DEFENDANT

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FEATURING

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The Missing Witness Charge: A Powerful Tool For Trial

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Event Data Recorders and the Defense of Transportation Claims

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President's Column

GARY A. ROME, ESQ.*

Dear DANY Members, Colleagues, and Sponsors:

It is such an honor to be serving as President of DANY at such an exciting and invigorating time for the organization. Thanks to the outstanding contributions over the last several years from my predecessors, our Board members, our executive director, Tony Celentano, and our contributors, the efforts that will be expended to strengthen and diversify the organization during the coming year will be rendered so much easier.

As many of you know, there have been three agenda items that we are continuing to promote this year while we continue to offer the defense bar an outstanding CLE program, The Defendant, social networking opportunities, and other benefits. First and foremost, I would like to extend my sincere appreciation and gratitude to the DANY diversity committee. We are in the midst of offering one of the most ambitious diversity programs that has been offered in the State of New York by any organization. DANY is currently championing a 10 month diversity initiative entitled ***Career Empowerment for Diverse Attorneys: Leadership, Mentorship and Rainmaking.*** The DANY Diversity Initiative seeks to empower women and diverse attorneys to assume control over their careers through training and accountability. The program is founded on the premise that public and private entities can grow and retain diverse legal talent by providing their attorneys with direct instruction in the arts of leadership, mentoring, networking and business development.

The initiative aims to teach women and diverse attorneys how to effectively compete for leadership positions in their firms, negotiate work arrangements and successfully pursue professional opportunities. For attorneys in private practice the goal is to teach practical business development skills. Establishing a sustainable book of business is essential for attorneys who seek increased compensation, equity partnership and professional flexibility.

The DANY Diversity Initiative kicked off in September 2014 with 25 participants. The majority of the participants are women, approximately one third are people of color and another 10% have self-identified as LGBT. Most of our participants are the first members of their families to attend law school. Together with frequent meetings and discussions with the 25 mentors who have volunteered to assist the participants, the program consists of 21 hours of classroom instruction led by professional legal business coaches who are attuned to the needs of women and diverse attorneys. These training sessions are three hours long and are taking place over a seven month period. Leadership, mentoring, branding, networking and rainmaking skills are explicitly taught and discussed.

The response to the program has been nothing short of incredible. We have received very favorable publicity, both locally and beyond. Most importantly, every participant has provided extraordinary feedback citing concrete examples of how the program has already had a profoundly positive effect on their practice of law.

The second agenda item has consisted of partnering with other bar associations in order not only to promote DANY, but to better serve the defense community. Several bar associations have participated in DANY events and we continue to reciprocate by supporting and attending other bar association events. In the coming months, we hope to establish a more formal arrangement with several bar associations in which standing committees with members from each organization can plan appropriate activities together.

Out third agenda item is attempting to turn DANY

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* *Gary Rome is a partner at the law firm of Barry, McTiernan and Moore located in New York City.*

President's Column

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into a true State organization. For the past year, we have been discussing the logistics of accomplishing this goal while speaking to many upstate attorneys. The first organizational meeting will be conducted as this issue of The Defendant is published. Thanks to the very generous offer from one of our leading sponsors, our CLE programs, Board meetings, and other events can be attended by upstate attorneys via the technology offered by Dietz Reporting. Now defense attorneys from anywhere in the State of New York can attend our CLE programs, meetings, or other events simply by logging onto the program from their computers.

To further promote DANY's efforts to strengthening the New York defense bar, we have offered free membership for one year to any attorney who has a primary office within the Third or Fourth Department. In addition, to encourage newly admitted defense attorneys to join DANY any defense attorney who is admitted to the bar for less than two years has also been offered a free one year membership for 2015.

I sincerely hope that 2015 will be a year in which all defense attorneys in New York can benefit significantly from what DANY has to offer. Thank you so much for your continued support.

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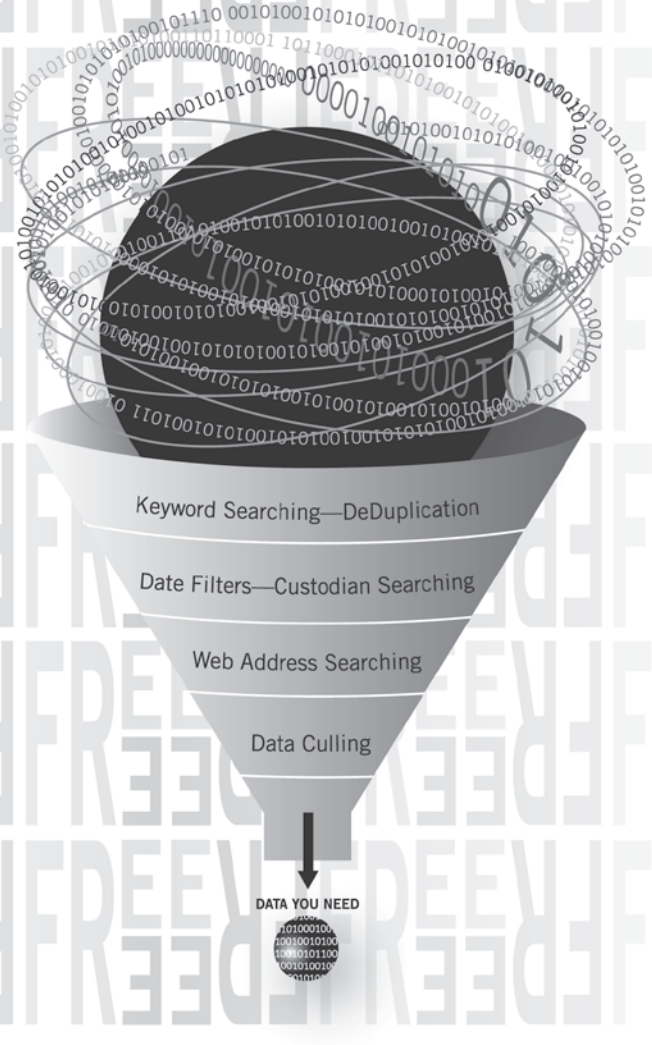

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Conduct Of Physical Examinations: Turning The Exam Room Into A Hearing Room?

COLIN F. MORRISSEY*

There is a growing problem in New York personal injury practice which defense practitioners need to have on their radar. Many plaintiffs attorneys are waging a campaign aimed at undermining defense medical examinations by use of "observation" tactics. Their common refrain is that defense examiners, a few of whom allegedly receive a large amount of total remuneration from performing defense exams, must be lying about their findings in their affirmed reports. Of course, none of those who advance this theory cite to any specific example of a defense examiner in New York having been convicted (or pled guilty), much less even formally charged or indicted by the state, for any sort of fraud (i.e. perjury) in the conduct or findings made in any defense medical examination; nor any insurance company ever having been charged, indicted, or convicted of any involvement in any such fraudulent scheme. In fact, the whole premise of that "paid-to-lie" logic applies far better to treating physicians --- as far as real world examples go. Indeed, the inability to cite a convicted defense examiner or insurance carrier stands in dramatically stark contrast to the repeating history of treating physicians who have been charged, indicted, and convicted (or plead guilty) of such fraud in this city and state. It is a semi-regular news item to hear of the most recent convictions in regard to frauds perpetrated in the No-Fault, Disability, Medicare, or Worker's Compensation arenas. If the actual evidence of such conduct is to justify observation of an exam – then it is the treating physicians' exams that warrant scrutiny.

Regardless, in this strategic effort to attack the credibility of defense examiners, plaintiffs attorneys have found that an "observer" is a useful tactic. This is done by either sending a live third party observer into the exam, or by attempting to video record the exam. Amazingly, it is being done unilaterally, by surprise, with an observer simply showing up at the exam and demanding access to the exam room, or by surreptitious video recording. Almost every plaintiff attorney I have dealt with on the issue of observers, has asserted that the law gives a plaintiff the "right" to unilaterally, by surprise, and without approval of the court, send a third party observer or "other representative" of their choosing (usually a non-attorney) to the noticed examination. In fact, even more disconcerting is that the NYC area has seen a proliferation of non-attorney "services", offering to furnish a non-attorney observer for hire, to attend exams, transcribe portions of the exam, and/or generate their own inexpert and biased opinions about what transpired at the exam. Some of these services openly advertise that they will interfere with the examiner, aim to besmirch an examiner's credibility and reputation, and to any extent possible – undermine the examiner's findings and opinion. These services are entirely unregulated, unlicensed, and have no accountability to anyone. More and more of plaintiffs attorneys are utilizing these services, which makes this observer a material witnesses in the case. These observers have an admitted singular purpose: to manufacture some taint on the defense examining physician --- to generate controversy on a motion, at trial, or at worst --- just to impede the thorough and expeditious completion of the discovery.

Defense counsel need to be aware of this surprise tactic – and the distraction and controversy it is calculated to cause. Defense practitioners should know the procedural rules and case law applicable to this discovery, to try to prevent these surprises from occurring. When not handled properly, plaintiffs attorneys are utilizing this tactic to succeed at turning the examination room into a hearing room – with resulting motion practice, evidentiary hearings, dubious allegations, and/or complications in completing what should be simple and straight-

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forward discovery. It can result in significant waste of both time and money, and if successful to any degree, can undermine this crucial part of the defense case. Defendants only get one exam --- so tactically speaking, if a plaintiff attorney can generate any issue about the exam, they have gained a real advantage. This article will attempt to provide procedural suggestions for defense practitioners, guidance on the case law, and insights on how to address the arguments that can be expected from the other side. The goal is to avoid the examining room being turned into a hearing room.

The Procedural Rules For Conduct of a Physical Examination

CPLR 3121 very clearly sets forth unambiguous rules to initiate this discovery. CPLR 3121 states that a party (almost always the defendant) may serve a notice for physical examination which is to set "the conditions and scope" of the exam. So the party serving the notice has the sole right --- at the outset --- to set any and all of the conditions for the demanded exam. CPLR 3121 makes absolutely no provision whatsoever for the party served (almost always the plaintiff) to affirmatively set any conditions of their own for the exam. This would, of course, include sending an observer of any type (attorney or non-attorney), or attempting to record the exam in any manner (video, audio, or transcription). Moreover, CPLR 3121 sets no prohibitions as to any condition which a defendant may set --- in their initial notice. So the defendant can set conditions excluding any type of observer, or any recording activity.

Thereafter, the plaintiff has the right to serve a written objection to any specified condition(s), as per CPLR 3122. However, CPLR 3122 also makes absolutely no provision whatsoever for a plaintiff to affirmatively impose any condition of their own. It confers nothing but a responsive right to object to any condition affirmatively noticed by the defendant. If a plaintiff has served a timely objection, CPLR 3124 sets forth that the defendant may then file a motion seeking a ruling by the Court on any condition to which plaintiff objected. (presuming the parties were unable to come to agree) A plaintiff who desires to set an affirmative condition for the exam, such as interposing some type of observer or arranging some form of electronic or transcribed recording of an exam, has a procedural rule to make that request. CPLR 3103 permits a plaintiff to make a motion seeking a protective order from demanded discovery, including directives as to how that discovery is to be conducted.

Of course, as is obvious from the CPLR rules governing this discovery --- any and all of the conditions under which the exam will ultimately occur, are to be on notice to the adversary, affording opportunity to object, and/or obtain a court ruling where needed. Nothing is to be done unilaterally, or by surprise, and the notion that there is a "right" to do so unilaterally and by surprise, is completely antithetical to the CPLR rules. So it should be abundantly clear that the state's procedural statutes for conduct of this discovery do not permit a plaintiff to secretly video record a physical exam, or unilaterally attempt to interpose any sort of observer into the exam room -- by surprise.

Defense Counsel Procedure

To prevent a problem, defense counsel should serve an initial 3121 notice which specifically excludes the types of observation and/or recording that is sought to be prevented. It should also generally forbid plaintiff from unilaterally undertaking any action in regards to imposing any condition under which the exam occurs, even if not expressly addressed in the notice, without notifying defense counsel first. It should notify plaintiff's counsel that if they desire to impose any condition(s), they are required to follow the mandatory CPLR procedure. To avoid a 'surprise' at the time of the exam itself, which may result in it not going forward – and a substantial waste of time, effort and money, you document notice of conditions which exclude those specific surprises, and any general surprises. Finally, ensure that the instructions for the conditions of the exam are clearly communicated to the defense examiner (or his/her staff), so that the exam does not inadvertently proceed under any 'surprise' condition(s).

If plaintiff serves a written timely objection to any condition, as required by CPLR 3122, the objection is required to specify their reasons -- with particularity. It is then mandatory that the parties

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make a good faith effort to resolve the dispute, before defense counsel resorts to the CPLR 3124 motion to compel the exam on the conditions they noticed. In these good faith efforts, defense counsel should serve a written demand for the plaintiff to specify the observer they seek to interpose into the exam (attorney or non-attorney), as well as their purpose, credentials, and qualifications; or to specify by whom and in what manner any recording is proposed to be created. The case law evaluates whether observers (live or electronic) are proper or not, on a case by case basis, and the nature of the case and the specific facts about the proposed observer, or manner in which recording will created, are material to every determination by the courts. Not all cases are the same, and not all observers are the same; but unless you obtain this information in advance of the motion, you cannot present a detailed argument to exclude it. You may also find that you can resolve an apparent dispute by stipulating to certain limitations or restrictions with your adversary. If plaintiff refuses to provide the info --- it makes your motion that much stronger. In the event of a motion to compel, defense counsel must present the Court with the binding case law on point, and be prepared to address the facts underlying those cases, in order to prevail. Winning the motion can be problematic, and in my experience many judges have no concept of the dangers that an unqualified observer presents – once that person has been given access to the exam room. It is up to defense counsel to educate judges about the spectrum of undesirable possibilities: obstruction, interference, coaching, misconduct, mischaracterization, misrepresentation, or outright fabrication. Judges should also be reminded that anything a non-attorney observer can report about what transpired at the exam, could almost always be reported by the plaintiff him/herself -- making the observer in almost all instances -- inherently duplicative.

Case Law on Precluding Video/Audio Recording

The video recording issue is perhaps the simpler issue. As previously noted, the CPLR procedure makes "secret" video recording completely and entirely improper, as it presumes that a plaintiff would seek prior approval from the court, because all 'conditions' under which the exam ultimately occurs are to be on notice. In Lamendola v. Slocum [(148 A.D.2d 781, (3rd Dept. 1989)], the Third Department affirmed the grant of defendants' motion to compel without permitting video recording, reasoning that since the NYCRR contains a provision for video recording of depositions (NYCRR 202.15), but the contains no statute or rule with any provision whatsoever for video recording of a physical examination. The Third Dept. found that this could not have been unintentional on the part of the legislature. The Third Dept. therefore held that creating a video recording of a physical exam could not properly be ordered unless the plaintiff had made a compelling showing of "special circumstances" warranting it. Lamendola has had no negative treatment in 25 years, and has been repeatedly followed. As a result it's holding should be argued as binding case law in the lower courts in the First and Second Departments, where no contrary rule has been made. (see People v. Shakur 215 A.D.2d 184, 185 [1st Dept. 1995] ["Trial courts within this [first] department must follow the determination of the Appellate Division in another department until such time as this court or the Court of Appeals passes on the question"]) So it is plain that a plaintiff has no right to unilaterally, much less secretly, record an exam. Some plaintiffs attorneys may argue that the absence of an express prohibition leaves the question open – but that argument ignores the Third Dept. reasoning, and is inconsistent with the statutes requiring notice of all conditions, and opportunity to object.

Case Law on Excluding An Attorney vs. Including A Non-Attorney

The case law concerning exclusion/inclusion of observers, makes a distinction between attorneys and non-attorneys. Excluding an attorney from representing their client at the exam places the burden on the defendant to make a compelling showing that it is necessary. Jakubowski v. Lengen (86 A.D.2d 398 [AD4, 1982]). This rule has been followed in every other Appellate Division. The Second Dept. added a consideration for "legal representatives" such as court appointed guardians

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or natural guardians, and the First Dept. extended the rule to psychiatric exams as well as physical exams. But the point is that the presumption is in favor of inclusion of plaintiff's attorney, and defendant has the burden to justify exclusion.

It is the reverse for non-attorney observers. The presumption is in favor of exclusion of non-attorneys, and plaintiff has the burden to justify inclusion. The rule as to live non-attorney observers was set by the Fourth Dept. in Mertz v. Bradford, (543 N.Y.S.2d 786 [4th Dept. 1989]), which directly addressed the issue of inclusion of live non-attorney observers. Defendant made a motion, seeking to exclude specific non-attorney live observers – in the form of a "medical representative" and a stenographer. The lower court denied the motion in all respects. The Fourth Department reversed entirely, and specifically held that plaintiff had the burden to show "special circumstances" warranting any such live non-attorney observers, or need for recording, but failed to do so. The Fourth Dept. had previously applied this same burden and rule, as against a stenographer, in Casali v. Philips (145 A.D.2d 941 [A.D.4 1988]). In Casali, the Fourth Dept. reversed the lower court grant of the plaintiff's motion for a stenographer, stating that plaintiff had failed to meet their burden to show "special circumstances". The Court also observed -- correctly so -- that allowing "further representation" (e.g. non-attorney observers) into exam room risks turn it into a hearing room, for which there is generally no justification or benefit. These cases plainly elucidate that the rule as to non-attorney observation of the exam (live or electronic) is a presumption of exclusion, unless plaintiff can meet their burden to show "special circumstances" warranting inclusion. These cases have no negative treatment, and again -- since no contrary holdings have been issued in any other departments, they should be considered binding authority on the lower courts in all departments. (see People v. Shakur, supra.)

So if defense counsel is contemplating a 3121 notice which seeks to exclude plaintiff's attorney from the exam room --- they should be prepared with compelling evidence and/or reasons as to why the exclusion of counsel is justified and necessary in their case, in order to meet their burden. One area in which this may be more easily contended is in regard to psychiatric exams – because of the "interview" manner in which they are conducted. In that circumstance, defense counsel should be prepared with testimony from the proposed defense examiner to explain how the psychiatric examination could/would be affected by the attorney's presence, and/or how that could/would render the results invalid. The expert should cite to medical research or other literature supporting the opinion.

On any motion for exclusion/inclusion of a proposed non-attorney, this case law should be presented, and the argument made -- employing the "special circumstances" standard. What may, or may not, be a special circumstance is argument to be made in view of the nature of the case, its specific facts, and the specific type of non-attorney observer plaintiff proposes, keeping in mind the general presumption of exclusion.

Dealing With Plaintiffs Arguments For Inclusion of A Non-Attorney Observer

The primary case defense counsel will see cited as support for an alleged "right" to have an observer in the exam room, is the Second Dept. decision in Ponce v. Health Ins. Plan of Greater New York, (100 A.D.2d 963 [2nd Dept. 1984]). This decision resolved a dispute over plaintiffs attorney attending exams. The Court does not detail how the dispute arose, or whether the moving defendants made any showings for exclusion on the motion in the lower court. It only noted that plaintiff appealed from the lower court grant of defendants' motion. The Second Dept. affirmed the lower court order compelling plaintiff to re-appear for exam. However, offering only a few sentences as to the presence of her legal representatives. The Court stated that, "…Marta Ponce is entitled to be examined in the presence of her attorney or other legal representative…". The use of the word "entitled" seems to have given rise to a misconception that there is an inherent "right" by which a plaintiff may unilaterally send any observer to the exam. The procedural rules plainly indicate that is not true. Additionally, in describing the observer,

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the court's use of the phrase: "…attorney or *other legal representative*…" has resulted in confusion, for superficial readers, that anyone at all may act as a '*other legal representative*' – a proposition which is absurd in the eyes of the law. Yet, this is the exact phrase that every plaintiff will cite to argue that it is presumed they may send any non-attorney at all to any exam --- unilaterally.

However, even a brief review of the facts and procedural history in Ponce reveals that it absolutely does not proclaim any general or inherent "right" to a non-attorney observer, nor did it proclaim that any such observer can be sent unilaterally and by surprise. It is obvious from the caption of the case that Marta Ponce was a legal incompetent, whose action had been brought by her Conservator, appointed by a court to act as her "legal representative" in all her affairs. In other words, Marta Ponce actually had an "*other legal representative*", and in view of that fact, it would be absurd to posit that the Court was referring to anyone other than her Conservator when using that phrase. Moreover, that the Court specified Marta by name (i.e. "…*Marta Ponce* is entitled…") was similarly a direct reference solely to her, and not to all plaintiffs in general. The decision was in every respect specific to the facts of that case. These are obvious facts which every plaintiff will overtly ignore when citing the case, and ridiculously proposing that the decision established an observer free-for-all. The argument ignores the facts of the case and the plain language used. It must also be noted that the Second Dept. cited only to Jakubowski v. Lengen (86 A.D.2d 398 [AD4, 1982]) -- a precedent going solely to the standard for exclusion of an attorney, which would be strange if the case had declared an observer free-for-all. So Ponce is not a precedent in favor of inclusion of non-attorney observers – other than to the extent that it acknowledges that a court appointed guardian may be a "legal representative" – akin to an attorney.

Jakubowski was the first case to deal with this "observer" controversy (a couple years before Ponce), and also seems to have unfortunately contributed to the misconception that a plaintiff has a "right" to a non-attorney observer, because the dispute in the case involved the conduct of a non-attorney observer. The defendant had not served a notice excluding an observer of any type, and the plaintiff then appeared at the exam with a "law clerk" employed by plaintiff's attorney – by surprise. Nevertheless, the doctor permitted the law clerk into the exam room, and as the exam proceeded, the law clerk interposed multiple objections to the examining physician's requests. As a result, the defense examiner determined to suspend the exam. The plaintiff refused to voluntarily re-appear to complete the exam and defendant moved to compel, but again made no request to exclude any type of observer. The lower court issued an order granting the defendant's motion and directing the plaintiff to re-submit to the exam, but also adding -- *sua sponte* -- a provision that the exam be conducted without any third party present. The plaintiff appealed. The Fourth Dept. affirmed the order to the extent it directed plaintiff to re-submit to the exam. However, the court elected to strike the exclusionary provision of the order, explaining that the lower court's *sua sponte* determination --- because it precluded plaintiff's attorney from attending the exam, on no showing at all --- was improvident. Most importantly, the Fourth Dept.'s rationale went solely to justification for a plaintiff's attorney to be present at the exam – i.e. to represent his/her client -- while glaringly omitting to mention any such justification for a non-attorney to be there. In fact, the Court forewarned of precisely the situation that is coming to pass… non-attorney third parties getting into the exam room, and turning it into a hearing room. So Jakubowski is a case establishing only a rule as to exclusion of attorneys, and this is how it has been cited in the other Appellate Divisions. It offered no holding as to inclusion of non-attorneys., and if anything offered a rationale which discouraged them. Indeed, it appears that is exactly the case, since a few years later, the Fourth Dept. set the rule for non-attorney observers -- in Mertz -- with a presumption of exclusion which a plaintiff has the burden to overcome.

