DEFENDANT

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President's Column: A Needed Change

VINCENT POZZUTO*

Long-time DANY members and those with knowledge of the history of the organization will note that the Board of Directors has now voted to change the name of DANY's annual award to the Defense Association of New York Civil Justice Award. This change was needed, and I am proud of the Board and proud to have been President when this change was effectuated. I know as well that all members of the Board take pride in realizing that this change was a required course of action, and also take satisfaction with the manner through which it was accomplished. It did not occur over the course of one meeting, but many, and was the subject of lively and meaningful debate regarding not only the need for a change, but the new name of the award. In the end the Board came to the conclusion that the award need not be named for a historical figure in the legal profession or politics, and that the award itself is bigger than any one person's name. In this fashion, the Defense Association of New York Civil Justice Award was born.

And upon further reflection, the name exemplifies the main goals of this organization: "Civil Justice". Civil Justice through zealous advocacy, as reflected in the tremendous work of the DANY Amicus Committee over the years. Civil Justice through education, as demonstrated by the efforts of the DANY CLE Committee in presenting thought provoking CLE seminars throughout the course of the past year, and many years prior. Civil Justice through promoting diversity in the profession, as has been championed by the DANY Diversity Initiative.

In addition, in making this change, the Board realized, quite simply, that the former namesake of this award was just not the proper person for such an award, as a slave owner and advocate of slave owner rights. Many institutions have come to this realization as well, and it has been well documented

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"Heeding Presumptions" in the Case of Inadequate Product Warnings

JOHN J. MCDONOUGH, ESQ.* AND
RYAN T. KEARNEY, ESQ. **

Under New York products liability law, manufacturers are charged with the duty to provide adequate warnings to alert consumers of the potential dangers arising from the use, and foreseeable misuse, of their products. This duty continues after the manufacture and/or sale of the products, requiring manufacturers to warn of any such dangers that are subsequently revealed through the happening of accidents and/or advancements in the state of the art. Cover v. Cohen, 61 N.Y.2d 261 (1984). The Court of Appeals has held that the standard for evaluating such claims is "intensely fact-specific, including but not limited to such issues as feasibility and difficulty of issuing warnings in the circumstances; obviousness of the risk from actual use of the product; knowledge of the particular product user; and proximate cause." Liriano v. Hobart Corp., 92 N.Y.2d 232 (1998).

On the issue of proximate cause, courts must analyze whether, in the event that an additional or more-detailed warning had been provided, plaintiff would have actually read and heeded it. Recently, plaintiffs have begun requesting that judges charge the jury with a "heeding presumption," i.e., an instruction to assume that the plaintiff would have in fact read and heeded such warnings. This is a developing issue of law that has yet to be determined at the appellate level. However, in some instances, a plaintiff's admitted failure to look for and/or read a product's posted warnings may provide a manufacturer with a legal defense to a claim that such warnings were inadequate. This article will explore the current state of law on such claims, as well as recent developments regarding the plaintiff's bar's efforts to obtain heeding presumption charges as a matter of law.

Continued on next page

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"Heeding Presumptions" in the Case of Inadequate Product Warnings

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The First Department has developed the most case law on this issue, which it first addressed in the 1997 case of Rodriquez v. Davis Equipment Corp., 235 A.D.2d 222 (1st Dep't 1997). In Rodriguez, the plaintiff was injured while operating a trenching machine from a standing position, and claimed that his injuries were caused by the lack of a warning advising him to only operate the machine while seated. However, because the plaintiff also admitted that he never looked for any warnings, the court held that a lack of such warning was not a substantial factor in causing his injuries, defeating plaintiff's allegations of proximate cause.

