timeframe overlaps - perhaps not coincidentally - with the Court of Appeals decisions in Toure v. Avis Rent-a-Car Systems, Inc., 98 N.Y.2d 345 (2002), and Pommels v. Perez, 4 N.Y.3d 566 (2005) - which were generally viewed as favoring stricter enforcement.
[16] It is certainly not "countless" – as was publicly asserted by the NYSTLA pres. - see Note 2, supra.
[17] In recapitulating my own caseload data, I looked at years 2003-2012, in cases pending in the Supreme Courts (or NYC Civil Courts via 325d). Only a small fraction were filed in the counties outside NYC. I tallied the total number of cases in which "serious injury" was deemed a legitimate issue on attorney review, against resulting disposition data on motions actually completed and/or filed.
[18] Ramkumar v. Grand Style Transp. Enterprises, Inc., 22 N.Y.3d 905 (2013)
[19] NY Daily News – January 13, 2013: "Fraud is Driving Car Insurance Rates Through the Roof: Brooklyn Prosecutor" (available at www.nydailynews.com/new-york/fraud-driving-car-insurance-rates-sky-hig-prosecutors-article-1.1245530

DEFENDANT

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The Use of Police Reports During Trial

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> [The statute] was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto.

Johnson has remained the majority rule in state and federal courts. *See Hochhauser v. Elec. Ins. Co.,* 46 A.D.3d 174 (2d Dep't 2007); *Yates v. Boir Transport, Inc.*, 249 F. Supp. 681 (S.D.N.Y. 1965); *Reeves v. King*, 534 So. 2d 1107 (Ala. 1988). Under this approach, statements included in a police report will only be admissible if the officer/recorder is a witness to the accident or condition described in the report, or if the observer/reporter supplying the information to the officer is under a business duty to do so. *Holliday v. Hudson Armored Car & Courier Serv.*, 301 A.D.2d 392 (1st Dep't 2003). For example, in the case of an ordinary automobile accident, drivers, passengers and other witnesses are not typically considered to be under a business duty to report to the police officer. *See Cover v. Cohen*, 61 N.Y.2d 261 (1984); *Westchester Med. Ctr. v. Progressive Cas. Ins. Co.,* 19 Misc. 3d 1113(A) (Sup. Ct., Nassau Cty. Feb. 28, 2008). Moreover, the Second Department has held that a driver's contractual duty to report an accident to his insurer is insufficient to establish the business duty necessary to escape the application of the hearsay rule. *Hochhauser*, 46 A.D.3d at 176.

In applying the general rule of *Johnson*, it is important to note that the observer/reporter is not required to be in the same business as the police officer/recorder, *Kelly v. Wasserman*, 5 N.Y.2d 425 (1959), nor will the admissibility of an otherwise qualified report necessarily be blocked if the recorder was not the individual who initially obtained the information in the report. *People v. Jackson*, 40 A.D.2d 1006 (2d Dep't 1972). If the recorder does not have personal knowledge of the statement, this should go to the weight attributable to the document, not its admissibility. C.P.L.R. § 4518(a). *See also Yates*, 249 F. Supp. at 682; *Matter of Nicole A.*, 39 Misc.3d 1224(A) (Family Ct., Bx. Cty. April 30, 2013).

A common hearsay issue arises where police reports contain a description of an accident with no attribution as to the source of the statements contained therein. In *Gagliano v. Vaccaro*, 97 A.D.2d 430 (2d Dep't 1983), the subject police report contained the following statement:

> "Vehicle # 1 travelling N/Bound on Pk. La. South with green Signal Light struck bicyclist traveling south from Monument Dr. to Myrtle Ave."

The police officer who prepared the report was not an eyewitness to the accident, and was unavailable at trial. The Second Department ruled that since the source of the information contained therein was not identifiable, it was reversible error to admit the report. In a similar case, the First Department also held a police report inadmissible when the recording officer conceded at trial that he could not identify the individual who supplied a particular statement included in the report. *Canty v. N.Y.C. Health & Hosp. Corp.*, 158 A.D.2d 271 (1st Dep't 1990) ("Thus, since the source of the information was unknown, the [police report] was properly excluded as a business record exception to the hearsay rule."). These cases point out the need to determine the source of police report statements during discovery. If this is not done, the trial lawyer should be given an opportunity to establish a foundation for the statements during trial. Failure to do so has been held to constitute reversible error. *Janac v. Adams*, 35 A.D. 2d 623 (3d Dep't 1970).

Counsel should also be prepared to address issues regarding evidence of non-verbal conduct contained in police reports. One case excluding evidence of non-verbal conduct is *Casey v. Tierno*, 127 A.D.2d 727 (2d Dep't 1987). There, the police officer's report indicated the following contributing factor on the part of the plaintiff:

> "Pedestrian confusion due to his actions of crossing the street and possible alcohol involvement due to the smell of alcohol."