Dealing With Surprises

Even though defense counsel may have served a detailed 3121 notice setting forth a condition

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2014 Serious Injury Threshold Decisions by the Four New York State Appellate Divisions

JOHN J. KOMAR*

A key word search on the "decisions" page at www.nycourts.gov finds that in 2014 a collective total of 138 decisions were issued by the four New York State Appellate Divisions on appeals taken from lower court "serious injury" threshold motion decisions under Insurance Law § 5102(d), which states:

> "Serious injury" means a personal injury which results in 1) death; 2) dismemberment; 3) significant disfigurement; 4) a fracture; 5) loss of a fetus; 6) permanent loss of use of a body organ, member, function or system; 7) permanent consequential limitation of use of a body organ or member; 8) significant limitation of use of a body function or system; or 9) 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 [90] days during the one hundred eighty [180] days immediately following the occurrence of the injury or impairment.

Soft tissue injuries, such as cervical or lumbar disc bulges or herniations, or torn ligaments in the shoulder or knee typically need to meet one of the last three of the above nine categories in order to survive a motion to dismiss and get the case to a jury.

Once the note of issue is filed on a "soft tissue injury" case the defendants must consider if the evidence collected during pre-trial discovery gives them a basis to make an initial *prima facie* showing that the injury or injuries alleged do not meet the threshold to qualify for any of these nine serious injury categories. If the injuries don't meet the threshold then a motion to dismiss is warranted.

If the court hearing the motion decides that the movant has met the initial burden of showing that plaintiff has not sustained a "serious injury" then the burden shifts to the plaintiff to come forward with admissible non-conclusory evidence raising a jury question of fact about whether he or she has sustained a serious injury.

A large majority of the 2014 "serious injury" decisions issued by the four New York State Appellate Divisions (86) were handed down by the Second Department. Most of those rulings (67) are in favor of the plaintiffs and consist of either: 1) decisions *reversed* after a defendant's motion was granted; or 2) decisions *affirmed* after the motion was denied.

Of the decisions *reversed* by the Second Department, the majority of those (18) were overturned for the sole reason that defendant failed to meet the initial burden under the "90/180" category. The case law most often cited in support of these reversals is *Che Hong Kim v Kossoff*, 90 AD3d 969 (2d Dept 2011).

In the First Department, more than one half of the total 2014 decisions (19) either *reversed* or *modified* the lower court's decision to grant the motion.

Modifying the lower court decision has the same effect as a reversal in that it revives a plaintiff's action by finding a question about some particular injury claimed. This then allows the plaintiff, as the First Department likes to point out citing *Rubin v SMS Taxi Corp.*, 71 AD3d 548 (1st Dept 2010), to plead and prove at trial all injuries allegedly sustained whether the injuries are "serious" or not.

Generally, how these cases were decided and whether the motions were ultimately granted or denied turned on an analysis of each party's argument under the guidelines established in the recent Court of Appeals cases: *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002); *Perl v Meher*, 18 NY3d 208 (2011); and *Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905 (2013).

The First Department does not cite to the Court

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2014 Serious Injury Threshold Decisions by the Four New York State Appellate Divisions

of Appeals cases as much as the other departments but rather looks to its own body of case law as the basis for its decisions.

Only one case from 2014 is going up to the Court of Appeals: Alvarez v NYLL Management Ltd., 120 AD3d 1043, (1st Dept 2014) where by a 3-2 vote the First Department affirmed the decision of Judge Betty O. Stinson in Bronx County to grant the defendant's motion.

There was only one case where the plaintiff was the movant: Hill v. Cash 117 AD3d 1423 (4th Dept 2014).

Here is a table breaking down by department how the 136 appellate court "serious injury" threshold motion appeals for 2014 were decided:

Appellate Department	Total Appeals Decided	Reversed After Granted	Reversed After Denied	Affirmed After Granted	Affirmed After Denied	Modified After Granted	Modified After Denied
First	**36**	6	2	12	2	13	1
Second	**86**	42	5	14	24	1	0
Third	**5**	1	0	1	0	2	1
Fourth	**11**	1	5	2	2*	1	0
TOTAL	**138**	**50**	**12**	**29**	**28**	**17**	**2**

*Plaintiff was the movant in one case

The tables on the following pages break down the cases further into categories which include the counties each case came from, the identity of the lower court judge, and the basic grounds for each appellate decision.

First Department Decisions Reversed (8):

Six (6) were *reversed* after the lower court *granted* defendant's motion:

A) Four (4) of these were reversed because the plaintiff raised a question of fact after the defendant met the initial burden of showing that plaintiff did not have a serious injury:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Ferrara	116 AD3d 408	Bronx	Barbato
Pantojas	117 AD3d 577	Bronx	Thompson
Vargas	117 AD3d 560	Bronx	Barbato
Sanchez	2014 NY Slip Op 08584	Bronx	Barbato

B) Two (2) of these were reversed because the defendant failed to meet the initial burden:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Boateng	119 AD3d 424	Bronx	Thompson
Prince	115 AD3d 424	Bronx	Barbato

Two (2) were *reversed* after the lower court *denied* defendant's motion:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Christopher*	115 AD3d 462	Bronx	Briganti-Hughes
Jones**	2014 NY Slip Op 08915	Bronx	Suarez

*Supplemental Bill of Particulars served too late ** Plaintiff failed to causally connect injury to accident

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First Department Decisions Affirmed (14):

Two (2) were *affirmed* after the lower court *denied* defendant's motion. (Defendant met the initial burden but plaintiff raised a question of fact):

Case Name	Citation	Supreme Court County	Supreme Court Judge
McSweeney	115 AD3d 572	New York	Silver
Vargas	2014 NY Slip Op 08561	Bronx	Guzman

Twelve (12) were *affirmed* after the lower court *granted* the defendant's motion. (Defendant met the initial burden and plaintiff failed to raise a question of fact):

Case Name	Citation	Supreme Court County	Supreme Court Judge
Acosta	119 AD3d 408	Bronx	Stinson
Alvarez*	120 AD3d 1043	Bronx	Stinson
Boone	120 AD3d 1143	New York	Bluth
Camillo	118 AD3d 586	Bronx	Walker
Corporan	117 AD3d 601	Bronx	Gonzalez
Farmer	117 AD3d 562	Bronx	Walker
Galarza	117 AD3d 488	Bronx	Friedlander
Henchy	115 AD3d 478	Bronx	Barbato
Kendig	115 AD3d 438	Bronx	Ruiz
Mena	117 AD3d 441	Bronx	Suarez
Nicholas	116 AD3d 567	Bronx	Barbato
Kester	2014 NY Slip Op 08379	New York	Bluth

*3-2 decision being appealed to the Court of Appeals

First Department Decisions Modified (14):

Thirteen (13) were *modified* after the lower court *granted* defendant's motion:

A) Seven (7) of these were modified because the appellate court found a question of fact with respect to plaintiff's claimed injury to the lumbar spine and/or cervical spine:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Diaz	115 AD3d 448	Bronx	Suarez
Long	117 AD3d 624	New York	Bluth
Harper	115 AD3d 597	Bronx	Thompson
R. Windham	115 AD3d 597	Bronx	Thompson
Fludd	122 AD3d 436	Bronx	Barbato
Anderson	122 AD3d 484	Bronx	Barbato
Mulligan	120 AD3d 1155	Bronx	Stinson

B) Three (3) of these were modified because the appellate court found a question of fact with respect to plaintiff's claimed knee injury:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Gomez	115 AD3d 448	Bronx	Suarez
Johnson	115 AD3d 425	Bronx	Barbato
Swift*	115 AD3d 507	Bronx	Thompson

* Court also found question of fact regarding 90/180 claim

C) Two (2) of these were modified because the appellate court found a question of fact with respect to plaintiff's claimed shoulder injury:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Kang	116 AD3d 540	Bronx	Suarez
Sutliff	122 AD3d 452	Bronx	Barbato

D) One (1) of these was modified because the appellate court found a question of fact with respect to plaintiff's claimed 90/180 disability:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Windham II	115 AD3d 597	Bronx	Thompson

-One (1) decision was *modified* after the lower court *denied* defendant's motion:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Holmes*	2014 NY Slip Op 09035	Bronx	Suarez

*Modified to grant dismissal of any claims under the permanent consequential serious injury category

Second Department Decisions Reversed (47):

Forty-two (42) were *reversed* after the lower court *granted* defendant's motion:

A) Eighteen (18) of these were reversed because the defendant failed to meet the initial burden on the "90/180" category:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Cruz	121 AD3d 637	Kings	Vaughan
Doulos	116 AD3d 656	Kings	Ruchelsman
Fernandez	114 AD3d 637	Kings	Silber

Hernandez	120 AD3d 628	Suffolk	Jones, Jr.
Johnson	115 AD3d 648	Kings	Bayne
Kacperski	121 AD3d 948	Queens	Strauss
Mamani	117 AD3d 804	Queens	Greco, Jr.
Preston	120 AD3d 647	Queens	Dufficy
Sencion	116 AD3d 1028	Queens	Weiss
Singh	117 AD3d 818	Queens	Dufficy
Smith	120 AD3d 658	Nassau	McCormack
Waxman	121 AD3d 972	Nassau	Galasso
Flowers	122 AD3d 673	Nassau	Mahon
Huang	2014 NY Slip Op 08402	Queens	Butler
Fort	2014 NY Slip Op 08628	Kings	Partnow
Carter	2014 NY Slip Op 08953	Queens	Dufficy
Luna	2014 NY Slip Op 08964	Nassau	Galasso
Rodriquez	2014 NY Slip Op 08973	Kings	Partnow

B) Seventeen (17) of these were reversed because the plaintiff raised a question of fact after defendant met the burden of showing that plaintiff did not sustain a serious injury:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Bedoya	120 AD3d 1374	Queens	Agate
Datikashvili	121 AD3d 637	Queens	Golia
Frelow	118 AD3d 745	Kings	Bayne
Giampino	118 AD3d 746	Queens	Weiss
Jean	113 AD3d 597	Kings	Schmidt
King	118 AD3d 956	Queens	Dufficy
Macchio	114 AD3d 647	Queens	Agate
Pirayatamwong	116 AD3d 686	Nassau	Phelan
Tomao	121 AD3d 882	Queens	Agate
Will	116 AD3d 696	Queens	Dufficy
Wysocka	117 AD3d 823	Queens	Siegal
Yeong Sun Koo	120 AD3d 1408	Queens	Strauss
Chae Hong Chung	120 AD3d 1408	Queens	Strauss
Ogle	122 AD3d 696	Kings	Silber
Trunzo	122 AD3d 722	Queens	McDonald
Belmont	2014 NY Slip Op 08798	Queens	Weiss
Che Hong Kim	2014 NY Slip Op 08953	Queens	Dufficy

C) Seven (7) of these were reversed because the defendant failed to meet the initial burden:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Chang	113 AD3d 582	Queens	Weiss
Ciuffo	118 AD3d 737	Nassau	Diamond
Miller	118 AD3d 761	Richmond	Maltese
Sanclemente	116 AD3d 688	Queens	Taylor
Werthner	120 AD3d 490	Suffolk	Lasalle
Clarke	122 AD3d 662	Nassau	Palmieri
Silan	122 AD3d 713	Queens	Siegal

Five (5) were *reversed* after the lower court *denied* defendant's motion:

A) Three (3) of these were reversed because the appellate court found that the plaintiff did not raise a question of fact after the defendant met the initial burden:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Cotto	117 AD3d 769	Queens	Kitzes
Liriano	113 AD3d 599	Nassau	Bruno
Marshall	117 AD3d 805	Nassau	Brown

B) Two (2) of these were reversed because the appellate court found that the plaintiff failed to raise a question of fact in a non-conclusory manner after defendant met the initial burden:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Henry	119 AD3d 528	Kings	Schmidt
Inzalaco	115 AD3d 807	Putnam	Lubell

Second Department Decisions Affirmed (38):

Fourteen (14) were *affirmed* after the lower court *granted* defendant's motion:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Alamin	113 AD3d 708	Kings	Lewis
Chang Min Li	121 AD3d 1032	Queens	Siegal
Hogue	117 AD3d 802	Queens	Strauss
Jackson	114 AD3d 728	Queens	Greco, Jr.
Livson	121 AD3d 952	Kings	Vaughan
Mohamed	116 AD3d 678	Nassau	Feinman

Moon	121 AD3d 678	Nassau	Brown
Persaud	117 AD3d 927	Queens	Grays
Persaud (II)	"	"	"
Narain	"	"	"
Reyes	121 AD3d 664	Orange	Bartlett
Flores	122 AD3d 671	Queens	Taylor
Syllas	2014 NY Slip Op 08419	Kings	Partnow
Hernandez	2014 NY Slip Op 08810	Queens	Siegal

Twenty-four (24) were *affirmed* after the lower court *denied* defendant's motion:

A) Twelve (12) of these were affirmed wherein plaintiff raised a question of fact after defendant met the initial burden:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Abreu	117 AD3d 972	Kings	Ash
Perez	"	"	"
Burgett	114 AD3d 822	Suffolk	Jones, Jr.
Felix	117 AD3d 780	Nassau	Reilly
Himmelberger	117 AD3d 801	Kings	Partnow
Master	122 AD3d 589	Kings	Solomon
Culpepper	118 AD3d 738	Kings	Partnow
Romero	113 AD3d 746	Kings	Lewis
Bracco	2014 NY Slip Op 08594	Kings	Partnow
Ford	2014 NY Slip Op 08600	Kings	Graham
Berger	2014 NY Slip Op 09093	Suffolk	Garguilo
Wilcoxen*	122 AD3d 727	Westchester	Giacomo

*Conflicting experts raised question of fact

B) Seven (7) of these were affirmed wherein the defendant failed to meet the initial burden:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Assemi	120 AD3d 1365	Nassau	Cozzens, Jr.
Berisha	116 AD3d 891	Queens	Butler
Felicciardi	122 AD3d 668	Suffolk	Baisley, Jr.
Meskovic	116 AD3d 1012	Richmond	Minardo
Natal	118 AD3d 762	Kings	Ruchelsman
Villa	119 AD3d 552	Orange	Slobod
Yunayeva	113 AD3d 607	Kings	Martin

C) Five (5) of these were affirmed wherein the defendant failed to meet the initial burden on only the 90/180 category:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Christie	113 AD3d 585	Nassau	Bruno
Ponce	115 AD3d 729	Queens	Nelson
Sablo	115 AD3d 731	Queens	Taylor
Sicca	121 AD3d 666	Kings	Schmidt
Williams	115 AD2d 740	Rockland	Walsh

Second Department Decisions Modified (1):

One (1) was *modified* after the lower court *granted* defendant's motion. (Appellate court found that defendant did not meet the burden to dismiss plaintiff's 90/180 claim):

Case Name	Citation	Supreme Court County	Supreme Court Judge
Dowling	119 AD3d 834	Suffolk	Whelan

Third Department Decisions Reversed (1):

One (1) was *reversed* after the lower court *granted* defendant's motion. Appellate court found that defendant did not meet the burden to dismiss plaintiff's 90/180 claim:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Poole	121 AD3d 1224	Court of Claims-Albany	McCarthy

Third Department Decisions Affirmed (1):

One (1) was *affirmed* after the lower court *granted* defendant's motion. (Appellate court found that plaintiff did not raise a question fact):

Case Name	Citation	Supreme Court County	Supreme Court Judge
Dudley	121 AD3d 1461	Schenectady	Reilly, Jr.

Third Department Decisions Modified (3):

Two (2) were *modified* after the lower court *granted* defendant's motion:

A) One (1) of these was modified because the appellate court found a question of fact with respect to plaintiff's claimed shoulder injury:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Vandetta	121 AD3d 1328	Saratoga	Ferrandino

B) The other one (1) was modified because the appellate court found that defendant failed to meet the initial burden on the 90/180 claim:

Case Name	Citation	Supreme Court County	Supreme Court Judge
Shelly	121 AD3d 1243	Ulster	Zwack

One (1) was *modified* after the lower court *denied* defendant's motion. (Appellate court found that defendant was entitled to dismissal of two serious injury categories: 90/180 and permanent loss of use):

Case Name	Citation	Supreme Court County	Supreme Court Judge
Raucci	119 AD3d 1044	Schenectady	Kramer

Fourth Department Decisions Reversed (6):

One (1) of these was *reversed* after the lower court *granted* defendant's motion. (Appellate court found that defendant failed to meet the initial burden):

Case Name	Citation	Supreme Court County	Supreme Court Judge
Clark	113 AD3d 1076	Erie	Walker

Five (5) of these were *reversed* after the lower court *denied* defendant's motion. (Appellate court found that the plaintiff failed to raise a question of fact after defendant met the initial burden):

Case Name	Citation	Supreme Court County	Supreme Court Judge
Applebee	118 AD3d 1279	Onondaga	Karalunas
Downie*	117 AD3d 1401	Niagara	Panepinto
Fanti**	115 AD3d 1341	Erie	Glownia
Fisher*	114 AD3d 1193	Wyoming	Dadd
Heather	115 AD3d 1325	Erie	Drury

*4-1 decision-dissent by Judge Whelan **Case involved two accidents occurring within 5 months

Fourth Department Decisions Affirmed (4):

One (1) of these was *affirmed* after the lower court *denied plaintiff's* motion for a finding that he met the 90/180 serious injury category:

2014 Serious Injury Threshold Decisions by the Four New York State Appellate Divisions

Case Name	Citation	Supreme Court County	Supreme Court Judge
Hill	117 AD3d 1423	Cattaraugas	Nenno

One (1) of these was *affirmed* after the lower court *denied* defendant's motion. (Appellate court found that defendant failed to meet the initial burden):

Case Name	Citation	Supreme Court County	Supreme Court Judge
Thomas	115 AD3d 1225	Erie	Curran

Two (2) of these were *affirmed* after the lower court *granted* defendant's motion. (Appellate court found that plaintiff failed to raise a question fact):

Case Name	Citation	Supreme Court County	Supreme Court Judge
French*	118 AD3d 1251	Onondaga	DeJoseph
Griffo	118 AD3d 1421	Erie	Drury

*4-1 decision-dissent by Judge Whelan

Fourth Department Decisions Modified (1):

One (1) decision was *modified* after the lower court *granted* defendant's motion. (Appellate court dismissed plaintiff's claim that he sustained a "permanent consequential limitation" of use injury, otherwise plaintiff raised a question of fact):

Case Name	Citation	Supreme Court County	Supreme Court Judge
Gates	120 AD3d 980	Onondaga	DeJoseph

SUMMARY

Statewide in 2014 the plaintiff was successful on 68% of the appeals filed (94 of 138) seeking review of lower court decisions on serious injury threshold motions.

In the First Department plaintiffs prevailed 58% of the time (21 of 36). In the Second Department plaintiffs won 78% of the appeals filed (67 of 86). In the very few Third Department appeals that were heard plaintiff was successful 80% of the time (4 of 5) while in the Fourth Department (also a relatively small number) the plaintiff was only successful on 27% of the appeals filed (3 of 11).

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The Missing Witness Charge: A Powerful Tool For Trial

KEVIN G. FALEY* & ASSOCIATE – REBECA ROSEDALE**

Witnesses are essential to the success or failure of a case. A good witness is every trial lawyer's dream. A poor witness can lay waste to even the best case. Attorneys, obviously, will try to call to the stand those witnesses who are most favorable to their case, however, sometimes attorneys are stuck with a "bad" witness.

As we also know, the calling of expert witnesses is routine and, at trial, experts are necessary to help establish the elements of a case, to explain the issues to the jury and to provide a reasoned and thoughtful narrative. Attorneys will pay high fees for those experts who can positively affect the outcome of the litigation. However, occasionally, an attorney is faced with a situation where the expert's testimony will not further his client's case and the expert may, in fact, be a better witness for his adversary than for him. An attorney may decide not to call the witness at trial and, thus, avoid detrimental testimony. But this may create another problem.

In accordance with CPLR § 3101(d), an attorney discloses to opposing counsel the names of expert witnesses and examining physicians he or she plans to call at trial and the nature of the witnesses' testimony. Likewise, the names and addresses of lay witnesses are also exchanged. In preparing for trial, opposing counsel may realize that these witnesses will actually support his case, but his adversary, perhaps coming to the same conclusion, decides not to call the witness.[1] How can the opposing party make use of this incriminating evidence if an attorney fails to call the witness? The answer: New York's missing witness charge.

Pursuant to New York's Pattern Jury Instructions 1:75, a party's failure to call a particular witness could lead to a jury charge allowing an adverse inference to be drawn. If the jury finds the party's explanation for not calling the witness to be *reasonable*, the jury is instructed *not to consider* the failure of the party to call the witness in evaluating the evidence.