The First Department has since issued similar opinions in Guadalupe v. Drackett Prods. Co., 253 A.D.2d 378 (1st Dep't 1998) (granting summary judgment to the manufacturers of "Crystal Draino" after plaintiff admitted that she had made no attempt to read the product's label, and that it was her custom not to do so); Sosna v. Am. Home Prods., 298 A.D.2d 158 (1st Dep't 2002) (holding that plaintiff could not establish proximate cause after admitting that he

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had not read the defendant manufacturer's posted warnings prior to the accident); Perez v. Radar Realty, 34 A.D.3d 305 (1st Dep't 2006) (wherein a "knowledge user" admitted that he made no attempt to read the product's label or warnings, likewise defeating his allegations of proximate cause); and Reis v. Volvo Cars of N. Am., 73 A.D.3d 420 (1st Dep't 2010) (dismissing plaintiff's failure to warn claims upon plaintiff's admission that he had not read his car's owner's manual, and stating that "a plaintiff asserting a failure to warn claim must adduce proof that the user of a product would have read and heeded a warning had one been given."). For its part, the Fourth Department has also followed this approach. See Upfold v. Generac Corp., 224 A.D.2d 1021 (4th Dep't 1996) (dismissing plaintiff's failure to warn claims upon plaintiff's admission that he generally does not read the product literature and/or warnings unless he encounters a problem using the product).

However, the Second Department has issued multiple opinions holding that, in some instances, a plaintiff may pursue a claim based upon inadequate product warnings despite plaintiff's admitted failure to read what had been provided. In Johnson v. Johnson Chemical, plaintiff brought suit against the manufacturer for failing to warn consumers not to use its aerosol insecticide product within a close proximity of open flame. 183 A.D.2d 64 (2d Dep't 1992). Plaintiff admitted at deposition that she had not read the warnings contained on the can, but her attorney claimed that such warnings should have been more prominently displayed. On these facts, the Court refused to hold that plaintiff's failure to read the product warnings defeated her allegations of proximate cause, and ruled that this issue should be submitted to the jury. See also Vail v. KMart Corp., 25 A.D.3d 549 (2d Dep't 2006) (finding defendants' arguments that plaintiff had never read the product labels before the injury to be unpersuasive as to proximate cause). But see Zapata v. Ingersoll-Rand Co., 36 Misc.3d 1230(A), 959 N.Y.S.2d 93 (Sup. Ct., Kings Cty. Aug. 15, 2012) (unpub.) (citing First Department decisions while noting the "well settled law" that plaintiff carries the burden "to adduce proof that had a warning been provided, he or she would have read the warning and heeded it").

The 2016 Court of Appeals decision in Matter of New York City Asbestos Litigation – Dummit briefly addressed this issue, but stopped short of addressing the contested request for a heeding presumption charge. 27 N.Y.3d 765 (2016). In this asbestos exposure case, the plaintiff argued that additional warnings should have been provided as to latent dangers resulting from foreseeable uses of the product. Notably, plaintiff had also testified that if such warnings had been provided, he would have read and heeded them. The trial court then instructed the jury, inter alia, to assume that such additional warnings would have been heeded if provided, and the jury entered a verdict for the plaintiff.

On appeal, the First Department affirmed the trial court's decision on other grounds, and, apart from the dissent (finding such instructions to be erroneous, yet ultimately harmless), did not address the issue of a heeding presumption. 121 A.D.3d 230 (1st Dep't 2014). In affirming the Appellate Division, the Court of Appeals did state that the burden of demonstrating proximate cause, which "includes the burden of demonstrating that the injured party would have heeded warnings, falls squarely on plaintiffs." 27 N.Y.3d at 805. However, the Court found defendants' arguments regarding the specific heeding presumption instructions to be unpreserved and therefore academic, expressly stating that its holding "should not be taken as an acceptance or rejection of the trial court's heeding instruction on the merits." Id.