The Second Department held it was error to admit this portion of the officer's report. The decision concerned the qualifications of the officer to conduct post-incident expert analysis, specifically regarding the officer's detection of alcohol odor after the incident, and whether this constituted evidence of a non-verbal conduct admission. While conclusory statements of a police officer should be excluded, *Murray v. Donlan*, 77 A.D.2d 337 (2d Dep't 1980), a police officer may testify as to his observations. *Pressley v. DePalma*, 39 A.D.3d 732 (2d Dep't 2007). In *Casey*, the officer smelled alcohol on the breath of the plaintiff, but the Court held that this non-verbal conduct should not have been admitted as an admission observed by the officer. 127 A.D.2d at 728 (further noting that the

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The Use of Police Reports During Trial

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officer was not qualified to render an expert opinion as to the possible causation of the accident).

By contrast, the Court of Appeals admitted similar non-verbal conduct evidence in *Ellison v. N.Y.C. Tr. Auth.*, 63 N.Y. 2d 1029 (1984). There, a Transit Authority officer's report included an opinion regarding the plaintiff decedent's state of sobriety by the police officer, who was also the observer and recorder of the evidence. The Court of Appeals held that it was reversible error to exclude this report. More recently, the Second Department also admitted evidence of a driver's intoxication included in a police report in *Westchester Med. Ctr. v. State Farm Mut. Auto. Ins. Co.*, 44 A.D.3d 750 (2d Dep't 2007). However, as to any post-incident physical evidence which forms the basis for an opinion in a police officer's report, this can be competently admitted only if the police officer is qualified as an expert. *See People v. Retamozzo*, 25 A.D.3d 73, 76 (1st Dep't 2005); *Larsen v. Viglioro Bros.*, 77 A.D.2d 562 (2d Dep't 1980).

When the credibility of a police officer/reporter is attacked, his credibility ordinarily may not be supported by proof of a prior consistent statement in his report. *People v. Encarnacion*, 29 Misc.3d 490 (Sup. Ct., Bx. Cty. 2010). *But see Klein v. Benrubi*, 60 A.D.2d 548 (1st Dep't 1977). However, New York courts follow an exception to this rule derived from FRE 801(d)(1)(B), which permits a prior consistent statement (e.g., a police officer's report) as non-hearsay if it is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. *See Moore v. Leventhal*, 303 N.Y. 534 (1952); *People v. Novak*, 41 Misc.3d 1204(A) (Sup. Ct., Sullivan Cty. 2013). The converse of this rule is also true: CPLR § 4514 permits the police officer/recorder to be impeached when his testimony is in conflict with the report made by him.

In *Palmer v. Hoffman*, 318 U.S. 109 (1943), the U.S. Supreme Court declined to apply the business records exception to records prepared in anticipation of litigation. Although some courts have held that this should operate to preclude the admission of police reports, which are primarily generated to evaluate potential lawbreakers for prosecution, *United States v. Ware*, 247 F.2d 798 (7th Cir. 1957), this narrow view has been rejected by New York State courts. *Green v. DeMarco*, 11 Misc.3d 451 (Sup. Ct., Monroe Cty. 2005) (stating that the New York rule "is more liberal, allowing for the introduction in evidence of records that may be disallowed under *Palmer*."). Further, a party's exculpatory statement may be admissible in New York in some circumstances. *See People v. Felton*, 264 A.D.2d 632 (1st Dep't 1999); *Bishin v. N.Y. Cent. R.R. Co.*, 20 A.D.2d 921 (2d Dep't 1964). *See also Huang v. N.Y.C. Tr. Auth.*, 49 A.D.3d 308 (1st Dep't 2008) (admitting police report containing statements by a party which assisted that party's position).

If a statement contained in a police report does not satisfy the business record exception, another hearsay exception must be found as a condition for the statements to be admitted into evidence. One exception to the hearsay rule that is often applicable in the context of police reports is the exception for party admissions. Admissions by a party opponent are not considered hearsay by the Federal Rules of Evidence. See FRE 801(d)(2). In New York, party admissions are considered hearsay, but are nevertheless admissible as an exception to the general exclusionary rule. Thus, party admissions contained in a police report are generally admissible against that party. *See Wein v. Robinson*, 92 A.D.3d 578 (1st Dep't 2012).

Another potentially applicable exception to the hearsay rule in New York is the exception for "present sense impressions." FRE 803(1) defines this exception as "a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." In *GEICO v. Martin,* the First Department admitted as a present sense impression a police report's identification of a license plate number obtained from a witness, where the evidence was later corroborated at trial. 102 A.D.3d 523 (1st Dep't 2013). *But see Phoenix Ins. Co. v. Golanek*, 50 A.D.3d 1148 (2d Dep't 2008) (where witness did not give police officer present sense impression of license plate information but rather a recollection of her own writing).

Based on the foregoing, it is clear that the trend in New York is to focus on the statement of the observer/reporter contained within the police report and attempt to match it with one of the 23 hearsay exceptions contained within FRE 803 or the residual exception codified at FRE 807, together with the additional exceptions to the hearsay rule which exist under the common law of New York. Practitioners must familiarize themselves with these exceptions in order to adequately prepare for admissibility issues regarding the use of police reports at trial.

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