If, however, the explanation is *not reasonable* or the party *did not give an explanation*,

> [The jury] *may*, although [is] not required to, conclude that the testimony of [the witness] would not support [the non-calling party's] position on the question of [the issue]; and would not contradict the evidence offered by [the adverse party] on [the issue] and [the jury] *may*, although [is] not required to, *draw the strongest inference against the [party]* on that question, that opposing evidence permits.[2]

The charge is premised on the "notion that the nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause."[3]

There are four preconditions to this jury charge. The requesting party must show: (1) the uncalled witness has knowledge about a material issue; (2) the witness is available to the non-calling party to testify; (3) the witness is under the "control" of the non-calling party, such that the witness would be expected to give testimony favorable to that party; and (4) the witness is expected to give noncumulative testimony.[4]

This article will initially discuss the definition of what is "noncumulative testimony" in light of a recent 2013 New York Court of Appeals' decision and will then address the three other preconditions to the missing witness charge.

Non-Cumulative Testimony

In *DeVito v. Feliciano*, the Court of Appeals clarified the noncumulative testimony requirement of the missing witness charge: testimony will be considered cumulative *only* if it is cumulative of testimony presented by the non-calling party.[5]

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Even if the uncalled witness's testimony would be cumulative of testimony presented by the party requesting the charge, the judge can still instruct the jury as to the charge. To determine if the testimony would be cumulative, one needs to cross-check the testimony presented by the non-calling party.

In *DeVito*, the plaintiff alleged injuries to her nose and back as a result of an automobile accident. Plaintiff's medical records revealed that four months before the accident, plaintiff fell and sustained a minor concussion and an injury to her wrist. At the trial, two doctors testified on plaintiff's behalf that the motor vehicle accident was "the competent producing cause" of plaintiff's neck and nose injuries.

During defense counsel's cross-examination, however, the same doctors speculated as to the cause of plaintiff's nose injury. One doctor acknowledged that plaintiff "was not a good historian of her health" and added that based on his evaluation of plaintiff's medical records "it appeared that plaintiff had not suffered an injury to her nose on the date of the car accident."[6] The other doctor conceded that it was "possible that plaintiff sustained her nasal fracture at some point before the date of the car accident."[7]

Despite defense counsel's obvious goal to cast doubt upon the cause of plaintiff's injury, defense counsel did not call to testify any of the four doctors who had examined plaintiff on his behalf. Defense counsel opted, instead, to read portions of one of the doctor's deposition testimony into the record. The testimony defense counsel chose to read included statements by the doctor that plaintiff was "not a very reliable historian" and that the doctor "could not say with certainty that plaintiff's nasal fracture had been caused by the car accident."[8]

Plaintiff's counsel, noting the defense's failure to produce any of the four doctors at trial, requested that the court give a missing witness charge. The trial court denied the request and the jury returned a verdict in favor of the defendant.[9] The Appellate Division affirmed, holding that the jury's verdict was based on a fair interpretation of the evidence. The Appellate Court stated that the trial court did not "err in declining to provide a missing witness charge since plaintiff did not satisfy the elements that are a prerequisite for receiving the charge."[10]

The Court of Appeals reversed, finding that the trial court's failure to give a missing witness charge was prejudicial to a substantial right of the plaintiff. Defense counsel argued that the noncumulative precondition to the charge was not satisfied because the doctors' testimony would have been cumulative of the testimony of the witnesses who testified on plaintiff's behalf.[11] The Court of Appeals ruled that "an uncalled witness's testimony may properly be considered cumulative *only* when it is cumulative of testimony or other evidence favoring the party *controlling the uncalled witness.*"[12]

The Court relied on the Third Department's analysis in *Leahy v. Allen* in deciding the issue. The Third Department held that "one person's testimony properly may be considered cumulative of another's only when both individuals are testifying in favor of the same party."[13] The Third Department explained that without such a holding "there would never be an occasion to invoke [the missing witness charge]."[14]

The Court in *DeVito* acknowledged that plaintiff's counsel's appeal to the jury during closing – "[D]on't you think if [the doctors not called by the defense] had something to tell you that could help [defendant's] case, that could show my client didn't suffer these injuries as a result of this accident, don't you think they would be here?" – was not a substitute for the charge.[15]

Although the jury was capable of making an inference based on such a statement, the jury was not instructed that they could draw the "strongest inference." Furthermore, the Court stated that the testimony elicited during defense counsel's cross-examinations was not so conclusive as to cast doubt upon plaintiff's claims. For these reasons, the Court held that plaintiff was prejudiced by the trial court's failure to instruct the jury as to the missing witness charge.

The Other Preconditions

A) *Materiality*

Demonstrating that the uncalled witness testimony would be noncumulative in nature is only one piece to the puzzle. The other elements, however, are clearer and simpler than the non-cumulative testimony requirement.

With regards to materiality, the party seeking the benefit of the charge has the burden of establishing that the uncalled witness will give testimony *material to the issues in the case.* The charge would

be improper, for example, if the uncalled witness is a physician who previously treated or examined the plaintiff, but not with regard to injuries alleged in the pending action.[16]

In *Feneck v. First Union Real Estate & Mortgage Investments*, the court denied the missing witness charge as to plaintiff's primary care physician because the physician did not treat plaintiff for the injuries sustained in the accident and, thus, "could not provide testimony regarding a material issue in the case."[17]

The missing witness charge *is* proper, however, where the uncalled witness was an eyewitness to the incident in issue. In *People v. Hall*, the Court of Appeals held that the missing witness charge was proper where the three uncalled witnesses were eyewitnesses to the robbery in question and, thus, had knowledge material to the trial.[18]

In *Crowder v. Wells & Wells Equipment, Inc.*, the First Department held that the defendant bus company and bus driver were entitled to the missing witness charge as to the defendant taxi driver where plaintiffs, passengers of the taxi cab, had no recollection of the accident and the taxi driver would have been knowledgeable about a material issue since he was "in a position to give testimony with respect to whether or not the [taxi] was under his control prior to the impact with the [defendants'] bus."[19]

B) *Availability*

The availability requirement goes to the party's ability to produce the witness. A witness is unavailable if he or she is, among other things, beyond the jurisdiction of the court,[20] dead, missing, incapacitated or refusing to testify on Fifth Amendment grounds.[21] The party against whom the charge is sought has the burden of showing that the witness is unavailable to testify.[22]

In *Dukes v. Rotem*, the First Department found that the unavailability element was not met where, even though plaintiff claimed that the doctor failed to respond to her letters, there was no evidence that the doctor's medical records and testimony could not be obtained by means of a subpoena.[23]

In *Taveras v. Martin*, the First Department held that the party opposing the missing witness charge failed to demonstrate that the uncalled witness was unavailable where there was no evidence that the witness remained ill after his hospital release.[24]

C) *Control*

Finally, control refers to the witness's relationship to the party. A party who lists a witness usually expects that witness to testify on its behalf and, thus, the party exercises control over that witness.[25] "Control is used in a very broad sense and includes a witness under the influence of a party as well as one under a party's employment or management."[26]

Generally, where a party and a witness once had a strong relationship (i.e., boyfriend/girlfriend, employer/employee), but the relationship has since been "extinguished" (i.e., ex-boyfriend/ex-girlfriend, ex-employer/ex-employee), the element of control will not be satisfied.[27] However, in *R.T. Cornell Pharmacy, Inc. v. Guzzo*, the Third Department held that defendant's mere testimony that he was no longer in a business relationship with the witness did not "preclude a finding of control as a matter of law" since the defendant failed to offer testimony of a changed business relationship such that the witness would be "hostile or uncooperative" if called as a witness.[28]

In *People v. Smith*, the Second Department held that where a witness, among other things, indicated his unwillingness to cooperate, the party opposing the missing witness charge gave a "good reason for the witness's absence."[29]

In *Diorio v. Scala*, the Third Department concluded that the missing witness charge was properly denied where there was a lack of evidence as to plaintiff's control over the witness doctor since the uncalled witness doctor had not treated the plaintiff in the five years prior to trial and plaintiff had started treatment with another physician.[30]

Finally, in *Follett v. Thompson*, the Second Department denied a missing witness charge request where the only evidence submitted in support of the relationship between the witness and the defendant was that they were co-employees.[31] The record was devoid of any evidence of "friendship or loyalty" between the defendant and the witness to satisfy the element of control.[32]

CONCLUSION

The missing witness charge is an important tool and litigators who believe that the jury is being denied the whole picture due to a party's failure

The Missing Witness Charge: A Powerful Tool For Trial

to call a witness should request its instruction. "The mere failure of a party to produce a witness at trial, standing alone, is insufficient to justify a missing witness charge."[33] The charge will only be given after a request has been made, which should be made as soon as possible,[34] and the four preconditions are satisfied:

1. Materiality – the uncalled witness's testimony would be about a material issue in the case;
2. Availability – if it was not for the party's failure to call the witness, the uncalled witness would be available to testify;
3. Control – the uncalled witness, because of his relationship with a party, is expected to testify on that party's behalf; and
4. Noncumulative – the uncalled witness's testimony would be noncumulative of testimony presented on behalf of the non-calling party.

Failure to call a witness is clearly intentional. The failure is usually an attempt to prevent damaging evidence being provided by a "friendly" witness. This testimony can be devastating to one's case as opposing counsel will no doubt point out to the jury that the harmful testimony was supplied by someone friendly to that party and therefore it must be true.

The Court of Appeals' clarified definition of noncumulative testimony should encourage more parties to request the charge and inevitably hold opposing parties accountable for the absence of a vital witness.

(Endnotes)

1 N.Y. C.P.L.R. § 3101(d)(1) (McKinney 2013) ("Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify….").

2 N.Y. Pattern Jury Instr. 1:75 (2013) (emphasis added).

3 *People v. Savinon*, 100 N.Y.2d 192, 196, 761 N.Y.S.2d 144, 146-47 (2003) (internal quotation marks omitted).

4 *See id.* at 197; *People v. Gonzalez*, 68 N.Y.2d 424, 427, 502 N.E.2d 583 (1986).

5 *DeVito v. Feliciano*, 22 N.Y.3d 159, 1 N.Y.3d 791 (2013).

6 *Id.* at 163.

[7] *Id.* at 164.
[8] *Id.*
[9] *DeVito v. Feliciano*, 2010 WL 6971895 (Sup. Ct. Bronx Cnty, 2010).
[10] *DeVito v. Feliciano*, 84 A.D.3d 645, 924 N.Y.S.2d 330 (1st Dep't 2011).
[11] *DeVito*, 22 N.Y.3d at 166.
[12] *Id.* (emphasis added).
[13] *Leahy v. Allen*, 221 A.D.2d 88, 92, 664 N.Y.S.2d 88 (3d Dep't 1996).
[14] *Id.*
[15] *DeVito*, 22 N.Y.3d at 165, 167.
[16] *Feneeck v. First Union Real Estate Equity & Mortg. Invs.*, 266 A.D.2d 916, 916, 697 N.Y.S.2d 442 (4th Dep't 1999).
[17] *Id.* at 916.
[18] *People v. Hall*, 18 N.Y.3d 122, 936 N.Y.S.2d 630 (2011).
[19] *Crowder v. Wells & Wells Equip., Inc.*, 11 A.D.3d 360, 361, 783 N.Y.S.2d 552, 554 (1st Dep't 2004).
[20] *See Cohen v. Lukacs*, 272 A.D.2d 501, 708 N.Y.S.2d 133 (2d Dep't 2000) (uncalled witness was unavailable as a matter of law where, at the time of trial, she resided in another state and was "beyond the jurisdiction of the court"); *see also* Zeeck v. Melina Taxi Co., 177 A.D.2d 692, 576 N.Y.S.2d 878 (2d Dep't 1991).
[21] *See* N.Y. Pattern Jury Instr. 1:75 cmt. II.C (2013).
[22] *People v. Gonazalez*, 68 N.Y.2d 424, 509 N.Y.S.2d 796.
[23] *Dukes v. Rotem*, 191 A.D.2d 35, 40, 599 N.Y.S.2d 915, 918 (1st Dep't 1993).
[24] *Taveras v. Martin*, 54 A.D.3d 667, 863 N.Y.S.2d 475 (2d Dep't 2008)
[25] *See People v. Hall*, 18 N.Y.3d at 131, 936 N.Y.S.2d at 630 (holding that the uncalled witness was in a party's control where the uncalled witness "could have been expected to support his version of events").
[26] *Chandler v. Flynn*, 111 A.D.2d 300, 301, 489 N.Y.S.2d 289, 291 (2d Dep't 1985).
[27] *See* In Re Judicial Settlement of Second Intermediate Account of Chase Manhattan Bank, 2 Misc. 3d 1002(A), 784 N.Y.S.2d 921 (Sur. Monroe Cnty. 2004) (holding that the element of control was missing where witness was a *former* employee of the petitioner); *see also People v. Gonzalez*, 68 N.Y.2d 424, 502 N.E.2d 583 (1986) (defense counsel entitled to missing witness charge where the people failed to call complainant's husband as a witness); Buttice v. Dyer, 1 A.D.3d 552, 767 N.Y.S.2d 784 (2d Dep't 2003) (ex-girlfriend was not under party's control).
[28] *R.T. Cornell Pharmacy, Inc. v. Guzzo*, 135 A.D.2d 1000, 1001, 522 N.Y.S.2d 725, 726 (3d Dep't 1987)
[29] *People v. Smith*, 71 A.D.3d 1174, 1175-76, 898 N.Y.S.2d 599 (2d Dep't 2010), *citing Savinon*, 100 N.Y.2d at 196.
[30] *Diorio v. Scala*, 183 A.D.2d 1065, 583 N.Y.S.2d 654 (3d Dep't1992).
[31] *Follett v. Thompson*, 171 A.D.2d 777, 778, 567 N.Y.S.2d 497, 498 (2d Dep't 1991).
[32] *Id.*
[33] *People v. Morris*, 140 A.D.2d 551, 552, 528 N.Y.S.2d 630 (2d Dep't 1988).
[34] Early notification "allow[s] the court to appropriately exercise its discretion and the parties to adjust trial strategy." N.Y. Pattern Jury Instr. 1:75, cmt. (citing *People v. Gonzalez*, 68 N.Y.2d 424, 509 N.Y.S.2d 796 (1986)).

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Does The Longshore And Harbor Workers' Compensation Act Preempt New York State Labor Law In Maritime Construction Accident Cases

DANIEL G. McDERMOTT*

Whether a case falls within the purview of admiralty jurisdiction, either in State or Federal Court, can have a significant impact on remedies available to an injured employee. The threshold test is whether the struct ure on navigable waters can be classified as a "vessel". If so, the Federal Longshore and Harbor Workers' Compensation Act ("LHWCA") will apply. If not, the New York State Labor Law §§240(1) and 241(6) will apply. The standards utilized, the burden of proof needed and the applicability of comparative negligence are all effected.

Whether the LHWCA preempts the New York State Labor Law in maritime construction accidents involves the interplay between the two statutes, and a question of whether the dock builder or some other maritime worker who does not go to sea can receive the benefits of the New York State Labor Law, which has strict liability requirements. The short answer to the question is - "It depends!"

Before discussing the interplay between the two statutes, it is imperative that they be reviewed briefly.

Initially, there are three sections of the Labor Law which are relevant to this topic. The first is §200, which essentially is a codification of the duty the employer had at common law to provide a safe work place for its employees. It requires a showing of negligence on the employer's part before liability can attach. The Labor Law basically applies to construction workers or individuals involved in renovation, cleaning of buildings, and things of that nature.

The next section is Labor Law §240(1) which deals with elevation-related hazards. This is a strict liability statute, meaning that there is no requirement that negligence be established. Basically, all that an employee needs to show is that he/she was injured on the job and that there was a casual connection between a violation of the statute and the injury sustained. Essentially, the employer is liable for the injuries even if the employer argues that it did not do anything wrong.

The third section of the Labor Law that has applicability is §241(6). This section requires that an employer of an individual involved in construction0, excavation or demolition work shall have a work area that is constructed so as to provide reasonable and adequate protection and safety to the persons employed or frequenting the work area.

New York Labor Law §§200, 240(1) and 241(6) apply to: all contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.

Now, §905 (b) of the LHWCA is also directed to a specific class of employees, namely, maritime workers who are not seamen. Seamen are covered under a different statute, 46 U.S.C. §688, commonly known as the Jones Act. This act extends the Federal Employer's Liability Act (FELA) to seamen. What is the different between a seaman and a non-seaman maritime employee? Essentially, the seaman is involved in the operation of the vessel, while the maritime worker is land-based. The maritime worker may work on a vessel when it is stationary, such as a barge. If the employee is injured during the course of his employment, he cannot sue his employer, but must take benefits as provided in the statute. Essentially, the LHWCA is a maritime employee's workers compensation scheme. On the other hand, if he is not the employee of the vessel and is injured as the result of negligence of the owner of the vessel, or by the vessel itself, §905(b) provides that he may sue the vessel owner even if the vessel is owned by his employer. In such a case, the employer is known to have a "dual capacity". In such a case, the employer can be sued as "vessel owner' but not in his capacity as employer. §905(b) is not a strict liability statute, but it allows the employee to recover

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if he can establish that there was negligence on the part of the vessel that resulted in or proximately caused the employee's injuries.

The LHWCA set forth the requirements for coverage. "Status" refers to the nature of the work performed; "situs" refers to the place of performance. The employee claiming benefits under the LHWCA must be engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, including any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. There are specific exclusions which apply to status.

The jurisdictional trigger for a claim under the LHWCA is an injury upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel). Jurisdictional questions based on issues of situs are fact-sensitive.

The key question to be asked is "what is a vessel?" That answer can be found in 33 U.S.C. §3: "the word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

These issues were raised and determined in a case entitled *Lee v. Astoria Generating Co., et al.*, 13 NY 3d 382 (Ct. of Appeals 2009), *cert. denied* US, 131 S.Ct. 215 (2010).

The Gowanus Gas Turbines Electric General Facility in Brooklyn, New York, owned and operated by Astoria Generating Company and Orion Power, maintained four barges on the Gowanus Canal that supported gas turbine generating units. The barges were attached to a power grid but were moved approximately once per decade for maintenance. Two of the barges had been moved for use as additional power sources.

Elliot Turbomachinery Co., Inc. and Elliot Company ("Elliot") were hired to overhaul the turbines at the Gowanus facility and employed the plaintiff, Lee. The plaintiff was injured when he slipped off a ladder entering a hatch on Barge No. 1, and he subsequently received benefits under the LHWCA as a land-based maritime employee.

The plaintiff commenced suit against Astoria/Orion alleging New York Labor Law §§200, 240(1) and 241(6) claims and common law negligence claims. Astoria/Orion filed a third-party complaint against Elliot for indemnification. The defendants both moved for summary judgment on the basis that the State Labor Law claims were preempted by the LHWCA and Federal Maritime Law. The New York Supreme Court granted summary judgment in favor of the defendants on the basis that 33 U.S.C. §905(a) precluded the claims against them as an employer (Elliot) and *via* preemption (Orion). The Appellate Division, Second Department, reversed and granted summary judgment for the plaintiff, holding that the barge did not constitute a vessel and the New York Labor Law claims were therefore not preempted. The Appellate Division awarded summary judgment pursuant to Labor Law §240(1). The Appellate Division granted the defendants' leave to appeal to the Court of Appeals. The Court of Appeals reversed, and the Order of the trial court was reinstated.

The Court of Appeals first examined whether the barge in controversy could be classified as a vessel in order to determine if the LHWCA were applicable law in this case. Under the LHWCA, an injured person cannot assert an action directly against his employer, but the Act does allow for negligence claims against third parties or any vessel involved in the injury. To evaluate whether the barge in question could be classified as a vessel, the Court looked to the U.S. Supreme Court's definition of a vessel, a "watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." *Stewart v. Dutra Construction Co.,* 543 U.S. 481 (2005)). Using this description, the Court reasoned that because the barge was located on navigable waters, was capable of being moved for maintenance and in emergencies and was not permanently anchored or moored, it fell within the Supreme Court's definition of a vessel. The Court therefore held that the LHWCA was the applicable law.

The Court then analyzed the second issue, whether the LHWCA, as federal law, preempted the New York Labor Law claims asserted by the plaintiff. Under the Supremacy Clause, a state law

is preempted by a federal law by "express provision, by implication, or by a conflict between federal and state law." The Court found that 33 U.S.C. §905(b) expressly preempted the New York Labor Laws because the LHWCA explicitly states that any remedy derived from an action brought against a vessel under the LHWCA "shall be exclusive of all other remedies." The Court consequently held that because the LHWCA was the applicable federal maritime law, the plaintiff's state law claims were preempted and the Order of the trial court was to be reinstated. This decision holds great importance because New York Labor Law §240(1) (so-called "Scaffold Law") imposes strict liability on contractors and property owners for elevation-related injuries at construction sites.

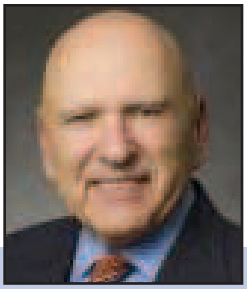
The Court of Appeals distinguished its holding in this case from *Cammon v. City of New York*, 95 NY 2d 583 (2000) which involved an injured worker receiving benefits under the LHWCA against a defendant landowner (City of New York). The distinction was based on the fact that *Cammon* did not involve §905(b)'s "Negligence of Vessel" as set forth in the LHWCA. The Court stated, "While it is true that Federal Maritime Law does not generally supersede state law, in this case, where Congress explicitly limited claims against the vessel owner to that Federal Act, state law claims are preempted."

Since the decision in *Lee,* there have been two cases in the Second Department more or less addressing related issues. The first involved Elsayed Eldoh, *Eldoh v. Astoria Generating Co.,* 81 AD 3d 871, (2d Dept. 2011) was also injured at the Astoria Generating plant. Eldoh was an employee of a company charged with overhauling one of the turbines on the barges. Among the parties he sued was the general contractor (Eldoh was an employee of a sub-contractor) which was retained by the owners of the vessel and the plant to repair the turbines. The Court found that Eldoh's suit against the general contractor could go forward because the general contractor was neither the owner of the vessel nor the plaintiff's employer. Thus, he could bring the action against the general contractor under Labor Law §240(1) and Labor Law §241(6). The Court found that these causes of actions were not preempted and, as well, that common law negligence claims against the general contractor were also not preempted. It should be noted that if the general contractor were found liable, he could not seek indemnity from Eldoh's employer because of the exclusivity provision of §905(b). The general contractor could probably be able to proceed against the vessel owner for indemnity but only for negligence – not strict liability.