The Supreme Court, New York County was recently confronted with this very issue in the January, 2017 asbestos exposure case of Castorina v. A.C. & S., where Justice Jaffe explored a requested heeding presumption charge in great detail. 2017 N.Y. Misc. LEXIS 885 (Sup. Ct., N.Y. Cty. Jan. 9, 2017). There, Justice Jaffe examined the plaintiff's contentions that such instructions were already part of the law in New York State, as well as the supposed propriety of this charge moving forward. As to the former argument, Justice Jaffe declined to find any existing "blanket requirement that a jury be charged with the burden-shifting presumption that a plaintiff would have heeded a warning . . . if given." Justice Jaffe then proceeded to analyze the proposed rationale behind the charge, i.e., its basis in the assumption that a

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IN MEMORIAM

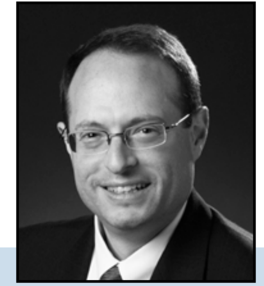
DAWN C. DESIMONE

April 7, 1966 – February 5, 2017

- Member of the Board of Directors of the Defense Association of New York, Inc. (DANY)
- Co-Chair of the Amicus Curiae Committee of DANY
- Valued Member of the Appeals Team at McGaw, Alventosa & Zajac

Dawn, our dear friend and colleague, will be deeply missed

The "Insurance" in Insurance Defense Attorney: Get Smart - Avoid the Cone of Silence



BY: JULIAN D. EHRLICH*

Understanding insurance is essential for the insurance defense attorney.

However, too often insurance defense attorneys tend to avoid the subject of insurance especially when the interests of their client, the insured, and its insurer diverge.

After all, insurance defense attorneys typically receive their suit assignments from, must report to and have attorneys' fees paid by insurers rather than their insured clients. Indeed, many clients prefer less communication from defense counsel. Some insureds will even say that they buy insurance precisely not to be bothered with claims.

Accordingly, it is entirely likely that defense attorneys have more contact through the life of a claim with the insurance adjuster than their insured client and much has been written of the tensions in the so-called tri-partite relationship.[i]

In addition, the insurer and insured may retain coverage counsel without telling the insurance defense attorney about this second set of attorneys.

Moreover, attorneys must be careful not to mention insurance at trial even while realizing that most jurors have a general notion of workers compensation and mandatory automobile insurance requirements.

Thus, there are a number of influences which have contributed to a view among insurance defense attorneys that insurance is something of a forbidden topic.[ii]

Nonetheless, insurance is quietly but inescapably pervasive in tort claims.

In 2010, The Defendant: The Journal of the Defense Association of New York featured The Coverage Issue with the entire edition dedicated to providing practical advice on coverage to the defense bar.

Since then, the insurance component of defense work has only become more compelling. More than ever insurance defense lawyers would "get smart" to know the fundamentals and keep current in their understanding of emerging insurance issues and trends.

This discussion will examine four common areas where insurance issues are likely to arise.

1) MAXIMIZING AVAILABLE COVERAGE

As noted recently in "Case Law Suggests Counsel Should Advise Clients About Available Insurance" by Howard Epstein and Theodore Keys, New York Law Journal, January 31, 2017, New York courts have strongly implied, but never expressly held, that defense attorneys have a duty to investigate and advise clients on the availability of coverage. The authors review several Appellate Division decisions which deny summary judgment motions by defense counsel sued in legal malpractice cases.

Waiting for case law to fully define such a duty or until a legal malpractice claim is made against the defense attorney is not only too late but inconsistent with client expectations.

Defense attorneys are well served to be familiar with their duties to maximize insurance and protect clients from uncovered exposure.

2) RISK TRANSFER

Risk transfer issues are ubiquitous presenting in many premises claims and nearly every construction site loss but also in some auto, professional and pollution claims. Risk transfer analysis is often a complicated mix of contractual indemnity, additional insured coverage, anti-subrogation principles and priority of coverage. Defense counsel must often explain to clients and insurers alike about illusory additional insured coverage[iii] and breaches of contract to procure insurance.[iv]

As claim values increasingly exceed primary limits, it is more likely that aggregates may be exhausted and excess layers pierced. Counsel is wise to know early

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* *Julian D. Ehrlich, Esq. is Senior Vice President of Claims at AON Risk Services Northeast, Inc.*