In another case, *Ashjian v. Orion Power Holdings*, 70 AD 3d 738 (2d Dept. 2010), plaintiff was also working on an overhaul of a turbine engine which was located on a barge at the same work project as in the *Lee* case. In this case, the plaintiff fell into an unguarded open hatch on the deck of the barge. The Court, citing *Lee*, threw out his claims under §240(1) and §241(6) on the grounds that they were preempted by the LHWCA. The Court also threw out on the merits, *Ashjian's* common law negligence claim, as well as his claim under §200 because the plaintiff could not establish that the owner had notice of the alleged defective condition, *i.e.*, the open hatch.

A more recent case that seems to revert to the reasoning of *Cammon* may clarify the apparent dichotomy between *Lee* and *Cammon*. In *Scheller v. Turner* (Index No. 14508/06, Kings County) (2010) (unpublished), the plaintiff suffered injuries when he fell into the water from a jerry-rigged gangway leading from a pier to a barge during a construction project at Pier 12 of the Brooklyn-Port Authority Terminal. Various parties were sued and each of the defendants made a motion to dismiss. The Court identified each party, and depending upon their role, applied LHWCA to the maritime defendants and Labor Law to the land-based defendants. The Court found that state laws were not preempted by the LHWCA as against the general contractor and land-based defendants. The case went up on appeal to the Appellate Division, Second Department but the appeal was never perfected.

The takeaway point from this article is that an injured maritime employee is covered by §905(b) of the LHWCA as to the owners of the vessel and the vessel itself. If the responsible parties were land-based, then the state labor laws will be applicable.



Zone Of Danger And The No Fault Law

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

In *Bovsun v Sanperi*, the New York Court of Appeals adopted the zone-of-danger or bystander liability doctrine, holding:

> Where a defendant's conduct is negligent as creating an unreasonable risk of bodily harm to a plaintiff and such conduct is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family in his or her presence, the plaintiff may recover damages for such injuries.[1]

Three elements must be present before liability may be imposed under the zone-of-danger doctrine: (1) The defendant's conduct must be a substantial factor in causing serious injury or death to the third party; (2) The plaintiff must be within the zone-of-danger; and (3) The injured person must be an "immediate family member" of the plaintiff. In *Bovsun*, the Court of Appeals also emphasized that a claimant's emotional distress must be "serious and verifiable."[2]

A plaintiff is within the z0one-of-danger only if she is subject to the danger of bodily harm or death, although it is not necessary that she actually sustain bodily injury or be killed. For example, in *Zea v. Kolb,* the Fourth Department found that the plaintiff, a mother, was not within the zone-of-danger when her daughter was struck and killed by the defendant's vehicle while riding her bicycle on the shoulder of a road.[3] Although the plaintiff, who was standing in a neighbor's driveway on theopposite side of the road, ran down the street out of fear for her daughter's safety, she remained on the opposite side of the road from her daughter and never overtook the defendant's vehicle. She also admitted that she was never in danger of the defendant's car. The court held that the possibility that she "could have been struck by a vehicle other than the defendant's or because she could have been struck by her daughter's body, which was thrown into the air upon impact," was insufficient to place her within the zone-of-danger.[4]

Additionally, there is no requirement that the plaintiff directly observe the immediate family member sustain injury, rather, the "observation requirement is satisfied if the 'peril or harm to such [family member] occurs in the plaintiff's presence'" and "there is a contemporaneous awareness of injury or death."[5]

Under the rule in *Bovsun,* the plaintiff does not have to distinguish between damages flowing from emotional distress sustained as a result of his or her own injuries and those sustained by observing injury or death to a family member. For example, in *Bovsun*, the majority opinion mentioned that one of the benefits of its holding was that it would "obviate the practical difficulties that juries otherwise have to face in seeking to separate the emotional distress

1 *Bovsun v Sanperi*, 61 NY2d 219 (1984).

2 *Bovsun*, 61 NY2d at 231 ("We are not suggesting that any trifling distress would be sufficient to support recovery of damages under the zone-of-danger rule.").

3 *Zea v Kolb*, 204 AD2d 1019 (4th Dept 1994).

4 *Zea*, 204 AD2d at 1020; *see also Wallace v Parks Corp*., 212 AD2d 132 (4th Dept 1995) (holding husband and sons of user of a camping stove were within zone-of-danger because they sustained injuries during rescue of user, but daughter of camping stove user was not because she had run out of house when fire began);*Kurth v Murphy*, 255 AD2d 365 (2d Dept 1998) (finding a material question of fact as to whether mother was within zone-of-danger when defendant's vehicle was moving toward both mother and daughter and mother was about eight feet from her daughter when daughter was struck).

5 *Cushing v Seemann*, 247 AD2d 891 (4th Dept 1998), citing *Bovsun v Sanperi*, 61 NY2d 219.

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suffered by a plaintiff attributable to his own physical injuries or fear thereof from the plaintiff's emotional distress in consequence of observing an injured or dying family member."[6]

A few years following *Bovsun*, the New York Supreme Court was asked to determine, for the first time, whether a person who sustains only mental injuries in a zone-of-danger situation is subject to proving that they also suffered a "serious injury" under the No-Fault law in *Delosovic v. City of New York*.[7] Insurance Law §5104(a) provides that no action to recover "non-economic loss" by a "covered person…for personal injuries arising out of negligence in the use or operation of a motor vehicle" may be maintained "except in the case of serious injury." The *Delosovic* court held that a plaintiff asserting a zone-of-danger claim does not need to establish a "serious injury" under the No-Fault law. The trial court's decision was ultimately affirmed by the Appellate Division, but without opinion and, thus, is the controlling law of this State.

The court's decision in *Delosovic* was premised upon the rationale that when the New York courts recognized the validity of a zone-of-danger claim in 1984 in *Bovsun*, a new cause of action was essentially created that did not exist at the time the No-Fault law was adopted in 1973. In other words, New York did not recognize a cause of action for emotional distress absent the existence of physical injury prior to the time that the No-Fault law was enacted. As such, according to the *Delosovic* court, the No-Fault law could not have been created with the legislative intent that no physical injury was required before damages could be awarded under the statute. To the contrary, the *Delosovic* court concluded that the No-Fault statute absolutely requires a showing of a serious "physical" injury before the claimant can recover.

However, the *Delosovic* court reasoned that, although a person claiming mental distress emanating from his or her own physical injuries sustained in a motor vehicle accident would have to satisfy the "serious injury" prerequisite to recover for the emotional injuries, the *Bovsun* decision carved out a specific exception for a zone-of-danger claimant. In short, the *Delosovic* court held that zone-of-danger claims fall outside the confines of the No-Fault law because the zone-of-danger doctrine does not require a claimant to have sustained a serious "physical injury" (via *Bovsun*) but the No-Fault law does. [8]

It is our opinion that, although *Delosovic* is the leading case in New York on the subject, it was incorrectly decided by the courts. Indeed, despite the reasoning of the *Delosovic* court, there is nothing within the four corners of the NoFault statute that would lead anyone to believe that it requires a plaintiff to demonstrate a "physical" injury before they are entitled to seek recovery thereunder. Instead, the statute provides that a claim for noneconomic loss can be maintained for "personal" injuries, if those injuries are "serious." There is nothing that would indicate that emotional distress injuries cannot be "personal" injuries. Simply stated, the court's conclusion that a claimant's injuries must be "physical" in nature in order for the No-Fault statute to be implicated was entirely baseless.

This is especially true in light of the Appellate Division, Third Department's more recent decision of *State Farm Mutual Automobile Ins. Co. v. Glinbizzi.*[9] There, the Court held that a plaintiff's zone-of-danger cause of action to recover for psychological injuries was covered under the insuredtortfeasor's automobile liability policy. There, State Farm's insured's vehicle struck and killed a pedestrian who was walking with his son. The son brought an action against the insured

[6] *Bovsun*, 61 NY2d at FN 10; *see also Cushing v Seemann*, 247 AD2d 891 (finding no basis for defendants' attempt to distinguish between emotional injuries suffered by plaintiff as a result of her own involvement in the accident and those suffered in consequence of observing her son's injury and death).

[7] *Delosovic v City of New York*, 143 Misc2d 801 (Sup Ct, New York County 1989), *affd* 174 AD2d 407, *lv denied* 79 NY2d 751 (1991).

[8] The *Delosovic* court rendered its decision despite the decision of the Supreme Court, Onondaga County in *Tarolli v Rossotti*, which dismissed plaintiff's claim for damages arising from psychic injuries allegedly resulting from her observing her husband sustain physical injuries (*Tarolli*, 141 Misc2d 107 [Sup Ct, Onondaga County 1988]). The *Tarolli* court concluded that allowing a plaintiff to recover solely for emotional distress without a showing of "serious injury," would defeat the purpose of the No-Fault law.

[9] *State Farm Mutual Automobile Ins. Co. v Glinbizzi*, 9 AD3d 756 (3d Dept 2004).

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Event Data Recorders and the Defense of Transportation Claims

CLAIRE F. RUSH*

On board event data recorders and telematic technology are swiftly changing the ways in which personal injury transportation cases are investigated, defended and tried. To effectively litigate cases where an event data recorder is present attorneys must understand the underlying processes by which the transportation industry is collecting, storing, extracting, aggregating, analyzing and utilizing data. Recent legislation and case law dealing with such questions as who owns and can use data collected in a transportation setting foreshadow many legal battles to come.

Event Data Recorders

In order to fully appreciate the magnitude of the changes this new technology will initiate in the ground transportation arena, attorneys' must understand what Sensing Diagnostic Modules (SDM's), Restraint Control Modules (RCM's) and Event Data Recorders (EDR's) are and how they function. SDM and RCM chips are the computer hardware that traditionally activate a vehicle's passive restraint system. These devices detect sudden changes in direction and/or rotation. When certain data thresholds are detected an SDM or RCM will send a signal to the event data recorder (EDR) to preserve specified information regarding the driver's and vehicle's pre and post event performance.

Once the threshold limits are exceeded performance data is downloaded to the EDR. In the meantime, the chips continue to monitor data from the vehicle's occupant, seat belt and crash sensing systems in order to determine whether or not to deploy the vehicle's airbag and passive restraint devices. Where the airbags and passive restraint systems are deployed the information is permanently preserved on the EDR. Where the passive restraint system does not deploy information pertaining to the event is generally preserved for approximately 250 more ignition cycles.

Today, event data recorders are installed in almost every new automobile manufactured in the United States. Some vehicles are manufactured with additional sensing diagnostic modules that are associated with the Powertrain Control Module (PCM) and/or Rollover Sensor module (ROS). These sensing modules operate independently of the SDM and RCM chips associated with the EDR for the passive restraint system.

Federal regulation of event data recorders began in 2006 when The National Highway Transportation and Safety Administration (NHTSA), adopted a series of regulations governing the minimum requirements for EDR's in light weight vehicles. See, 49 CFR 563. These regulations require car manufacturers who voluntarily install EDR's to record fifteen discrete automotive performance factors five seconds before and after a crash. These variables include how fast the car was travelling, whether the driver applied the brakes, whether the driver was wearing a seat belt, the time that elapsed before the air bags deployed, and how far the accelerator was depressed. This rule also requires manufacturers to make a commercially available tool to permit third parties to download any information captured and preserved on the EDR. Finally this regulation sets forth standards for data capture and format as well as minimum thresholds for data crash survivability

In an effort to further enhance the use of information gleaned from EDRs and improve vehicle safety the NHSTA proposed a new rule in December 2012 that would mandate the installation of EDRs in all new cars, light trucks, vans and SUVs manufactured in the United States beginning in September 2014. This proposed rule which has yet to be adopted would establish a Federal Motor Vehicle Safety Standard (FMVSS) and would require all "light vehicles" to be equipped with EDRs that meet the data elements, data capture and format,

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data retrieval, and data crash survivability of 49 CFR Part 563, Event Data Recorders .

Vehicle Telematics

Thanks to advances in wireless communication technologies the data downloaded by a vehicle is increasingly available to drivers, businesses and insurers on a real time basis. This wireless interconnectivity is called telematics. Telematics as used in the automotive industry refers to the integrated use of informatics and wireless technology for the purpose of sending, receiving, storing and acting upon "big data" via telecommunication devices. Global positioning systems, navigation systems, traffic information, emergency response systems and stolen vehicle tracking devices are all relatively recent technological advancements that are premised upon telematic technologies. Telematics is no longer a luxury option but rather a business necessity in the new car market. Current projections suggest that over 60 million vehicles will be equipped with a telematics system by 2019.

The sheer amount of data each and every vehicle can and will generate is mind boggling. The average car on the road today which monitors everything from tire pressure, engine RPM, oil temperature and speed, can produce anywhere from 5 to 250 gigabytes of data an hour. Advanced concept cars, such as Google's self- driving vehicle, currently generate about 1 gigabyte of data every second (the equivalent of sending 200,000 plain text e-mails or uploading 100 hi-resolution digital photos). The collection and preservation of this information will pose significant logistical headaches for those who are charged with the duty of collecting, preserving and sharing this data as well as for those who will be called upon to develop analytics programs to manage, analyze and leverage the resulting data.

EDRs, Telematics and Emerging Legal Issues

The insatiable demand for "big data" by manufacturers, owners, insurers, government and third parties is fueling a whole host of legal challenges in the area of EDR technology and telematics. One of the earliest controversies in this arena stemmed from attempts by third parties to simply access EDR data. In the ground transportation industry EDRs were initially installed to provide car manufacturers with specific information regarding the performance of their vehicles. Over time police agencies and attorneys began to increasingly demand access to this information to assist in the prosecution and defense of criminal and civil cases. Counsel for the car manufacturers initially resisted requests for this information on the grounds that the data was proprietary. That portion of the NHSTA part 563 regulations that requires vehicle manufacturers to make tools commercially available to enable crash investigators to retrieve EDR information was enacted in direct response to the refusal of the transportation industry to disclose this data to third parties.

One would think that issues pertaining to who owns a vehicle's data, who can access that data and for what purposes the data can be used would be dictated by federal law. Congress however has abdicated its power to legislate with respect to these issues to state authorities. The inaction of our federal government has resulted in a crazy patchwork quilt of local laws and state court decisions.

Statutory Requirements for EDRs in New York State

To date only thirteen states have enacted legislation governing the ownership and use of EDR data. Vehicle and Traffic Law § 416-b entitled "Vehicle data recording devices" addresses these issues in New York State. This statute provides that where a manufacturer equips a new vehicle with an EDR or SDM type device, it must disclose the presence of this hardware to consumers in the vehicle "owner's manual". For purposes of this statute an EDR is broadly defined to include any device installed for the purpose of capturing data after a crash in order to either record speed, direction, location, seatbelt status and steering and brake performance or transmit information regarding the happening of an accident to a central communications system. Ownership of the data is deemed to reside in any person "having all the incidents of ownership, including the legal title of a vehicle whether or not such person lends rents or creates a security interest in the vehicle." Data preserved on an EDR may not be downloaded or otherwise retrieved by a person other than the owner of the motor vehicle unless either : (1) the owner of the motor vehicle or the owner's agent or legal representative consents;(2) there is a Court Order; (3) the data is accessed

solely for the purpose of improving motor vehicle safety, security or traffic management including for medical research of the human body's reaction to motor vehicle crashes, provided that the identity of the registered owner or driver is not disclosed ; (4) the data is retrieved, for the purpose of diagnosing, servicing, or repairing the motor vehicle; or (5) the data is accessed for the purpose of determining the need for or facilitating an emergency medical response in the event of a motor vehicle crash.

While the New York State legislature should be applauded for having tried to address these issues it is clear that the present law does not go far enough. In the first place it fails to set forth standards for after- market EDR devices. This hardware often installed in vehicles at the behest of fleet managers and insurers is subject to no regulation at present in New York. Moreover, it fails to resolve the issues as to who owns data as between titled owners, registered owners, lessees and drivers. Of even more importance from a privacy standpoint is the fact that this statute does not address data recorders that are not installed for the purpose "of capturing data after a crash". The present law simply does not confront the issue as to whether or not a car manufacturer may access and "sell" non-crash related data to data brokers. This is particularly important in view of the proliferation of telematic technology which can provide a bird's eye view into a driver's habitual routes and destinations. Connected drivers in the UK for instance are regularly bombarded with coupons and ads from businesses they typically pass during their auto commutes.

EDRs and Discovery Issues

In the context of garden variety tort claims New York Courts routinely find that accident related data preserved by an EDR is "material and necessary" and typically order the disclosure of such data. *See generally*, Heltz v. Barratt, 115 AD3d 1298 (4th Dept 2014); Williams v. NYCTA, 26 Misc3d 1207 (Sup Ct, Kings County 2010); Then v. NYCTA, 22 Misc.3d1129 (Sup Ct, Queens Co. 2009). While an individual who fails to secure EDR data will generally be excused, commercial carriers and fleet operators can rest assured that they will become embroiled in expensive and unnecessary motion practice if they do not adopt procedures for downloading, preserving and producing EDR data. A carrier's failure to preserve such evidence will surely provoke a spoliation motion while the failure to adopt protocols for the collection and preservation of EDR data will engender *motions in limine* to exclude such data as unreliable or inauthentic.

Authentication of EDR Data

Although no reported cases in New York specifically address the foundation that must be laid to authenticate EDR data, attorneys should follow the general rules for authenticating evidence. Authentication is established by proof that the offered evidence is genuine and that it has not been tampered with. People v McGee, 49 NY2d 48, 59 (1979). In New York State common carriers and fleet operators would be best served by adopting written procedures for downloading and preserving EDR data. Such protocols should, at a minimum, include preservation of the hardware (i.e. chips and EDR's), where practical, together with the electronic files in which the data is downloaded. Where data is transmitted via telematics encryption should be mandatory. In addition, data files should be preserved in native format and include all corresponding metadata. Persons and/or units charged with the responsibility of preserving, maintaining and producing EDR data should be explicitly identified and chain of custody practices strictly enforced. Finally, protocols must be adopted to insure that such data is not compromised or deleted in the course of ordinary computer processing and/or backup.

The Proponent of EDR Evidence Must Demonstrate it is Reliable and Generally Accepted

New York courts have held that accident data downloaded from a vehicle's passive restraint system may be admitted into evidence without the need for a *Frye* Hearing. *See*, Frye v. U.S., 293 F. 1013, 1014 (D.C. Cir. 1923). The leading case on this issue is People v. Hopkins, 6 Misc 3d 1008 (Sup Ct, Monroe County 2004), *affd* , 46 AD3d 1449 (4th Dept 2007). The Appellate Division in *Hopkins* upheld a trial court's denial of a motion for a *Frye* hearing with respect to the admissibility of EDR data downloaded from a sensing diagnostic module (SDM) in defendant's automobile. The Fourth Department observed that a court need not hold a Frye hearing where it can rely

upon previous rulings in other court proceedings. The Court, citing Bachman v. General Motors, 332 Ill.App.3d 760 (4th District 2002) and People v. Christmann, 3 Misc3d 309 (Newark Justice Ct, Wayne County 2004) concluded that since data downloaded from a passive restraint system has been "generally accepted as reliable and accurate" by the automobile industry and the National Highway and Traffic Safety Administration a *Frye* Hearing was unnecessary.

The *Bachman* case provides a text book example of how to get EDR data admitted into evidence. Plaintiff in *Bachman* claimed that an airbag improperly deployed causing her to lose control of her car and be injured. Data downloaded by the vehicle manufacturer in this products liability case indicated that the car's passive restraint system had properly deployed in response to a crash. Plaintiff's counsel made a *motion in limine* to exclude the data as unreliable and requested a *Frye* Hearing to establish the reliability and general acceptance of the processes by which the data was created, downloaded and preserved.

At the resulting *Frye* hearing GM produced evidence from multiple engineers regarding the development and design of its SDM/ EDR system. GM's witnesses included a senior product engineer who was responsible for designing and developing SDM/ EDR systems, a systems engineer responsible for implementing the SDM/ EDR technology in the specific vehicle model, a supervisor of diagnostic software who released the data to a third party so that it could develop a commercially available crash data retrieval system as dictated by 49 CFR 563 and an engineer who had prepared a peer reviewed paper addressing the reliability of the resulting data. The Court denied plaintiff's *motion in limine* and a jury ultimately returned a verdict in GM's favor.

Attorneys who wish to proffer data downloaded from EDR hardware not associated with a vehicle's passive restraint system must be prepared to defend the integrity of the data at a *Frye* Hearing. In People v. Muscarnera, 16 Misc3d 622 (Dist Ct, Nassau County 2004) a trial court ruled that where data is downloaded from the Powertrain Control Module (PCM) as opposed to the passive restraint system, the proponent of the evidence must establish via a *Frye* Hearing that the data generated by this technology is generally accepted as reliable in the automotive community. Counsel proffering evidence from these types of EDRs should establish that the technology has been tested and subjected to peer review and publication. Known and/or potential error rates should be conceded and industry performance standards identified and conformed to. To insure the admissibility of novel types of EDR data the proponent of this evidence must demonstrate that: (1) the engineering principles relied upon to obtain and preserve the data are generally accepted as reliable; (2) there is general acceptance that the technology utilized is reliable, replicable and produces accurate results; and (3) the methods used to collect, download, preserve and produce the data were conducted in such a way as to yield an accurate result.

Attorneys litigating in this area should also be aware that EDR data not related to the passive restraint system is typically accessed through a vehicle's Onboard Diagnostic Connector (OBD-II). A vehicle's OBD-II system permits auto repair technicians to use a standardized digital communications port to obtain information regarding the functioning of a vehicle's various sub-systems. Unfortunately, OBD-II systems are easy to tamper with and EDR data can thus be intentionally or unintentionally compromised. Testimony regarding the procedures followed to download such information is essential in order to successfully authenticate the resulting data.