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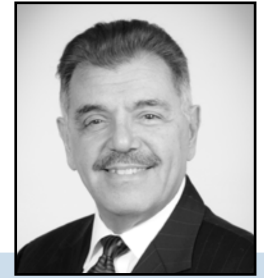

BY THOMAS LAQUERCIA, ESQ.*

On January 10, 2017, a federal jury recommended the death penalty for Dylann S. Roof for murdering the pastor and members of the Mother Emanuel A.M.E. in Charleston on June 17, 2015 in a mass shooting at an evening Bible study at the church. It took some time for the news to sink in: One of the Charleston victims actually bore the surname Pinckney. Among the victims was Clementa Carlos "Clem" Pinckney (July 30, 1973 – June 17, 2015). At first, my impression was that the Pinckney victim was a woman because the pastor's name was Clementa. How wrong was I, as explained below.

Little more than a week later the board of directors of DANY met on the 19th to rename the Pinckney Award. The thought began to haunt me about the coincidence and I determined to find out whether there was any relationship with our own long lasting association with Charles Cotesworth Pinckney and the Pastor "Clem" Pinckney.

In brief, the eponymous Pinckney award and the victim of the mass murder of June 17, 2015 at the Mother Emanuel A.M.E. in Charleston did have many a connection as unfolds below.

I'll skip right to the fallen pastor who was both an admired religious leader and a respected soft spoken legislator in South Carolina, so much so that even U.S. President Barack Obama delivered the eulogy at Pinckney's memorial nine days later.

Clementa Carlos "Clem" Pinckney was not only a senior pastor of the Mother Emanuel A.M.E. church in Charleston but was a Democratic member of the South Carolina Senate, representing the 45th District from 2000 until his death in 2015. He was previously a member of the South Carolina House of Representatives from 1997 through 2000. Pinckney preached in Beaufort, Charleston, and Columbia. He became pastor of Emanuel A.M.E. Church in Charleston, South Carolina, in 2010. As part of his work, Pinckney oversaw 17 churches in the area.

More to the point: Pinckney's father's family, the Pinckney family, based in the Beaufort, South Carolina area could possibly be descendants of slaves owned by Charles Cotesworth Pinckney who, as we know, was instrumental in framing the United States Constitution and was part of the Middleton-Rutledge-Pinckney family, a family that included many politicians (Arthur Middleton and Edward Rutledge both signed the Declaration of Independence). I also learned that the Pinckney Island National Wildlife Refuge is where the plantation was located. The website for Pinckney Island NWR relates that it was once included in the plantation of Major General Charles Cotesworth Pinckney, who is described therein as a prominent lawyer active in South Carolina politics from 1801 to 1815.

But more to issue of the names.

Indeed, according to reporter Kevin Sack of the New York Times, "Mr. Pinckney's late mother, Theopia Stevenson Aikens, was a baseball fan who named her son after Roberto Clemente, the Pittsburgh Pirates All-Star, who had died in a plane crash seven months earlier while delivering aid to earthquake victims in Nicaragua, family members said. His last name, one of the most storied in South Carolina politics, is that of a pair of white slaveholding cousins who signed the United States Constitution." [fact checked: yes, there actually were two Pinckneys who signed the Constitution, "C C" being one of the them and later becoming a leading Federalist candidate].

Pastor Pinckney also entered politics as his eponymous historical figure had done during the infancy of the Republic. The pastor was first elected to the South Carolina General Assembly in 1996 at the age of 23, becoming the youngest African American elected as a South Carolina state legislator. [32] He served in the South Carolina House

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* *Thomas M. Laquercia is a founding member of Laquercia LLP.*

The "Insurance" in Insurance Defense Attorney: Get Smart - Avoid the Cone of Silence

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on which insurers to report to and to understand which policies are likely to be impacted. Indeed, counsel may need to corral multiple insurers' for settlement discussions.

3) DISCOVERY ORDERS

Insurance and coverage can present as early as at suit assignment. Generally, counsel must disclose applicable insurance as part of discovery and a superficial review may not be sufficient to accurately represent insurance information.