As telematic transmission of EDR type information becomes increasingly ubiquitous attorneys must also be prepared to defend or attack the integrity of the telematic processes whereby a vehicle's data is wirelessly transmitted, collected and preserved. A vehicle's computer system may just as easily be compromised today through the hacking of a wireless signal as it can through the manipulation of a physical port. Vehicle information transmitted via telematics is almost always subject to alteration since it is not routinely encrypted. Modern vehicles use a number of wireless devices including Bluetooth and cellular connections that expose the vehicle's on board computer systems to hacking. Until such time as telematically transmitted vehicle data is routinely encrypted, the integrity of such data will be difficult to authenticate.

Event Data Recorders and the Defense of Transportation Claims

EDR Evidence Must be Introduced via Competent Expert Testimony

Whether at trial or on a motion for summary judgment, competent expert testimony must be utilized to present and explain the significance of EDR generated data. Expert testimony is necessary to describe how EDR's function and how the data is downloaded. Moreover it is imperative that the expert possess the knowledge, skill, experience and education necessary to interpret data generated by the subject EDR. A lawyer who attempts to cut corners by hiring a frequent testifier does so at his own peril where EDR issues are in play.

In Figueroa v. Gallager, 2005 NY Slip Op 05760 (2nd Dept 2005), plaintiffs claimed to have sustained enhanced injuries due to the failure of a truck's airbag system to properly deploy. The manufacturer moved for summary judgment arguing that the airbag system functioned properly. In support of its motion the manufacturer submitted an affidavit from a mechanical and automotive engineer with expertise in the area of airbag design and safety. In support of this affidavit the witness downloaded information from the passive restraint SDM and concluded that the impact was below the commonly accepted threshold level for airbag deployment. In opposition to the motion plaintiffs submitted an affidavit from a purported automobile safety expert who merely stated that the air bag and seat belt restraint system had not worked properly. In reply the manufacturer noted that plaintiffs' expert was not an automotive engineer with any recognized expertise in the design of air bags and did not refer to any generally accepted measurements, tests or other expert analysis or studies which would support his conclusion that the passive restraint system failed. The trial court agreed with the manufacturer and nonsuited the plaintiffs.

CONCLUSION

Attorneys who litigate in the transportation area must become familiar with event data recorders and the technologies by which they generate data. As the collection of EDR data becomes more and more frequent trial attorneys will be expected to be conversant with the processes by which this electronic evidence is collected, preserved and disseminated.

Zone Of Danger And The No Fault Law

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alleging a zone-of-danger claim for psychological injuries he sustained when witnessing the accident and his father's death. State Farm then commenced a declaratory judgment action seeking a declaration that the policy did not cover the son's injuries under its definition of "bodily injury." [10]

In denying State Farm's motion, the trial court held that State Farm was obligated to indemnify its insured for any judgment obtained by the son for his zone-of-danger claim. In affirming the decision of the trial court, the Appellate Division held that the policy's definition of "bodily injury" was ambiguous and subject to two interpretations: (i) The sickness, disease or death must inure to the same person who suffered the bodily injury, or (ii) Any sickness, disease or death to any person is covered if it results from bodily injury to the same or different person. Accordingly, the Appellate Division reasoned that the average insured would expect that the purely psychological injuries sustained by the son as a result of witnessing the death of a relative while in the zone-of-danger would be covered under the policy.

The decision in *Glinbizzi* is in stark contrast to the holding in *Delosovic*. *Delosovic* maintained that "physical" injury is separate from psychic or emotional injury, and it must be treated as such. Meanwhile, under the reasoning of *Glinbizzi*, bodily injury – *i.e.*, physical injury – may include psychic injuries, at least for coverage purposes under a liability policy.

This created a legal world in which a claim for psychic injuries may fall within the definition of "bodily injury" in a liability policy but would not be subject to the No-Fault statute, which requires the claimant to sustain "personal injuries" of a "serious" nature.

[10] The policy defined "bodily injury" as "bodily injury to a person and sickness, disease or death which results from it."

10 Timeless Rules For A Defense Practice

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

Our firm was founded in 1952. The founding partner of this New York defense firm was John E. Morris, born in the Bronx to Irish immigrants, a graduate of public schools and City College and who then made the leap to Harvard Law School. Had he lived, Mr. Morris would be almost 100 years old today.

John E. Morris was a member of "The Greatest Generation." Like many others at the time, he served in World War II and then returned to practice law in New York City. He was also a member of the generation of New York trial lawyers who were renowned for their trial skills, Damon Runyon-esque characters with nicknames like "Eyebrows Riley" and "Big Jim Hayes."

His nickname was "Shoe Polish Morris" because of his perennial jet black hair. He was a raconteur, a bard who told stories to the jurors. He entertained them, angered them, made them laugh, and as a result got his fair share of defendants' verdicts. This was in the day when cases were tried back to back, where carriers were unafraid to take verdicts and where jurors still seemed to be somewhat in awe of and enjoyed the excitement of the trial experience.

In 1993 we were fortunate enough to buy John Morris' practice and with the help of our colleagues and clients the firm grew, bolstered by the clients he had established. We respected one another and trusted one another. He gave us precious words of advice on how to be a good lawyer and how to run a defense firm. While these chestnuts are by no means all inclusive, we pass them on to you.

TRIAL PREPARATION

Rule 1 - "Preparation is everything"

Mr. Morris felt that the three keys to trial success were PREPARATION, PREPARTION, PREPARATION. There is no substitute for hard work. He said simply: "The most prepared attorney wins." He did not read summaries or digests of depositions, medical records or expert reports. He read every line, met every witness, examined every x-ray personally. Openings, cross-examination and closing statements were all written out beforehand. The judges' charges, jury sheets, all memorandums of law were prepared ahead of time and printed. No flying by the seat of one's pants. No shooting from the hip. He did not want to hear an attorney say "I'm good on my feet". PREPARE, PREPARE, PREPARE. To paraphrase Winston Churchill, John Morris spent a lot of time preparing his spontaneous remarks.

Rule 2 - "Don't give them the money today"

Negotiation and settlement are part of a defense attorney's (and plaintiff 's attorney's) everyday life. It is a game of poker with the better poker players usually getting the better settlements.

Every poker player and every attorney have their own style of "negotiating" and John Morris certainly had his.

Before one trial the company had viewed the case as one of liability and had authorized a range of money to be offered to the plaintiff. They had told the attorney, "see what you can do." When Morris heard this he warned: "That doesn't mean you give it to them today." He strongly felt that the longer one waited before offering the amount the less the carrier would end up paying. He did this not to run up trial costs, as these costs would pale in comparison to the amount saved. He did it as part of his negotiating, as part of his poker playing style. The first day he told the attorney to say, "I have nothing." Next day say "I'll make a call". Third day he said, "offer something." Trials took longer then, juries took days to pick. The climate has changed but we hear him saying "don't offer it today", when a carrier discusses settling a case.

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Rule 3 - "Go to the scene"

John Morris was a firm believer in going to the scene of any accident prior to deposition and again prior to trial with your witness. He felt that nothing took the place of a firsthand view of the scene of the accident. He insisted that you take your witness with you to the scene of the accident before he testified. This would apply to property cases, construction cases as well as slip and fall accidents and even rape cases. In one case where it was alleged that the scene of the crime – the kitchen - was unsafe, he would require us to go numerous times to scour the scene. An investigator's report with photographs was not good enough for his standards.

Rule 4 - "Get the witness"

Mr. Morris spared no time and expense in locating and interviewing crucial witnesses to a lawsuit. Nothing was more important than obtaining the non-party disinterested witness' testimony. Like the scene in "The Godfather, Part II": bring the brother in from Sicily to sit in the courtroom.

He once hired an investigator, water plane and backwoods' guide to find a crucial witness who was camping in a remote area of rural Maine and bring back to New York City for trial. Spare no time, effort or expense. Get the witness and bring him into the courtroom.

Rule 5 - "Give them a show"

Mr. Morris believed that you should try every case as if your life depended on it, no matter how small. He told us always to assign the best possible attorney you have available at the time of trial. Moreover, he came from the school of attorneys who felt that the jury also wanted a showman. He would tell us "They are expecting Perry Mason, give them a show." He criticized young lawyers for being too scientific, for reading from their notes, and presenting a college lecture instead of a story to the jury. He was a great believer in the dramatic gesture, in throwing down his eyeglasses or acting in mock surprise over a witness' answer. His eyeglasses became a prop that he would use effectively with the jury. If a witness was saying something he thought was unbelievable he would take off his glasses prop them up his forehead and stare incredulously at the jury. If he was frustrated with the testimony he would toss his glasses onto the defense table with flare. He was also given to gracious gestures such as wishing a victim on the stand "All the best" in front of the jury.

Rule 6 - "Do not poll the jury"

Mr. Morris always told us never, ever, poll the jury. He once received a defendant's verdict and said he was so completely full of himself at the time that he thought it would sound very important to ask the judge to have the jury polled. During the polling, juror #2 said that she had decided to render a defendant's verdict because, "my voices had told me it was the right thing to do." Mr. Morris immediately left the courtroom. His advice to us once you get your verdict: "Do not even bother to pick up your notes. Run out of the courtroom and let your trial prep guy pick up behind you". Never poll the jury after a defendant's verdict. Do not look a gift horse in the mouth.

LAW OFFICE MANAGEMENT

Rule 7 - "The client is always right"

Whenever a client called complaining about a charge our mentor's advice was "take it off the bill immediately, no questions asked." He did not believe in arguing over issues that the company may have had with any attorney's billing. Although, we often wonder what his position would be in this day of electronic bill review and appeals and routine bill cutting by third party services hired to review defense attorneys' bills.

Whenever a company complained about a trial attorney or file handling attorney, Mr. Morris' advice was "take them off the file." Do not argue and do not force any company to accept an attorney or convince them that he is a good attorney. Once they voice their displeasure with an attorney, it is hard to convince them otherwise. If the carrier has lost confidence in their counsel it is almost impossible to redeem him in their eyes.

Rule 8 - "Don't argue about the rate"

Mr. Morris always told us before going out to a client meeting for the first time in an attempt to get new business: "Don't argue about the rate. $5, $10 more or less doesn't matter. Get the client, do good work and you will make it up with more cases." He

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Felonies, Misdemeanors, Other Offenses and Bad Acts–A Defendant's Guide to Impeach Credibility in New York Personal Injury Cases

STEVEN R. DYKI, ESQ.*

A powerful tool in the arsenal of the defense litigator in civil actions for personal injuries pending in New York State Courts is to attack the credibility of the plaintiff or other material witness with evidence of a prior criminal conviction or other bad act. Such impeachment evidence can often be the turning point in the case that results in a defense verdict or provides the impetus to a reasonable settlement.

However, once such evidence is brought to light, the plaintiff's counsel undoubtedly will do everything in her or his power to prevent such evidence from being considered, including but not limited to instructing the plaintiff not to answer questions about the prior conviction or bad act during a deposition, and making a motion to preclude the evidence from being introduced at trial. Even if the defense attorney successfully introduces the evidence of a witness's prior criminal conviction or other bad act, the plaintiff's counsel will surely seek to marginalize the evidence after it is presented.

Therefore, it is incumbent upon the defense litigator to be prepared to handle all aspects of the witness's prior criminal conviction or other bad act. This article provides a broad overview of some of the common issues that arise in personal injury actions pending in New York State Courts with regard to introducing prior convictions and other bad acts to impeach credibility.[1]

I. FELONIES AND MISDEMEANORS

The statute that provides the starting point for handling a witness's prior conviction in a civil action pending in New York State Court is CPLR § 4513, entitled "Competency of person convicted of crime," which states the following:

> A person who has been convicted of a crime is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer.[2]

The Rule was put into effect to change the common law rule that a person convicted of a crime was not a competent witness.[3] The theory underlying the Rule is that a conviction indicates that a bad act was done which not have been done except by a person with a serious character defect, and a person with a serious character defect would be substantially less likely to tell the truth than a person without a conviction.[4] Consequently, any witness who testifies at a civil proceeding may be impeached by proof of a conviction of a crime.[5]

But what is a "crime" within the meaning of CPLR § 4513? Penal Law § 10.00(6), defines "crime" as a "misdemeanor or a felony."[6] A "misdemeanor" is an offense, other than a traffic violation for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.[7] Some examples of misdemeanors in New York include petit larceny, unauthorized use of a computer, and forgery in the third degree.[8]

A "felony" is an offense for which a sentence to a term of imprisonment in excess of one year may be imposed. Some examples of felonies in New York include murder in the first degree, manslaughter in the first degree, and criminal solicitation in the first degree.[9]

Clearly, when a witness has a prior conviction for a misdemeanor or felony in New York State, CPLR § 4513 permits introduction of the conviction by questioning on cross-examination or by the record of the conviction. Therefore, even if the witness denies that he or she was convicted of the crime, evidence of the conviction can be used to impeach the

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witness. Furthermore, the questioning is not limited to person's answer. Evidence of the circumstances of the offense may be permitted if there is a reasonable basis to do so, such as transcripts of proceedings, indictments, plea deals, etc.[10]

II. OTHER OFFENSES AND BAD ACTS

However, there are certain offenses in New York that do not rise to the level of misdemeanors or felonies, such as traffic infractions and violations. There may are also be evidence of other immoral or vicious acts that a witness may have committed for which there are no convictions. CPLR § 4513 cannot be used to introduce evidence of these types of convictions or prior bad acts to impeach the credibility of the witness. But that does not mean that a defense litigator should refrain from attempting to introduce evidence regarding these other convictions and prior bad acts.

A. People v. Sandoval

In a landmark criminal decision, the Court of Appeals held in *People v. Sandoval* that:

> Evidence of specific criminal, vicious or immoral conduct should be admitted if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility. Lapse of time, however, will affect the materiality if not the relevance of the previous conduct. The commission of an act of impulsive violence, particularly if remote in time, will seldom have any logical bearing on the defendant's [or witness's] credibility, veracity or honesty at the time of trial. To the extent, however, that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant [to] voluntarily place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. A demonstrated determination to deliberately further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity.[11]

The Court of Appeals also made it clear in *People v. Sandoval* commission of perjury or other offenses involving dishonesty or untrustworthiness such as theft, fraud, bribery, or acts of deceit, cheating and breach of trust will "usually have a very material relevance, whenever committed." [12]

Therefore, if a witness has prior conviction that does not rise to the level of a misdemeanor or felony, or you are in possession of evidence of a prior bad act, questions to the witness may still be permitted regarding the conviction as evidence of vicious or immoral conduct to impeach the credibility of the witness. However, if the witness denies the conviction or other bad act, it is likely that collateral evidence may not be introduced solely to contradict a witness's testimony regarding the prior conviction or bad act.[13]

B. Collateral Evidence Rule

As indicated above, the Court of Appeals' decision in *People v. Sandoval* arose out of a criminal case. In another landmark decision, *Badr v. Hogan*, the Court of Appeals addressed the scope of an inquiry and the admissible evidence of prior bad act that was not a conviction of a "crime" in a civil proceeding. In response to a direct question by defense counsel, the plaintiff in *Badr* denied improperly receiving funds from the Social Services Department.[14] Rather than continue to question the witness regarding the prior conduct, the defense counsel immediately produced extrinsic evidence of the conduct, a confession of judgment signed by the plaintiff. The plaintiff identified and admitted signing the confession of judgment. The Court held that matter was unquestionably collateral, and it was error to admit extrinsic proof for the sole purpose of contradicting testimony on a collateral issue.[15] However, the Court did not preclude the attempt to refresh the witness's recollection by continuing to ask questions related to the bad act.

It must be noted that Courts have held that *People v. Sandoval* and its progeny do not apply to cross-examining a witness pursuant to CPLR § 4513 in a civil matter. Consequently, Courts have held that the lapse of time regarding a conviction for a felony or misdemeanor is not a basis to preclude the evidence of the conviction.[16] Furthermore,

CPLR § 4513 does not prohibit extrinsic proof of the conviction of a felony or misdemeanor, nor does it place any limits on the number of convictions that can be offered to impeach the witness.[17] Consequently, a defense litigator must consider the exact nature of the offense or bad act when deciding whether to use CPLR § 4513 or *People v. Sandoval* to introduce the evidence.

C. Traffic Infractions

A "traffic infraction" is defined as "any law, ordinance, order, rule or regulation regulating traffic which is not declared by this chapter or any other law of this state to be a misdemeanor or felony. A traffic infraction is not a crime …" Some examples of traffic infractions include operating a motor vehicle in excess of the maximum speed limits, and failing to stop at an intersection with a stop sign.[19]

Since a traffic infraction is not a "crime," a defense attorney cannot rely upon CPLR § 4513 to introduce evidence of the prior traffic infraction. Furthermore, the Court of Appeals held in *People v. Sandoval* that "questions as to traffic violations should rarely, if ever, be permitted." Therefore, do not expect the Court to allow any questions or evidence to be presented regarding a witness's prior speeding tickets, or the failure to pay parking tickets unless these infractions have some direct bearing on the issues of the case. However, if one of the issues in the case is that the plaintiff received a ticket for speeding in the subject accident, and the plaintiff has several past speeding tickets, a Judge may find that although the infractions have a direct bearing on the issues of the case, the prejudicial effect introducing the prior speeding tickets outweighs the probative value.

There are also certain offenses involving the use of a motor vehicle that are not "traffic infractions," but in fact are misdemeanors and felonies. Some examples of these crimes include the unlawful fleeing a police officer in the third degree, unauthorized use of a motor vehicle in the first degree, and vehicular manslaughter in the first degree. [20] CPLR § 4513 clearly provides the basis for introducing evidence of these types of convictions involving the use of a vehicle.

D. Violations

A "violation" is defined by Penal Law § 10.00(3) as "an offense, other than a 'traffic infraction' for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed."[21] Some examples of violations include disorderly conduct, loitering, appearance in public under the influence of narcotics or a drug other than alcohol, and unlawful prevention of public access to records.[22]

Since a violation is not a "crime", the defense litigator cannot expect to introduce evidence of the conviction for a "violation" pursuant to CPLR § 4513. However, the "violation" conviction may be relevant and admissible as evidence of vicious and immoral conduct. But do not expect the Court to allow extrinsic proof of conviction for the sole purpose of contradicting a witness's testimony that he or she was not convicted of a violation.

E. Arrests and Indictments Are Not Convictions

The Courts have made it clear that CPLR § 4513 does not provide allow for questioning a witness regarding an arrest or an indictment without a conviction. Impeachment based on an arrest or indictment alone is improper because they involve mere accusations of guilt.[23] However, if a witness is arrested or indicted and pleads guilty to a lesser misdemeanor or felony, questions regarding the charges that were not dismissed on the merits are a proper subject of inquiry.[24] Furthermore, the underlying facts of the arrest or indictment may be properly introduced as evidence of a prior bad act.[25]

F. Youthful Offender and Juvenile Delinquency Adjudications

The Court of Appeals has held that it is impermissible to use a conviction under the Juvenile Delinquency Act or a New York Youthful Offender adjudication as an impeachment weapon because these adjudications are not convictions of a crime.[26] Therefore, the Court will not allow a defense litigator to rely upon CPLR §4513 to introduce evidence of a youthful offender or juvenile delinquency adjudication "conviction" to impeach a witness under these circumstances. However, inquiry into the actual nature of the acts constituting the basis

for the youthful offender or juvenile delinquency adjudication may be permitted as prior bad acts.[27]

Cross-examination is permissible for a criminal conviction under the Federal Youth Corrections Act and such evidence may be used to attack credibility in a later proceeding.[28]

G. Out of State Convictions

A criminal conviction in a foreign jurisdiction may be used against a witness testifying in New York if the act or acts constituted a crime in that jurisdiction.[29] Consequently, if an offense constituted a "crime" when committed in any foreign State, the conviction can be used to impeach the witness in a New York proceeding. CPLR § 4513 may apply and allow introduction of extrinsic evidence of the conviction to be introduced if the crime rises to the level of a felony or misdemeanor.

H. Disciplinary Actions Against Physician

Another bad act that may be used to impeach a witness's credibility is a disciplinary finding against a physician. However, the underlying findings and determinations must be probative on the issue of credibility and outweigh the possibility of prejudice .[30]

III. DISCOVERING THE PRIOR CONVICTION

Against the basic framework described above, a defense litigator should discover and obtain evidence of the prior convictions and other bad acts. There are several different avenues for discovering a prior criminal conviction. Preferably, this should be done at the outset of the case and before any depositions are held. However, that is not always possible, particularly in situations where a plaintiff has changed his or her name and refuses to produce a Social Security number.

In any event, a cost-effective way to start an inquiry as to whether a witness has any prior criminal convictions or other bad acts is to use the internet to perform a background search. By simply typing the name of the witness into a search engine such as Google, you may be lead to websites that reflect that the plaintiff was convicted of a crime or prior bad act, such as news articles or professional license/disciplinary decisions. Most states, including New York, have websites for their respective departments of correction that include a feature to perform a search as to whether a person has served time in a correctional facility. The Federal Bureau of Prisons also has a website that includes a feature to search for past and present inmates.[31] New York State also has a website that allows a defense litigator to search for any pending criminal proceedings involving a witness.[32] Legal research sites, such as Westlaw and Lexis/Nexis, also have features that allow for a search of criminal records databases. However, please note that any printouts or reproductions of search results are probably inadmissible evidence. A recommended practice is to obtain certified copies of the convictions and public records regarding the prior conviction from the issuing Court to ensure that you have the best chance of getting the prior conviction introduced at trial.

One of the methods most often used is to determine if a witness has any prior criminal convictions is to hire an investigator to perform a criminal background search. Typically, the search will document any prior criminal convictions in any State. In order to ensure the best chance of introducing extrinsic evidence of the conviction, it is recommended that a certified copy of the criminal conviction and any public records from the Court proceedings be obtained.

IV. HANDLING THE DEPOSITION

Armed with the knowledge that a plaintiff or other witness has a prior criminal conviction or has committed a prior bad act, a defense attorney should be prepared to question the witness regarding the conviction at a deposition. The scope of permissible questioning at a deposition is governed by the Uniform Rules for the Conduct of Depositions, which states the following in relevant part:

> A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court or (ii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent

> not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question the examining party shall have the right to complete the remainder of the question.[33]

When applying this rule to questioning a witness at a deposition regarding a prior conviction for a felony or misdemeanor pursuant to CPLR § 4513, it is apparent that the witness must answer each and every single question regarding the prior conviction. This can include questions about the underlying facts of the criminal acts, all charges brought against the witness, any plea deals, etc.[34]

When applying the rule to questioning a witness at a deposition regarding a prior conviction that is not a felony or misdemeanor, or is a prior bad act without a conviction pursuant to *People v. Sandoval,* a question that attempts to introduce extrinsic evidence for the sole purpose of contradicting a witness's testimony that he or she was not convicted of a lesser offense, or did not commit a prior bad act may not be allowed. However, that should not stop the defense litigator from attempting to introduce the evidence to refresh the recollection of the witness during the deposition.

A defense attorney should be prepared to deal with objections made by the plaintiff's counsel and instructions to the witness not to answer questions regarding the conviction. A recommended practice would be to fully complete the question and contact the assigned Judge for a ruling as to whether the witness is required to answer. Preferably, defense counsel will want to direct the Judge to the relevant statutory and case law. In the event the assigned Judge is not available, the defense attorney should have the question marked for a ruling, reserve the right to a further deposition of the witness to include the blocked question, and upon receipt of the transcript, immediately file and serve a motion to compel the plaintiff to appear for a continued deposition and answer the blocked question.

V. MOTIONS FOR SUMMARY JUDGMENT

After depositions and other discovery have been completed, a plaintiff may move for summary judgment on the issue of liability. Summary judgment is drastic remedy which requires that the party opposing the motion be accorded every favorable inference and issues of credibility may not be determined o the motion but must await the trial.[35] Therefore, it would seem that evidence of a conviction or other bad act to support that there is a question as to the plaintiff's credibility that prevents a Court from awarding summary judgment if the plaintiff is the only witness to the occurrence. However, at least one court has held that a plaintiff's criminal conviction by itself is insufficient to raise an issue of fact as to credibility when the plaintiff is the sole witness to an accident.[36] Therefore, it is probably preferable to use the conviction or other bad act as a supplement to other existing issues of fact when attempting to defeat a plaintiff's motion for summary judgment.

IV. INTRODUCING THE PRIOR CONVICTION AT TRIAL

Assuming the prior convictions or other bad acts of the plaintiff or the plaintiff's other potential witnesses do not provide the impetus to a reasonable settlement or the case has not otherwise been dismissed, the case will proceed to trial and the defense attorney should be prepared to offer evidence of the prior conviction or other bad act into evidence. However, the scope of evidence that is admissible at trial may more limited than the testimony and evidence elicited at a deposition.

When offering evidence of a prior conviction of a felony or misdemeanor to impeach the credibility of the plaintiff or other witness, Courts have interpreted CPLR § 4513 broadly, and that the statute provides the trial Court with no discretion to exclude a particular conviction.[37] Other Courts have held that the trial Court may not even place limits on the number of convictions that may be admitted. Furthermore, even if a certificate of relief or pardon has been issued, evidence of a prior conviction for a felony or misdemeanor may be admitted.[38] Furthermore, Courts have held that cross-examination may inquire as to the facts underlying the arrest, an indictment, or an adjournment in contemplation of dismissal.[39] However, some Courts have applied CPLR § 4513

to only permit an inquiry to a conviction that shows some tendency of moral turpitude in order to be relevant to credibility.[40] Therefore, the scope of cross-examination pursuant to CPLR § 4513 undertaken by defense counsel should be broad, but thoughtfully tailored to achieve the objective of impeaching the credibility of the plaintiff without negatively affecting the jury's perception of the overall defense; i.e. the defense should not rely solely upon the prior conviction.

When offering evidence of a prior bad act or a conviction that is not a felony or misdemeanor, CPLR § 4513 does not apply, and the holding in *People v. Sandoval* controls. In those situations, the Courts have held that evidence of specific vicious or immoral conduct should be admitted if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility.[41] A trial Court may exclude the evidence entirely, or limit the inquiry to the fact that there has been a prior bad act by weighing the probative value of the evidence against the prejudicial effect. A witness may even deny committing the prior bad act and the defense attorney may be precluded from offering extrinsic proof of the act. The trial Court has discretion to the control the manner of presentation of proof, especially when dealing with matters affecting a witness' credibility and accuracy. It is unlikely that a trial Court's ruling in will be overturned on appeal, unless there is an abuse of discretion.

Regardless of how the conviction or other bad act is going to be offered into evidence, the defense attorney should anticipate receiving a *motion in limine* to preclude the evidence of the prior convictions or other bad acts, and be prepared with relevant statutes and case law to defeat the motion.

Assuming the witness's prior conviction has been successfully introduced into evidence and the credibility of the witness (either the plaintiff or a witness supporting the plaintiff's case) has been impeached, the defense attorney can expect the plaintiff's attorney to attempt to marginalize the conviction to the trier of fact. The witness may seek to rehabilitate himself by explaining the conviction or showing extenuating circumstances, and may also introduce proof of his or her "general good character for truth and veracity" by character witnesses.[42] Each case is factually unique and will present its own set of circumstances. Typically however, the plaintiff's attorney will argue that the prior conviction does not have any bearing on the facts of the plaintiff's case, and that there is no reason to doubt the otherwise credible witness. The defense litigator should craft her or his arguments to emphasize that the plaintiff or other witness lacks credibility due to the prior conviction and tie in the lack of credibility to the overall defense strategy in the case in a meaningful way. For example, the defense attorney can argue the description of an accident given by a plaintiff completely lacks credibility, and then bolster the plaintiff's lack of credibility by arguing that his prior criminal conviction demonstrates that he advances his self-interest at the expense of others.

VI. CONCLUSION

Applying the basic framework of obtaining and introducing prior convictions and bad acts to the specific factual circumstances of each case will provide defense attorney with the opportunity to assert powerful arguments to impeach the credibility of the plaintiff's case. Each case is unique and careful consideration should be given to the overall strategy. If successful, the use of a prior conviction or other bad act to impeach credibility can often "turn the tide" in a personal injury case to the defendant's favor resulting in a defense verdict or provide the impetus to a reasonable settlement.

(Endnotes)

1 The author would like to thank Lindsay Bethea for her assistance in researching the statutes and case law discussed in this article, and Alan Russo for his assistance and guidance in preparing this article.

2 N.Y. C.P.L.R. § 4513 (McKinney 2014)

3 See Weinstein Korn & Miller, New York Civil Practice, CPLR P 4513.01

4 Id.

5 In Re: B. Children, 23 Misc.3d 1119(A), 886 N.Y.S.2d 70 (Fam. Ct. Kings County 2009)

6 N.Y. Penal Law § 10.00(6) (McKinney 2014)

7 N.Y. Penal Law § 10.00(4) (McKinney 2014)

8 N.Y. Penal Law §§ 155.25, 156.05, 170.05 (McKinney 2014)

9 N.Y. Penal Law § 100.13, 125.20, 125.27 (McKinney 2014)

10 See Dance v. Town of Southampton, 95 A.D.2d 442, 453,

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467 N.Y.S.2d 203 (2nd Dep't 1983)

[11] People v. Sandoval, 34 N.Y.2d 371, 377, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974)

[12] Id.

[13] People v. Sorge 391 N.Y. 198, 201, 93 N.E.2d 637 (1950)

[14] Badr v. Hogan, 75 N.Y.2d 629, 635 554 N.E.2d 890, 555 N.Y.S.2d 249 (1990)

[15] Id. 75 N.Y.2d at 635-636

[16] See Reiner v. City of New York, 2011 N.Y. Slip Op 30149(U) (Sup. Ct. N.Y. County 2011)

[17] See Able Cycle Engines, Inc. v. Allstate Ins. Co., 84 A.D.2d 140, 142-143, 445 N.Y.S.2d 469 (2nd Dep't 1981), lv. denied 57 N.Y.2d 607 (1982); see also Vernon v. New York City Health and Hospitals Corp., 167 A.D.2d 252, 561 N.Y.S.2d 751 (1st Dep't 1990); see also In Re: B. Children, supra.

[18] N.Y. Penal Law § 10.00(2) (McKinney 2014); N.Y. Vehicle and Traffic Law § 155 (McKinney 2014)

[19] N.Y Vehicle and Traffic Law §§ 1180-a, 1142 (McKinney 2014)

[20] N.Y. Penal Law §§ 125.13, 165.08, 270.25 (McKinney 014)

[21] N.Y. Penal Law § 10.00(3) (McKinney 2014)

[22] N.Y. Penal law §§ 240.20, 240.35, 240.40, 240.65 (McKinney 2014)

[23] Dance, supra.

[24] Murphy v. Estate of Vece, 173 A.D.2d 445, 447, 570 N.Y.S.2d 71 (2nd Dep't 1991); People v. Flowers, 273 A.D.2d 938, 939, 710 N.Y.S.2d 295 (4th Dep't 2000)

[25] Dance, supra.

[26] People v. Gray, 84 N.Y.2d 709, 712, 646 N.E.2d 444, 622 N.Y.S.2d 223 (1995)

[27] Id.

[28] People v. Rivera, 100 A.D.2d 914, 915, 474 N.Y.S.2d 573 (2nd Dep't 1984)

[29] See People v. Gray, supra 84 N.Y.2d at 713-714, People v. Rivera, supra. 100 A.D.2d at 915, 474 N.Y.S.2d 573 (2nd Dep't 1984); See also People v. Brown, 2 A.D.2d 202, 203, 153 N.Y.S.2d 744 (4th Dep't 1956)

[30] See Cipriano v. Ho, 29 Misc.3d 952, 908 N.Y.S.2d 552, 557-559 (Sup. Ct. Kings County 2010); Torres v. Ashmawy, 24 Misc.3d 506, 875 N.Y.S.2d 781, 785-787 (Sup. Ct. Orange County 2009)

[31] Federal Bureau of Prisons, <http://www.bop.gov/inmateloc/> (visited: Jan. 9, 2015)

[32] New York State Unified Court System, E-courts: Webcrims, <https://iapps.courts.state.ny.us/webcrim_attorney/AttorneyWelcome> (visited: Jan. 9, 2015)

[33] N.Y. CLS Unif Rules, Trial Cts § 221.2 (McKinney 2014)

[34] See Reiner, supra.

[35] Vega v. Restani Construction Corp., 18 N.Y.3d 499, 503, 965 N.E.2d 240, 942 N.Y.S.2d 13 (2012)

[36] Marrero v. 2075 Holding Co. LLC, 106 A.D.3d 408, 410, 964 N.Y.S.2d 144 (1st Dep't 2013)

[37] See Guarisco v. E.J. Milk Farms, 90 Misc.2d 81, 393 N.Y.S.2d 883 (Civ. Ct. Queens County 1977); see also In Re: B. Children, supra.

[38] Able Cycle Engines, Inc., supra.

[39] See In Re: Jessica Y., 206 A.D.2d 598, 599, 613 N.Y.S.2d 1008 (3rd Dep't 1994)

[40] Torres, supra.

[41] People v. Smith, 18 N.Y.3d 588, 593, 965 N.E.2d 232, 942 N.Y.S.2d 5 (2012); People v. Sandoval, supra.

[42] See Derrick v. Wallace, 217 N.Y. 520, 525, 112 N.E. 440 (1916)

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always said his most profitable client was one who had quoted him the lowest rate. Get the first file, prove yourself with outstanding legal work and then worry about the rate later. Tough advice to follow in these difficult times but has it always served us well.

Rule 9 - "Do the right thing"

Mr. Morris was not a big "schmoozer." Back in the day there were fewer law firms and less entertaining in general. Your legal reputation carried you. While he was not a big believer in going to Yankee games, Broadway shows or having lunch or dinner Mr. Morris visited the sick and never missed a wake, a shiva, a funeral service or a memorial service for any of his clients and their family members.

Rule 10 - "They've got to see your face"

The last time we saw John Morris was when he left the office after the buyout and he told us as the new owners of the firm, "Come in everyday even if you come in late and leave early, come in everyday. They've got to see your face".

Mr. Morris passed on to us these 10 basic rules to run a defense law firm. We think of him often when we come across situations both during trials and trying to run a defense practice in these challenging economic times.

Worthy Of Note

VINCENT P. POZZUTO *

1. INSURANCE COVERAGE

Travelers Indemnity Company v. Orange & Rockland Utilities, 2015 N. Y. Slip Op 00292, (1st Dept. 2015)

The Appellant Orange & Rockland Utilities appealed from an Order of the Supreme Court, New York County, which granted Travelers Indemnity Company summary judgment on its declaratory judgment action seeking a declaration that it was not obligated to provide coverage to Appellant for its clean-up of hazardous waste sites. The Court held that Appellant did not give timely notice under the policies. It held that Appellant's argument that it did not have actual notice of any pollution was insufficient as the record was replete with documents demonstrating that pollution likely existed at each of the sites considered. In addition, the Court noted that there were repeated interactions with both state and federal regulators, which, coupled with the documents, was sufficient to put the Appellant on notice. Finally, the Court held that Appellant's willful failure to investigate despite the overwhelming evidence of potential contamination, negated its content/on of a lack of awareness of the pollution.

2. PREMISES LIABILITY-STORM IN PROGRESS

Ndiaye v. NEP West 119th Street LP, 2015 N. Y. Slip Op 00279, (1 Dept. 2015)*

Plaintiff sought damages for injuries allegedly suffered when she slipped and fell on ice on the front steps of a building owned by Defendants. The lower Court granted summary judgment to the Defendants under the "Storm in Progress" rule. The Appellate Division, First Department, reversed, holding that issues of fact existed as to the applicability of the Storm in Progress rule. The Court noted that while the accident occurred at 11:30 a.m., and the Defendant's expert meteorologist stated that the storm was in progress from Midnight to 2 p.m., in three locations, light snow fall ceased at 6:25 a.m. and freezing rain stopped at 8:27 a.m. and did not begin falling again until 11:35 a.m. The Court held that "a temporary lull or break in the storm at the time of the accident would not necessarily establish a reasonable opportunity to clear away the hazard." However, "if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, common sense would dictate that the storm in progress rule not be applied." The Court held that triable issues of fact existed as to whether the three hours that elapsed between the last freezing rain and plaintiffs accident afforded Defendant a reasonable opportunity to clear the steps. Additionally, the Court further held that issues of fact existed as to whether the icy condition that caused plaintiff's fall existed prior to the storm. Plaintiff and her son testified that the steps had been icy for some days before the accident. Defendant submitted no evidence as to when the steps had last been inspected or cleaned of snow and ice or as to the condition of the steps on the day of the accident or the days immediately preceding it. The Court held that the superintendent's testimony about the general cleaning procedures alone was insufficient to establish that Defendant lacked notice of the alleged condition before the accident.

3. DISCOVERY

Robinson v. Highbridge House Ogden LLC, 2015 NY Slip Op 00457 (1st Dept. 2015)

In an action seeking recovery for injuries due to a slip and fall on a transitory water condition, the lower Court denied plaintiff's motion to compel defendants to produce maintenance records and the maintenance complaint log book for a period of two years prior to and including the date of the accident.

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The Appellate Division, First Department modified, to the extent of granting so much of the motion as sought production of maintenance records and the maintenance complaint log book entries relating to wet or slippery conditions on the subject stairwell for a one-year period prior to and including the date of the accident. The Court held that to the extent that plaintiff sought records for any other location or any other type of condition, or for a period exceeding one year, the request was not "material and necessary to the prosecution of the action."

4. REVIEW OF DAMAGES

Mata v. City of New York, 2015 NY Slip Op 00450 (1st Dept. 2015)

Upon a jury verdict, plaintiff was awarded $2,000,000 for past pain and suffering, and $3,500,000 for future pain and suffering over 50 years. Plaintiff had suffered a wrist injury requiring arthroscopic surgery and a laminectomy with fusion surgery to her lower back. The Court found that plaintiff was able to perform her full time job of owning and operating a daycare center in her home. The Court held that a new trial on damages would be ordered unless plaintiff stipulated to an award of $1,000,000 for past pain and suffering and $2,000,000 for future pain and suffering.

5. DISCOVERY

Calhoun v. County of Suffolk, 2014 NY Slip Op 09102 (2nd Dept. 2014)

In an action alleging wrongful death, plaintiff appealed from so much of an Order as denied plaintiff's motion to compel the defendant to release five audiotapes of interviews of police officers conducted by the Internal Affairs Bureau of the Suffolk County Police Department. The case arose out of a high speed chase that the Suffolk County Police Department engaged in, during which the suspect, defendant Richard Mair, lost control of his vehicle and crashed into the house of plaintiffs decedent. The County of Suffolk objected to plaintiff's demand for the file generated in the course of the investigation. After an in camera review, the trial Court concluded that there was relevant information contained therein and directed the County to provide plaintiff with a twenty-three page written narrative report contained within the file. The report listed its source materials, including the five audiotapes. The County ultimately objected to providing the tapes. The Appellate Division, Second Department held that the audiotapes should be produced to plaintiff so that plaintiffs could hear the actual interviews and not just the summaries of same in the narrative report.

6. PREMISES LIABILITY

Garcia-Monsalve v. Wellington Leasing L.P. 2014 NY Slip Op (2nd Dept. 2014)

Plaintiff allegedly suffered injury after slipping and falling on a wet ramp on Defendant's premises. The lower Court granted summary judgment. The Appellate Division, Second Department reversed, holding that Defendant failed to meet their prima facie burden on the motion for summary judgment since Defendant could not establish when it had last cleaned or inspected the ramp. The Court held that reference to general cleaning practices is insufficient to establish a lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question.

7. INDEMNITY

Henderson v. Gyrodyne Company of America, Inc. 2014 NY Slip Op 09106 (2nd Dept. 2014)

In an action alleging personal injuries, the third-party defendant filed a motion for summary judgment arguing that it was the "alter ego" of plaintiff's employer and thus the common-law cause of action for indemnity should be dismissed as plaintiff had not suffered a "grave injury" as defined by Section 11 of the Workers' Compensation Law. The Appellate Division affirmed the denial of the third-party defendant's motion for summary judgment. The Court held that under some circumstances, the defense afforded by the exclusivity provisions of the Workers' Compensation Law may extend to a company that is the alter ego of the injured plaintiff's employer. However, the Court held that the third-party defendant failed to make a prima facie showing that is should be deemed the alter ego of the company that employed plaintiff as it presented no evidence with regard to the financial structure of the subject entities or the business locations of those entities. In addition, although the third-party defendant submitted evidence that the

two entities maintained Workers' Compensation Insurance through a certain trust, it failed to establish whether the injured plaintiff was granted Workers' Compensation benefits as an employee of third-party defendant or an entity completely unrelated to third-party defendant. The Court also held that the lower Court properly denied that portion of third-party defendant's motion seeking to dismiss the contractual indemnity claim. The Court held that while the lease between third-party plaintiff and third-party defendant had expired approximately one month before the accident, the third-party defendant continued to occupy the premises. Pursuant to common law, when a tenant remains in possession after the expiration of a lease, there is implied a continuance of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument, which in this case included a contractual indemnification provision running in favor of third-party plaintiff.

8. INSURANCE COVERAGE

Valentine v. Quincy Mut. Fire Ins. Co. 2014 NY Slip Op 08984 (2nd Dept. 2014)

Plaintiffs' home was destroyed by fire on October 15, 2010. Plaintiffs had purchased a homeowner's casualty insurance policy from the defendant Ouincy Mutual Fire Insurance Company, through an insurance broker, defendant Sheridan. An endorsement to the policy allowed plaintiffs to recover full replacement costs when certain terms and conditions of the policy were met. In 2009, prior to the fire, Quincy applied to the New York State Department of Insurance to substitute the "replacement cost" provision of its homeowners' policy endorsements with a new provision that only permitted recovery of an additional 25% above the total coverage. With the permission of the Department of Insurance, Quincy then allegedly sent an advisory notice of the change in the policy to Sheridan. Quincy did not send the advisory directly to plaintiffs. Plaintiffs asserted that they never received such notice. Plaintiffs brought an action claiming breach of contract, violation of General Business Law Section 349, violation of Insurance Law Section 3425(d) and insurance broker negligence. After all parties moved for summary judgment, the lower Court concluded that Quincy violated Insurance Law Section 3425(d) by failing to directly notify the plaintiffs of the policy change. The court thus concluded that the "replacement cost" coverage endorsement remained in effect on the date of the loss. The lower Court granted Quincy summary judgment on the General Business Law Section 349 cause of action. On appeal, the Appellate Division, found that the Supreme Court erred in granting Quincy summary judgment on the General Business Law Section 349 claim. The Court held that the elements of a cause of action to recover damages for deceptive business practices under GBL Section 349 are that the defendant engaged in a deceptive practice or act, that the challenged practice or act was consumer-oriented and that plaintiff suffered an injury as a result. The Court held that Quincy's submissions failed to demonstrate, prima facie, that its failure to comply with the notice provisions set forth in Insurance Law Section 3425(d) did not constitute a deceptive business practice. The Court noted that Quincy failed to notify its insureds of the change to the policy, and plaintiffs were clearly injured due to the lack of notice that they were underinsured. The Appellate Division also held that Quincy's common-law indemnity claim against Sheridan should have also been dismissed as Sheridan demonstrated that under Insurance Law Section 3425(d), Quincy had the sole obligation and responsibility to notify its insureds directly of a change in their policy terms.

9. PREMISES LIABILITY

Baldwin v. Windcrest Riverhead LLC, 2014 NY Slip Op 08797

The Appellate Division, Second Department reversed the lower Court and granted third- party defendant summary judgment. The Court held that plaintiff merely speculated that the ice, snow and water on the interior staircase entered the house through the soffits installed by the third-party defendant. In addition, the Court held that third-party plaintiffs expert opinion was speculative, wherein the expert stated "it is possible for snow to have fallen from the soffits to the interior stairway."