Reliance on certificates can be particularly risky. Certificates are often described as "not worth the paper they are written on" because they typically come with "for information only" disclaimers. However, recent Appellate Division decisions have given inconsistent effect to certificates.[v]

Moreover, certificates may not always be accurate and typically include information only as to the lead layer excess rather than the full tower of coverage.

4) RESERVATIONS OF RIGHTS

Reservations of rights (RORs) letters can pose special challenges to defense attorneys.[vi]

For example, some insurers take the position that sharing the RORs with defense counsel is exclusively the insured's right. Thus, the insurer's suit assignment may not include or reference any ROR.

Accordingly, in preliminary conversations with the client, defense counsel should consider inquiring whether an ROR has been issued. The grounds for the reservation can directly impact on how counsel defends the case to maximize coverage.

In addition, as noted recently in "Special Interrogatories in Coverage Disputes: The Hidden Risk" by Benjamin Zelermyer and Jeffrey Steinberg, New York Law Journal, February 24, 2017, insurers may have a right to request special interrogatories to jurors. As noted by the authors, it may be "incumbent on insurers" to request interrogatories from the trial judge where there are issues of fact in the underlying case that may bear on related declaratory judgment actions.

Insurance defense attorneys should prepare well in advance if there is a possibility of an insurer intervening in the underlying trial. This may require regular communication and coordination with the insured's general counsel or policyholder attorney in the declaratory judgment action.[vii]

Moreover, defense counsel should have at least a high level awareness of emerging issues on duties that may be incumbent on insurers issuing ROR's.

For example, a recent decision on RORs which has received widespread national attention is Harleysville Grp. Is. v. Heritage Cmtys., Inc., 2017 S.C. LEXIS 8 (2017) from the Supreme Court of South Carolina. That case involved the common scenario where a GL insurer reserved rights in a construction defect property damage claim.

The Court surveyed case law from New York, Minnesota, Georgia, federal appellate courts and multiple treatises to find the ROR was so flawed as to be ineffective barring the insurer from asserting any coverage defenses.

Specifically, the Court repeatedly referred to the ROR as a "cut and paste job" which failed in the following ways:

1) to properly alert the policyholder to the potential inapplicability of coverage;
2) to advise the insured of the right to request special jury interrogatories between covered and uncovered damages; and
3) to advise the insured that the insurer intended to bring a DJ action seeking an order denying coverage.

As a result, Harleysville owed its insured the full $14 million of verdicts in two underlying cases. Commentators are already calling Harleysville a "top 10" decision of 2017 and "blindsiding everyone in the construction world" and "wreaks absolute havoc on insurers, TPAs and anyone who has sent a Reservation of Rights letter."

While the better practice for insurers has always been to include reasoned analysis applying loss facts to the policy terms in RORs, it is increasingly clear that courts will view "cut and paste" ROR's unfavorably.

In addition, in New York, under Insurance Law 3420(d) insurers have a duty to provide timely coverage position letters and a continuing duty to

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provide an updated analysis as facts become known.[viii]

There is also authority in New York to support an insurer's duty to advise the insured of the right to independent counsel.[ix]

Conclusion

Insurance is the first word in insurance defense attorney.

"I am not your coverage lawyer" is not an acceptable response to a client asking about risk transfer. "I cannot get involved in insurance for ethical reasons" is generally not true and "I asked you not to tell me that chief" is not smart.

Moreover, as this discussion has highlighted in just four common scenarios, the insurance defense attorney who ignores insurance issues does so at significant risk to themselves and their clients.

The Spring 2010 "Coverage Issue" of The Defendant continues to be an essential resource and it remains critical that insurance defense attorneys do not view insurance a necessary evil best banished to the cone of silence.