10. ASSUMPTION OF RISK

Dann v. Family Sports Complex, Inc. NY Slip Op 518086 (3rd Dept. 2014)

Conduct Of Physical Examinations: Turning The Exam Room Into A Hearing Room?

Continued from page 11

excluding observers (whether just an attorney, a non-attorney, or both), it should be anticipated that even though plaintiff did not serve a 3122 objection, plaintiff will nevertheless appear -- by surprise -- with some type of observer. Defense counsel need to ensure that clear instructions about the exact conditions for the exam have been communicated to the defense examiner (and/or their staff), so he/she can handle any surprises properly. If defense counsel has followed the procedural rules, the proper instruction for the defense examiner to deal with any 'surprise' is to instruct him/her to refuse to conduct the exam --- except under the strict conditions set by the 3121 notice, by stipulation, or by the Court's order. If plaintiff refuses to submit to the exam unless the examiner acquiesces to their 'surprise' condition, then plaintiff will be in the wrong, and a motion to compel should prevail. However, in that circumstance, defense counsel should expect that plaintiffs will refuse to appear for any subsequent exam, claiming they deem the exam "waived". Some defense counsel might be swayed by this threat, and tempted to allow the surprise observer into the exam room. However, this ignores the numerous risks presented by permitting an unknown observer into the exam room, almost all of which could significantly hurt their client's defense. In the end, defense counsel should not be overly concerned by a threat of "wavier" of the exam --- as both Ponce and Jakubowski (and numerous other cases) resulted in plaintiff being ordered to submit to the exam. Moreover, I could not find any Appellate Division case where a waiver was affirmed or imposed.

CONCLUSION

There is a growing trend in personal injury cases to attempt to obtain observation of the physical exam as a surprise tactic. Defense attorneys should be aware of it, and prepared to prevent it. If affirmative steps are not taken at the inception, in the 3121 notice, it is a problem that most defense counsel will eventually encounter. An understanding of the procedural rules for this discovery, and a strong knowledge of the applicable case law, can ensure that no surprises occur in your case --- at least as regards the conduct of the physical exam.

Worthy Of Note

Continued from page 49

Plaintiff, an experienced soccer player, was injured when playing in an indoor soccer game at the defendant's complex. He was injured when he dove for a ball and struck a concrete footer of the indoor complex. The footer was covered by a piece of blue vinyl. The lower Court granted defendant summary judgment under the assumption of risk doctrine. The Appellate Division, Third Department reversed, holding that while crashing into a wall playing indoor soccer is inherent in the activity, issues of fact existed as to whether the risk was concealed and thus was not subject to the assumption of the risk doctrine. Specifically, the Court noted that plaintiff testified that he had never seen the concrete footer, and did not know it was underneath the blue vinyl liner. As to plaintiffs claim against the manufacturer of the structure, the Court held that plaintiffs expert failed to establish that the guidelines he cited, for high school and collegiate soccer games, were applicable to recreational indoor soccer.

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Open and Obvious Conditions - 2014 Cases and Principles

BRADLEY J. CORSAIR*

Numerous premises liability claims allege conditions that are arguably open, obvious, and not actionable. Matters involving such conditions may befit one of two defenses, i.e. "open, obvious, and not inherently dangerous," and "primary assumption of the risk." These defenses are often asserted by motion for summary judgment, and successful outcomes are not infrequent.

Where a condition is open and obvious, any duty to warn is dispensed with. Moreover, if such a condition is also not inherently dangerous, there is no associated failure to maintain a premises in a reasonably safe condition.

This article will discuss most of the 2014 appellate opinions that concern open and obvious conditions, and their key principles. The cases are categorized under headings for the types of defects or contexts that they involve. The intent here is to facilitate recognition, evaluation, and advocacy of the potential defenses, and to provide a useful reference.

Open, Obvious, and Not Inherently Dangerous

With this type of controversy, there are two commonplace issues. One is whether the claimed condition was a relatively benign potential danger. The other is whether, under the circumstances, the condition was sufficient warning in and of itself. To aid analysis, let us now review some of the prevalent precepts, before seeing how these issues played out in 2014 appeals.

An "open and obvious" condition is one that is "readily observable by the reasonable use of one's senses."[1] That means the condition "could not reasonably be overlooked by anyone in the area whose eyes were open,"[2] or "could not be overlooked by *any* observer reasonably using his or her ordinary senses."[3] However, "even visible hazards do not necessarily qualify as open and obvious" because the "nature or location of some hazards, while they are technically visible, make them likely to be overlooked."[4] Also important, that a dangerous condition is open and obvious does not relieve a landowner of all duty to maintain a premises in a reasonably safe condition. [5]

"Whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case."[6] As such, the question of existence of a dangerous or defective condition is generally for the factfinder.[7] Still, summary judgment is appropriate where a plaintiff fails to demonstrate the existence of *any* dangerous condition.[8] It is also warranted where the condition is open, obvious, and not inherently dangerous as a matter of law,[9] as there is no duty to protect or to warn in such a situation.[10]

Likewise, the issue of whether a dangerous condition is open and obvious is fact-specific[11] and thus usually a question for the jury,[12] and cannot be divorced from the surrounding circumstances.[13] It is accordingly said that "a condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted,"[14] or if the plaintiff were to "forget what he or she has discovered."[15] A condition can be obscured by other objects or by inadequate illumination,[16] among other things.

Since the merit of this defense is a fact intensive inquiry, it helps to be familiar with the wealth of case settings where the position has been addressed. With this in mind, we now transition to a case study that is organized with several topic categories.

Single and Dual Step Risers

A good number of actions in this realm involve single or dual steps onto or down from something, such as a landing, platform, plaza, or adjoining

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room. As will be seen, it helps a defendant if a color difference or other contrast existed where the plaintiff fell. However, to warrant a summary dismissal, there must not be an undue danger because of some other characteristic.

In *Barley v. Robert J. Wilkins, Inc.*,[17] the plaintiff was descending a single step riser within a bus terminal building. This riser was immediately apparent; it was located in a doorway, and the surrounding flooring was of a contrasting color and material. Given this, and the plaintiff's prior passage over the riser and awareness of it, the duty to warn was not an impediment to a dismissal.

Another issue, though, was whether an actionable danger existed because of the height of the step, combined with the lack of a handrail. The movant had not demonstrated what the height of the riser was, or whether it comported with generally accepted standards. Conversely, the plaintiff had testified that it was difficult for her and coworkers to traverse the step, because it was "very high." There was thus a triable issue as to whether the height of the riser amounted to a dangerous or defective condition.

A plaintiff's knowledge and recent use of an involved area did support a dismissal, however, in *Kirk v. Staples The Office Superstore East*.[18] Apparently the plaintiff had missed a step as she was descending two steps in leaving a backroom of a Staples store. The Second Department emphasized that she had used these steps before the accident to ascend to the backroom area, and had no problem at that time.

The *Kirk* opinion below[19] discusses several additional factors which may be worth exploring in discovery in a case of this sort. Those factors include color contrast (black steps, tan floor), opportunity to become familiar with surroundings (plaintiff was in the backroom for a few minutes), ability to see (the room was well lit, and plaintiff could see the steps despite the presence of boxes and other objects), the direction of the plaintiff's view ("looking forward"), and the lack of prior or subsequent incidents (the defendant deponent had used the steps twenty to thirty times a day before the accident, and about ten to twelve times after the accident that same day).

Also noteworthy, no handrail was present, and the steps allegedly were uneven and had depression, as well as inadequate width. The plaintiff's attempt to support these allegations with an expert affidavit was rejected because the expert had not visited the scene or inspected the steps.

Defendants prevailed in this kind of case on a number of other occasions in 2014. In *Varon v. New York City Department of Education*,[20] the plaintiff purportedly fell down a single-step riser after entering a bathroom located in a building owned by the defendants. The top of the riser had been painted red earlier that year, which contrasted with the rest of the bathroom floor. Also significant, there were signs on the outside of the bathroom door warning individuals entering the bathroom to watch their step. That the plaintiff had somehow not seen the red paint, and not become aware of the warning signs, did not entitle him to a trial.

Dillman v. City Cellar Wine[21] involved a trip and fall in a restaurant. The alleged problem was single step that separated a carpeted dining area from the rest of the space, which consisted of wooden flooring. This was considered open and obvious and not inherently dangerous as a matter of law. Presumably there was a contrast between the carpeted and wood floor surfaces that was a key to the defense.

The defense can also be effective where the plaintiff had recently risen from a seated position. This is apparently what happened in *Coppola v. Cure of Ars Roman Catholic Church*,[22] where the plaintiff allegedly tripped and fell over a 5 1/2-inch-high, single-step riser while exiting a church pew.

This scenario also exists in outdoor settings. In *Fiore v. Deberbieri Associates, Inc.*,[23] the plaintiff tripped and fell while stepping up from a parking lot to a sidewalk at the entrance to a 7-Eleven store. The defendant's deponent testified that the curb and sidewalk were approved by the Town when constructed in years past, and he hadn't perceived any danger or received any complaints since that time. As for the plaintiff, she and an expert collectively attested that the curb was unusually high where she tripped, i.e. 8 to 8 1/2 inches, and that its varying height constituted a misleading visual cue. The motion court declined to consider this evidence, emphasizing that the plaintiff had not adequately identified the cause of her fall in her examination before trial. On appeal, the Second Department took

account of the parties' deposition testimony, and found the condition to be open and obvious and not inherently dangerous.

The Third Department reached a different conclusion for a plaintiff who was descending a curb after exiting a facility, in *Flanger v. 2461 Elm Realty Corp.*[24] The defendant's evidence was that no one had complained of any defects concerning the curb, sidewalk or canopy, and no prior accidents had occurred. Further, the six-inch curb was painted yellow about nine months before the accident. Though that paint had become somewhat worn, the yellow remained visible enough to plausibly support an open and obvious defense. However, the photographs did not portray the plaintiff's vantage point in approaching the curb. In that regard, the plaintiff testified that an awning had created a "shade tunnel" of darkness that contrasted to the bright sunshine of the time. This, in turn, made it difficult for her to see the curb. It was also possible that her opportunity to appreciate the step down was reduced because other people were walking ahead of her.

Other Sidewalk Conditions

It seems that the appellate courts in 2014 did not use the open and obvious and not inherently dangerous phrase in appeals involving sidewalk cracks, holes, widened joints, or raised or depressed sections. This is not surprising, as prospects for the defense figure to decrease to the extent a condition is relatively small, inconspicuous, and/or hazardous. There was one appeal though involving a type of small object that rests along New York City sidewalks fairly routinely. *Doughim v. M & U.S. Property, Inc.*[25] concerns a plaintiff who tripped and fell over a lock that was affixed to a set of sidewalk-level cellar doors. This, however, did not constitute an open and obvious condition, nor a trivial one, as a matter of law.

Other Height Differentials

A fall from a platform, stage or the like is another periodic loss in our circles. *Jankite v. Scoresby Hose Co.*[26] involved a five-year-old girl who fell from a porch during an event at the defendant's firehouse. While she and her father were playing a game, she took a step and had the fall. Her father had been seated at a picnic table, which allegedly was just 6-12" away from the unguarded porch edge. The defendant's position was that the height differential was less than 29 inches and so no handrail was required, and no prior similar incidents had occurred. Further, the lighting was good, and the porch edge was a brick border painted red, albeit the plaintiff disputed the latter feature. Considering the nature and layout of the event, and all other surrounding circumstances, the Third Department found triable issues as to whether the drop-off was an open and obvious hazard, and whether the defendant had created a danger.

Wet Ground or Floor

In this scenario, the source of the water and its proximity to the accident location may be factors to consider.

In *Bluth v. Bias Yaakov Academy for Girls*,[27] the plaintiff teacher slipped and fell while helping a camp student run through a sprinkler on premises owned by the defendant academy. The wet condition of the asphalt caused by the sprinkler was an open and obvious condition which, as a matter of law, was not inherently dangerous.

This was not the case, however, in *DiVetri v. ABM Janitorial Service, Inc.*[28] There, a porter had been using a hose to clean a sidewalk near a building entrance, at a heavily trafficked time. The plaintiff had noticed this activity and, afterward, that her toes were wet as she entered the building. After taking several steps, she slipped and fell on the marble lobby floor. In this situation, the open and obvious hosing activity served only to extinguish the duty to warn; the porter's employer remained subject to liability on the theory of a created unsafe condition.

Summary judgment was also denied in a wet staircase action, although a porter with a mop and bucket was standing in an adjoining hallway. In *Soto v. 2780 Realty Co., LLC*,[29] the plaintiff allegedly slipped and fell as she descended the dimly lit stairs in her apartment building. Unbeknownst to the plaintiff, the porter had recently mopped the staircase, and had varied from the defendant's standard practice in not placing cones or warning signs. Nor did he give the plaintiff a verbal warning when she passed him in the hallway on her way to the stairwell, which hallway was dry since the porter was not mopping there. Also relevant, the plaintiff had not detected

any floor cleaner odor, and the wetness was of a transparent nature. In this background, there could not be a summary finding of an open and obvious condition that did not require additional warning.

Exterior Features Unseen at Night

The open and obvious defense is weaker to the extent that a plaintiff's opportunity to see and avoid a condition is compromised by poor lighting conditions. In *Wolfe v. North Merrick Union Free School Dist,*[30] the plaintiff was injured around midnight during a game with friends akin to hide-and-seek. The plaintiff tripped over an elevated concrete platform, and fell down an exterior stairway leading to the basement of a school.

According to the defendant's expert, the amount of lighting was sufficient to illuminate the staircase such that it should have been open and obvious. However, the plaintiff and two friends attested that the area was completely dark, and so he hadn't seen the platform or the staircase. Additionally, the plaintiff's expert opined that the lighting at the staircase was insufficient and below the minimum requirements set by good and accepted engineering practice. There was thus a triable issue as to whether the plaintiff's conduct was the sole proximate cause of his injuries.[31]

Lighting conditions are also important in the more common cases of pedestrians walking outdoors at night. In *Baron v. 305-323 East Shore Road Corp.,*[32] the plaintiff tripped and fell over a ramp outside a building owned by the defendant, where it was completely dark. He also had not seen the ramp because its color blended into that of the surrounding pavement. The fact that the ramp was unlit, and could not be distinguished from the adjoining parking lot, precluded an award of summary judgment.

As to whether and when lighting should be provided, *Conneally v. Diocese of Rockville Centre,*[33] informs us that "absent a hazardous condition or other circumstance giving rise to an obligation to provide exterior lighting for a particular area, landowners are generally not required to illuminate their property during all hours of darkness."[34] However, "a landowner whose property is open to the public is charged with the duty of providing safe means of ingress and egress, which includes a duty to provide adequate lighting."[35]

In *Conneally*, the plaintiff's accident occurred just after a concert she had attended inside a church. She allegedly tripped and fell due to an elevation differential between the church's outdoor plaza area and the abutting sidewalk below it. She purportedly did not see the difference in height because the area was inadequately lit. The defendants attempted to overcome this claim with an expert who opined that the lighting conditions were adequate. However, this affidavit did not carry the day; the expert's inspection of the premises was more than two years after the accident, and it was not shown that lighting conditions were the same then as when the accident had occurred.

A rather intriguing case is *Powers v. 31 E 31 LLC.*[36] The plaintiff, while intoxicated, fell off a setback roof and landed in the bottom of an air shaft. The setback roof, which ran the length of the rear of the building, was five feet wide and accessible through a window of the second-floor apartment of the plaintiff's friend. Although most of the setback abutted either a wall or a setback roof of the adjacent building, a portion of it abutted a 25-foot-deep air shaft. There was no railing, fence or parapet wall around the perimeter of the air shaft, whose opening measured approximately six feet, four inches by eight feet, five inches.

The plaintiff asserted that, at night, guests climbing out of the window and onto the setback roof could not see the air shaft or appreciate the drop. For instance, one of the plaintiff's companions had not noticed the air shaft the first time that she went out on the setback. It was also significant that only a small part of the roof, i.e. the portion next to the air shaft, was completely open to the surface below. Given this, and conflicting testimony as to the available lighting, summary judgment on an open and obvious defense was held not to be indicated.

Summary judgment was granted though in *LiPuma v. J.P. Morgan Chase N.A.*[37] In that matter, the plaintiff allegedly fell over a wheel stop in the defendant's parking lot at dusk. He claimed that the defendant failed to provide adequate lighting, and improperly situated the wheel stop in an area where pedestrians might walk. However, the defendant's affidavits and photographic evidence established

that the wheel stops possessed reflectorized coatings, which made them visible in the ambient light.

Objects in Aisles and Passageways

There are numerous cases in which the plaintiff encountered an object in a store aisle or other interior space. This is often a defense-friendly scenario.

In *Benjamin v. Trade Fair Supermarket, Inc.*,[38] the plaintiff allegedly was injured when she tripped and fell over boxes in the meat aisle of the defendants' supermarket. The claim was that these items were negligently left there and permitted to remain. The Second Department deemed the boxes to be readily observable by the reasonable use of one's senses, and not inherently dangerous as a matter of law. Accordingly, a summary judgment of dismissal was warranted.

Boyle v. Pottery Barn Outlet[39] involved a similar occurrence. A store owner was sued by a patron who had tripped and fallen over a cardboard box in the aisle of store. The Second Department characterized this as "open and obvious, readily observable by those employing the reasonable use of their senses, and not inherently dangerous as a matter of law."[40]

Koepke v. Deer Hills Hardware, Inc.[41] is another store aisle accident case that was successfully defended. The plaintiff presumed that he had fallen on account of three folded-up beach chairs that were stacked and leaning against a wall. This too was open and obvious and not inherently dangerous.

A dismissal also occurred in *Schwartz v. Kings Third Ave. Pharmacy, Inc.*,[42] which involved a trip and fall over a display rack in an aisle of the defendant's store. The plaintiff had seen the display rack before the accident, and photographs showed its open and obvious nature and placement in a reasonably safe location. The base did not protrude into the aisle, was essentially flush with the shelves above, and the rack was placed flat against shelving which was clear and uncluttered. The First Deparment rejected the plaintiff's position that she had lacked sufficient time to perceive the rack upon turning into the aisle. This was considering that she had seen the rack, and it was located at least several feet into the aisle.

These results aside, summary judgment in cases of store aisle accidents is by no means guaranteed. In *Russo v. Home Goods, Inc.*,[43] the plaintiff allegedly tripped and fell over an empty dolly, known as a "pallet jack," while shopping at the defendants' store. As she entered an aisle, she was looking up at lamps on shelves that were for sale. She did not look down and, after taking two steps into the aisle, she tripped over the pallet jack, which was below her knee and low to the ground. It was long, square, and made of wood and/or iron, had wheels, and had a handle sticking up in the back of it. The plaintiff had not seen the pallet jack in the store previously.

This pallet jack was a makeshift "flatbed" that enabled employees to transport furniture and other merchandise to customer cars outside. Pallet jacks were usually stored in the stockroom immediately after use, and admittedly were not supposed to be left unattended because they are a tripping hazard. The Appellate Division also found it significant that the pallet jack was low to the ground and empty and had no distinguishing features, and the plaintiff hadn't seen it since she was looking at items up on shelves. Given the totality of these circumstances, a summary dismissal based on an open and obvious defense was not justified.

The defense has been applied to a library aisle accident. The plaintiff in *Lew v. Manhasset Public Library*[44] was walking down an aisle with bookshelves to her left and tables and chairs to her right. She came across a book cart in the aisle, and, as she walked around it, she allegedly tripped and fell on the leg of a chair. The book cart and the chair were held to be open and obvious and not inherently dangerous.

The defense may also be honored in other varieties of passageways. In *Mathis v. D.D. Dylan, LLC*,[45] the plaintiff allegedly tripped and fell over a cardboard box containing a shovel in the hallway / foyer of the defendant's premises. She had testified that she had visited the premises almost daily, and the box containing the shovel was in the same place during the prior nine months. Additionally, she had passed the box with the shovel more than once on the loss date, without incident. The condition was thus considered open and obvious and not inherently dangerous as a matter of law.

The Second Department held likewise in *Piarino v. Nouveau Elevator Industries, Inc.*,[46] where the condition complained of was a stack of elevator doors in a hallway. This was viewed as open and obvious, known to the plaintiff, and not inherently dangerous.

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

Other Indoor Accidents

Apparently a locked door can spawn a trial if it should have been capable of opening. In *Maneri v. Patchogue-Medford Union Free School Dist.*,[47] the plaintiff eighth grade student was injured at the conclusion of a physical education class. As her classmates attempted to enter the girls' locker room, she was inadvertently pushed into the locker room door by the students behind her. The door had been locked at the beginning of class to prevent unauthorized entry into the locker room, but was not unlocked prior to the occurrence. Summary judgment could not be granted against this backdrop.

An unlocked door can be a problem as well. The plaintiff in *McKnight v. Coppola*[48] fell down the basement stairway at the defendant's residence. She had walked down an unlit hallway, intending to open the door to the first floor bathroom. Instead, she opened the door to the basement. After moving her hand along a wall in search of a light switch, she took a step and fell down the stairs. She complained that the basement door was next to the bathroom door, and was identical in appearance to it, justifying a trial on the open and obvious defense.

An open window, if large enough and accessible enough, may not suit the defense either. In *Parslow v. Leake*,[49] the intoxicated plaintiff fell out of a second-story bathroom window while attending a party at a residence populated by college students. The window sill was merely 13 1/2 inches above the floor, and the maximum window opening was 39 inches high and 35 inches wide. The window had no screen or fall protection device, and was fully open and yet covered by blinds. This being so, the window opening was not sufficiently open and obvious as to extinguish the duty to warn. Likewise, it posed enough of a danger such that the duty to keep the premises safe might not have been discharged.

Other Outdoor Accidents

Whereas sports participants commonly assume risks that stem from athletic field imperfections (see below), an ordinary pedestrian may enjoy greater legal refuge. In *Oldham-Powers v. Longwood Cent. School Dist.*,[50] the plaintiff fell after stepping into a pole vault box while walking across a high school sports field. She had thought that she was traversing a walkway, which was actually a pole vault runway. While she was walking, she was speaking to her daughter and was not looking down.

A condition as here could be considered not inherently dangerous and readily observable with reasonable use of the senses, as the movant had met its summary judgment burden. However, the plaintiff created a triable issue based on an expert affidavit and her testimony that she had never been to this area. The expert opined that the pole vault runway and box constituted a pedestrian risk, which required the defendant to either cover the box or place warning signs.

The factor of distraction undermined the defense of a case involving a rather routine and benign landscaping feature, i.e. a Belgian block border. In *Pellegrino v. Trapasso*,[51] the 15 year old plaintiff was attending a party at the defendant's house, where fireworks were being set off. The plaintiff allegedly stepped backward to distance himself from the fireworks. In doing so, he tripped over Belgian blocks that surrounded a tree on the front lawn. Evidently, the distraction and/or potential danger of the fireworks excused the plaintiff's failure to see and avoid the condition, at least in a summary judgment context.

Without factors of distraction or inadequate lighting in play, a defendant can be more optimistic that decorative items surrounding a tree, garden or the like will not give rise to liability. That was the case in *Samantha R. v. New York City Housing Authority*.[52] In that matter, the infant plaintiff was injured when, after kicking a soccer ball into a planting area on the defendant's premises, she tripped over a decorative wicket fence and fell onto pavement. The wicket fence had surrounded the planting area. The First Department held that the fence was open and obvious and not inherently dangerous, and granted summary judgment dismissing the complaint.

Scalice v. Braisted[53] concerns an exterior staircase accident that was attributed to fallen tree matter. Specifically, the plaintiff slipped and fell on the back steps of the defendant's residence, after feeling a

"hard cone" or "ball" beneath her foot. Afterward, she observed a crushed seed ball, which was about the size of a golf ball, on the step. Two or three other seed balls and some leaves were scattered about the steps and landing as well. The seed balls and leaves apparently had fallen from a nearby tree belonging to the defendant's neighbor. This condition was open and obvious, i.e., readily observable by those employing the reasonable use of their senses, and not inherently dangerous.

Other Natural Phenomena

A landowner has a duty to warn of a latent, dangerous condition of which he is or should be aware, but this does not extend to the open and obvious dangers of natural geographic phenomena.[54] Thus, although a genuine danger may exist in this setting, a case can nevertheless be defensible so long as the duty to warn was satisfied.

King v. Cornell University[55] involves a college student's tragic fall to his death in a campus gorge. Apparently the plaintiff decedent was running along a gorge trail, and crossed over a split rail fence that ran alongside it. He was consequently exposed to the edge of a cliff that was about 35 feet from the fence. The area between the fence and the cliff was sparsely wooded, and had sloped downward from the trail. Photographs did not depict the actual condition at the cliff's edge, nor the 200-foot drop-off there. The Third Department found a triable issue as to whether the cliff's edge was visible and obvious, or, presented a latent, dangerous condition necessitating a warning that had not been provided.

Primary Assumption of Risk

Under the assumption of the risk doctrine, voluntary participants in recreational or athletic activities are deemed to consent to commonly appreciated risks which are inherent in and arise out of the nature of the sport generally, and which flow from participation.[56] This encompasses risks associated with the construction of a playing field, the activity engaged in, and the surface and any open and obvious conditions on it,[57] including "risks involving less than optimal conditions."[58] Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation.[59]

The doctrine is not a defense based on a plaintiff's culpable conduct, but rather is a measure of the defendant's duty of care to participants in certain types of athletic or recreational activities.[60] A plaintiff who freely accepts a known risk commensurately negates any duty on the part of the defendant to safeguard him or her from the risk.[61] Accordingly, "if the risks are known by or perfectly obvious to the player, he or she has consented to them and the property owner has discharged its duty of care by making the conditions as safe as they appear to be."[62]

On the other hand, this class of plaintiffs does not assume concealed or unreasonably increased risks, or unique and dangerous conditions over and above the usual dangers that are inherent in the activity.[63] Awareness of the risk of engaging in a particular activity is to be assessed against the background of the skill and experience of the particular plaintiff.[64]

The doctrine potentially applies to athletic, "socially valuable voluntary activity"[65] such as "sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues."[66] It is intended to facilitate "free and vigorous participation" in such activity.[67] A rationale is that placing the risk of participation on the participant encourages sponsorship, and thus more opportunities for sports and recreation.[68]

Sports Venues

Dann v. Family Sports Complex, Inc.,[69] involving injury during indoor soccer, provides a good study concerning concealed versus appreciated risk. The plaintiff was an experienced soccer player who was injured while playing in a game inside a dome. The dome had inflated fabric walls that were anchored to a concrete footer that rose 10 inches above ground level. The plaintiff lunged for a ball and slid into the raised footer, which was located approximately 55 inches from the goal line. The footer was concealed by an inner vinyl liner that hung to the ground.

There were several competing considerations. On one hand, the risk of crashing into a wall is inherent in indoor soccer, and the wall was open and obvious. On the other hand, the presence of the concrete footer was concealed by the hanging liner, at least at the particular spot where the plaintiff had impacted it. The defendants did emphasize that the footer was visible elsewhere in the dome, and that the plaintiff

had seen the lack of "give" when soccer balls struck the wall. Regardless, a triable issue existed since the plaintiff had never actually seen the footer, and thought the wall would have a cushioning effect.

Conversely, the primary assumption of risk doctrine can be applied in cases involving sports courts and fields where the risk was not concealed. In *Perez v. New York City Dept. of Educ.*,[70] the 17-year-old plaintiff was injured while playing basketball in a gymnasium owned by the defendants. He was running at a fast pace and jumped to block a lay-up. As he did so, his right arm went through and shattered a pane of glass in one of the entrance doors to the gymnasium, which was situated beyond the baseline but in its proximity. The Second Department agreed that the plaintiff had assumed the obvious and inherent risk of coming into contact with the entrance door's pane of glass, by electing to play basketball on that court.

Another example is *Perez v. City of New York*,[71] wherein a high school softball player was injured when she slid into home plate, and her left foot got stuck in mud. It had rained heavily that day, and she had seen the "mud area" prior to the accident. Summary judgment was in order because the plaintiff had assumed the risk of injury, by voluntarily playing the game with full awareness of the field's condition.

A school sports team member is less likely to assume an obvious risk where her usual venue had been changed to a substantially different location. That is what happened in *Braile v. Patchogue Medford School Dist. of Town of Brookhaven*,[72] involving a 12-year-old school soccer team participant. Soccer practice was held indoors on the accident date because it was raining outside. Among other activities, the coach had paired up students to run a 150 foot sprint in a school hallway, to a finish line in space that was past an open set of double doors. A hard wall was located just 9 - 10 feet beyond those double doors. The team had not practiced there before, and the plaintiff was in the first pair to sprint. As you might be suspecting, the plaintiff ended up running into the wall.

Summary judgment was not appropriate, as the child soccer player had not necessarily consented to the risks of racing in the school hallway. The hallway was not a designated athletic venue, and the team had not held practice there before. Also, it was for a jury to decide if the defendant's coach had unreasonably increased the inherent risks of soccer practice by setting the finish line too close to a wall in this transitory running course.

Recreation

The doctrine can also apply to informal athletic and recreational activity. For example, in *Latimer v. City of New York*,[73] the plaintiff was injured while having a football catch on handball courts. He was running and then tripped over a raised, cracked, and uneven edge of the concrete sidewalk adjacent to one of the paved courts. There was also a gap of approximately one inch between the two slabs. The 26-year-old plaintiff was familiar with the risk of falling while running to catch a ball, and had a general awareness of the defects in the playground due to his 15+ prior visits there. And while the plaintiff had not seen this particular condition, it was there to be seen. Summary judgment dismissing the action was thus warranted.

The doctrine can apply to certain types of bicycling, such as motocross. In *Mamati v. City of New York Parks & Recreation*,[74] the plaintiff was riding on a dirt bike trail in a City park, and allegedly was injured while jumping his bicycle off of a dirt mound. The defendant's summary judgment motion demonstrated that the plaintiff assumed the risk of his injuries by voluntarily jumping his bicycle as such, considering also that he was fully aware of the mound's condition from two prior encounters with it.

Primary assumption of the risk has been relevant in a golf course setting. In *Simon v. Hamlet Windwatch Development, LLC*,[75] the plaintiff golfer had exited his golf cart on a cart path near the top of a staircase leading down to a green. While walking to the rear of the golf cart to retrieve his putter, he stepped into an area of the cart path that contained a depressed drainage grate. As a result, he fell forward and partially onto a wooden step. The open and obvious grate was a commonly appreciated risk associated with the construction of the golf course, and thus the claim was ripe for the defense.

An assumption of risk position was also attempted in *Toyryla v. St. Denis*,[76] which concerned a dive into a lake. The plaintiff dove off a dock that was part of the defendants' residential property. The parties had been friendly and the plaintiff had been diving and

swimming there on numerous other occasions. At this time, however, the water level was substantially lower and so the usual six foot depth was reduced, and yet the lake bottom could not be seen. The defendants knew about the reduced water level, but the plaintiff did not.

The defendants moved for summary judgment, contending among other things that they had no duty to warn about the lowered water level since the plaintiff had stated that he would not be entering the water. However, it was extremely hot that day and children were already in the lake, and the plaintiff was wearing swim trunks. Therefore, that the plaintiff would ultimately take a dive was not unforeseeable as a matter of law, and whether a duty to warn was breached merited jury consideration as well.

Health Clubs

The claim of a treadmill user was successfully defended in *DiBenedetto v. Town Sports Intern., LLC*.[77] The plaintiff alleged injury from stepping onto a treadmill that another member had vacated but did not turn off. The Second Department observed that the assumption of the risk doctrine has been applied in cases involving gyms and fitness centers. Here, a dismissal was indicated because the plaintiff had been a frequent treadmill user at the facility, and had been standing beside the treadmill for two minutes -- long enough to appreciate the state of affairs. Moreover, the defendant discharged its duty of care "by making the conditions as safe as they appeared to be."[78]

Child and Teen Games

As discussed above, an elevated concrete platform and adjoining exterior stairway, in allegedly poor lighting conditions, were not considered open and obvious conditions for purposes of a sole proximate cause defense.[79] That same case also held that primary assumption of risk did not apply to the plaintiff's "manhunt" hide-and-seek game. That entertainment was analogous to "horseplay" to which the doctrine is not germane,[80] as neither activity is the sort of socially valuable endeavor that the doctrine seeks to encourage.

Conclusion

As now seen, we had a good volume and variety of appeals in 2014 involving open and obvious conditions. These types of cases appear to comprise a significant landscape in the general liability world, and provide summary dismissal opportunities with some frequency. It is my hope that the foregoing review has been instructive, and will be useful in your practice.

(Endnotes)

1 *Benjamin v. Trade Fair Supermarket, Inc.*, 119 A.D.3d 880, 989 N.Y.S.2d 872, 873 (2d Dept 7/30/14); see also *Boyle v. Pottery Barn Outlet*, 117 A.D.3d 665, 985 N.Y.S.2d 291 (2d Dept 5/7/14)

2 *Powers v. 31 E 31 LLC*, 2014 WL 6751747 at *2 (1st Dept 12/2/14); *Soto v. 2780 Realty Co., LLC*, 114 A.D.3d 503, 980 N.Y.S.2d 93, 95 (1st Dept 2/13/14)

3 *King v. Cornell University*, 119 A.D.3d 1195, 990 N.Y.S.2d 329, 332 (3d Dept 7/17/14)

4 *Powers*, 2014 WL 6751747 at *2; see also *Soto*, 114 A.D.3d at 503

5 *Barley v. Robert J. Wilkins, Inc.*, 122 A.D.3d 1116, 2014 WL 6475184 (3d Dept 11/20/14); see also *DiVetri v. ABM Janitorial Service, Inc.*, 119 A.D.3d 486, 990 N.Y.S.2d 496, 49 (1st Dept 7/24/14)

6 *Powers*, 2014 WL 6751747 at *2, quoting *Russo v. Home Goods, Inc.*, 119 AD3d 924, 925-926, 990 N.Y.S.2d 95 (2d Dept 7/30/14)

7 *Id.*

8 *Id.*

9 *Dillman v. City Cellar Wine*, 996 N.Y.S.2d 545, 2014 N.Y. Slip Op. 08598 (2d Dept 12/10/14); *Varon v. New York City Department of Education*, 2014 WL 6910533 (2d Dept 12/10/14); *Doughim v. M & U.S. Property, Inc.*, 120 A.D.3d 466, 990 N.Y.S.2d 816 (2d Dept 8/6/14); *Coppola v. Cure of Ars Roman Catholic Church*, 119 A.D.3d 726, 989 N.Y.S.2d 314, 315 (2d Dept 7/16/14)

10 *Bluth v. Bias Yaakov Academy for Girls*, 2014 WL 7180887 (2d Dept 12/17/14); *Baron v. 305-323 East Shore Road Corp.*, 121 A.D.3d 826, 2014 WL 5151422 (2d Dept 10/15/14); *Oldham-Powers v. Longwood Cent. School Dist.*, 2014 WL 6778891 at *1 (2d Dept 12/3/14)

11 *Baron*, 2014 WL 5151422 at *1

12 *Oldham-Powers*, 2014 WL 6778891 at *1; *Pellegrino v. Trapasso*, 114 A.D.3d 917, 980 N.Y.S.2d 813, 814 (2d Dept 2/26/14)

13 *Id.*; see also *Doughim v. M & U.S. Property, Inc.*, 120 A.D.3d 466, 990 N.Y.S.2d 816, 817 (2d Dept 8/6/14)

14 *Doughim*, 990 N.Y.S.2d at 817; *Maneri v. Patchogue-Medford Union Free School Dist.*, 121 A.D.3d 1056, 2014 WL 5461605 (2d Dept 10/29/14); *Parslow v. Leake*, 117 A.D.3d 55, 63, 984 N.Y.S.2d 493 (4th Dept 3/28/14)

15 *Jankite v. Scoresby Hose Co.*, 119 A.D.3d 1189, 990 N.Y.S.2d 678, 681 (3d Dept 7/17/14)

16 *Russo v. Incorporated Village of Atlantic Beach*, 119 A.D.3d 764, 989 N.Y.S.2d 320 (2d Dept 7/16/14)

17 2014 WL 6475184 (3d Dept 11/20/14)

[18] 2014 WL 7180853 (2d Dept 12/17/14)
[19] 2013 WL 5785197
[20] 2014 WL 6910533 (2d Dept 12/10/14)
[21] 996 N.Y.S.2d 545, 2014 N.Y. Slip Op. 08598 (2d Dept 12/10/14)
[22] 119 A.D.3d 726, 989 N.Y.S.2d 314 (2d Dept 7/16/14)
[23] Sup Ct, Suffolk Cty, index 45576/10, aff'd 120 A.D.3d 623, 990 N.Y.S.2d 876 (2d Dept 8/20/14)
[24] 2014 WL 6802737 (3d Dept 12/4/14)
[25] 120 A.D.3d 466, 990 N.Y.S.2d 816 (2d Dept 8/6/14)
[26] 119 A.D.3d 1189, 990 N.Y.S.2d 678 (3d Dept 7/17/14)
[27] 2014 WL 7180887 (2d Dept 12/17/14)
[28] 119 A.D.3d 486, 990 N.Y.S.2d 496 (1st Dept 7/24/14)
[29] 114 A.D.3d 503, 980 N.Y.S.2d 93 (1st Dept 2/13/14)
[30] 2014 WL 5633695 (2d Dept 11/5/14)
[31] *Wolfe* also holds that the plaintiff's game was not a kind of activity that befits the doctrine of primary assumption of risk, which is discussed later in this article.
[32] 121 A.D.3d 826, 2014 WL 5151422 (2d Dept 10/15/14)
[33] 116 A.D.3d 905, 984 N.Y.S.2d 127 (2d Dept 4/23/14)
[34] *Conneally*, 984 N.Y.S.2d at 128, citing *Miller v. Consolidated Rail Corp.,* 9 N.Y.3d 973, 974, 848 N.Y.S.2d 599
[35] *Conneally*, 984 N.Y.S.2d at 128
[36] 2014 WL 6751747 (1st Dept 12/2/14); this opinion was upon remittitur from the Court of Appeals, for consideration of issues raised but not determined on appeal to the First Department.
[37] 119 A.D.3d 532, 987 N.Y.S.2d 915 (2d Dept 7/2/14)
[38] 119 A.D.3d 880, 989 N.Y.S.2d 872 (2d Dept 7/30/14)
[39] 117 A.D.3d 665, 985 N.Y.S.2d 291 (2d Dept 5/7/14)
[40] *Boyle*, 117 A.D.3d at 665
[41] 118 A.D.3d 957, 987 N.Y.S.2d 854 (3d Dept 6/25/14)
[42] 116 A.D.3d 474, 984 N.Y.S.2d 13 (1st Dept 4/8/14)
[43] 119 A.D.3d 924, 990 N.Y.S.2d 95 (2d Dept 7/30/14)
[44] 2014 WL 7392514 (2d Dept 12/31/14)
[45] 119 A.D.3d 908, 990 N.Y.S.2d 581 (2d Dept 7/30/14)

[46] 116 A.D.3d 685, 983 N.Y.S.2d 288 (2d Dept 4/2/14)
[47] 121 A.D.3d 1056, 2014 WL 5461605 (2d Dept 10/29/14)
[48] 113 A.D.3d 1087, 978 N.Y.S.2d 562 (4th Dept 1/3/14)
[49] 117 A.D.3d 55, 984 N.Y.S.2d 493 (4th Dept 3/28/14)
[50] 2014 WL 6778891 (2d Dept 12/3/14)
[51] 114 A.D.3d 917, 980 N.Y.S.2d 813 (2d Dept 2/26/14)
[52] 117 A.D.3d 600, 986 N.Y.S.2d 115 (1st Dept 5/22/14)
[53] 116 A.D.3d 755, 982 N.Y.S.2d 921 (2d Dept 4/9/14)
[54] *King v. Cornell University*, 119 A.D.3d 1195, 990 N.Y.S.2d 329, 331 (3d Dept 7/17/14)
[55] 119 A.D.3d 1195, 990 N.Y.S.2d 329 (3d Dept 7/17/14)
[56] *Dann v. Family Sports Complex, Inc.*, 2014 WL 6803040 at *1 (3d Dept 12/4/14), citing *Morgan v. State of New York,* 90 N.Y.2d 471, 484; *DiBenedetto v. Town Sports Intern., LLC*, 118 A.D.3d 663, 987 N.Y.S.2d 102, 103 (2d Dept 6/4/14); *Latimer v. City of New York*, 118 A.D.3d 420, 987 N.Y.S.2d 58 (1st Dept 6/3/14); see also *Mamati v. City of New York Parks & Recreation*, 2014 WL 6780568 at *1 (2d Dept 12/3/14)
[57] *DiBenedetto*, 987 N.Y.S.2d at 103; see also *Mamati*, 2014 WL 6780568 at *1, and *Perez v. New York City Dept. of Educ.*, 115 A.D.3d 921, 982 N.Y.S.2d 577, 578-79 (2d Dept 3/26/14)
[58] *Latimer*, 118 A.D.3d at 421, citing *Bukowski v. Clarkson Univ.,* 19 N.Y.3d 353, 948 N.Y.S.2d 568
[59] *Mamati*, 2014 WL 6780568 at *1
[60] *Braile v. Patchogue Medford School Dist. of Town of Brookhaven*, 2014 WL 7332759 at *1 (2d Dept 12/24/14),
[61] *Braile*, 2014 WL 7332759 at *1 (2d Dept 12/24/14), citing *Custodi v. Town of Amherst,* 20 N.Y.3d 83, 87, 957 N.Y.S.2d 268
[62] *Latimer*, 118 A.D.3d at 42; *Mamati*, 2014 WL 6780568 at *1, citing *Turcotte v. Fell,* 68 N.Y.2d at 439
[63] *Dann*, 2014 WL 6803040 at *1, citing *Morgan*, 90 N.Y.2d at 485; *Braile*, 2014 WL 7332759 at *2
[64] *DiBenedetto*, 987 N.Y.S.2d at 103, citing *Maddox v. City of New York,* 66 N.Y.2d 270, 278, 496 N.Y.S.2d 726; *Latimer*, 118 A.D.3d at 421
[65] *Wolfe v. North Merrick Union Free School Dist*, 2014 WL 5633695 (2d Dept 11/5/14), citing *Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d 392, 901 N.Y.S.2d 127
[66] *Braile*, 2014 WL 7332759 at *2
[67] *Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d at 395, quoting *Benitez v. New York City Bd. of Educ.,* 73 N.Y.2d 650, 657, 543 N.Y.S.2d 29
[68] *Wolfe v. North Merrick Union Free School Dist*, 2014 WL 5633695, citing *Custodi v. Town of Amherst,* 20 N.Y.3d 83, 88, 957 N.Y.S.2d 268
[69] 2014 WL 6803040 (3d Dept 12/4/14)
[70] 115 A.D.3d 921, 982 N.Y.S.2d 577 (2d Dept 3/26/14)
[71] 118 A.D.3d 686, 986 N.Y.S.2d 850 (2d Dept 6/4/14)
[72] 2014 WL 7332759 (2d Dept 12/24/14)
[73] 118 A.D.3d 420, 987 N.Y.S.2d 58 (1st Dept 6/3/14)
[74] 2014 WL 6780568 (2d Dept 12/3/14)
[75] 120 A.D.3d 657, 990 N.Y.S.2d 870 (2d Dept 8/20/14)
[76] 119 A.D.3d 1263, 990 N.Y.S.2d 712 (3d Dept 7/24/14)
[77] 118 A.D.3d 663, 987 N.Y.S.2d 102 (2d Dept 6/4/14)
[78] 987 N.Y.S.2d at 104, citing *Turcotte v. Fell,* 68 N.Y.2d 432, 439, 510 N.Y.S.2d 49
[79] *Wolfe v. North Merrick Union Free School Dist*, 2014 WL 5633695
[80] See *Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d 392

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