While there are real reasons for proceeding with care and caution, insurance can be the difference between control and chaos. A better approach for the insurance defense attorney and their clients is … insured… and loving it.

i See "Potential Ethical Dilemmas Facing Defense Counsel in the Tripartite Relationship" by Melissa Waters, *The Defendant: The Journal of the Defense Association of New York* (Spring 2010); "Defense Counsel's Obligation After Shaya B. Pacific: Something Else to Lose Sleep Over" by Michael Lenoff, *The Defendant: The Journal of the Defense Association of New York,* (Spring 2010) and "Unlimited 1b Coverage and the Grave Injury Defense: Avoiding Potential Conflicts" by Andrew Zajac and Dawn C. DeSimone, The Defendant: *The Journal of the Defense Association of New York,* (Spring 2010).

ii See "What Every Insurance Defense Attorney and their Client Need to Know About Insurance" by Julian D. Ehrlich, *The Defendant: The Journal of the Defense Association of New York* (Spring 2010).

iii See Spotting Illusory Downstream Coverage by William G. Kelly, *The Defendant: The Journal of the Defense Association of New York* (Spring 2010).

iv See "Someone Failed to Procure Insurance – Now What?" by John V. Fabiani, Jr., *The Defendant: The Journal of the Defense Association of New York* (Spring 2010).

v See *Three Boroughs LLC v. Endurance Am. Specialty Ins. Co.,* 143 A.D.3d 480 (1st Dept. 2016); *Southwest Ma. and Gen. Inc. v. Preferred Constrs. Ins. Co.,* 143 A.D.3d 577 (1st Dept. 2016).

vi See "Defending Under a Reservation of Rights: A Potential Minefield of Conflicts" by Jonathan A. Judd, *The Defendant: The Journal of the Defense Association of New York* (Spring 2010).

vii See "DJ Attorney and Underlying Attorney: More in Common Than You Might Think" by Glenn Dienstag, *The Defendant: The Journal of the Defense Association of* New York (Spring 2010).

viii *Endurance Am. Specialty Ins. Co. v. Utica First Ins. Co.,* 132 A.D.3d 434 (1st Dept. 2015).

ix *Elacqua v. Physicians' Reciprocal Insurers,* (3d Dept. 2008) and see J. Pigott dissent in *QBE Ins. Corp. V Jinx-Proof Inc.* (2014).

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What's in a Name?

of Representatives until being elected to the South Carolina Senate in 2000.

Three days following the mass murder, The New York Times published an Op-Ed piece by historian Henry Louis Gates Jr. who is a professor and the director of the Hutchins Center for African and African American Research at Harvard University and the chairman of The Root. Professor Gates had featured Pastor Pinckney in interviews for his award-winning PBS series *The African Americans: Many Rivers to Cross.*

Now, why do I bother with the foregoing history of names? In short, it is to show how full circle society has come and yet how society still falters, failing to protect its leaders, how the meaning of a name and what it represents can change from planter and slaver to religious leader and martyr and how much irony, some bitter, some sweet—can flow from one family's name over the centuries. After all, Pastor Pinckney kept his family name down from the ages of slavery and actually did it proud; yet he was felled by a white supremacist. How very tragic and sad, beyond pathos.

President's Column

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in the press how these institutions have sought to acknowledge mistakes made in the past, and correct them going forward. Moreover, the quote to which DANY in the past has credited to the former namesake of its award, "millions for defense, not a penny for tribute", was not only not uttered by him, but does not reflect what this organization is about. This organization is about the fair administration of justice in the civil defense arena. Some cases have to be tried, some cases have to settle, some cases can be dismissed on motion, but all cases should be handled with a view towards zealous advocacy and civility. This is what DANY stands for.

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"Heeding Presumptions" in the Case of Inadequate Product Warnings

reasonable person will exercise ordinary care for their own safety, and act appropriately if given adequate information. In granting a directed verdict for the defendants, Justice Jaffe opined that while heeding presumptions may be appropriate in cases where the injured party was deceased or otherwise unable to testify, the burden of proving that such warnings would have been heeded is not otherwise onerous, and should be carried by the plaintiff.

Although Justice Jaffe's decision in Castorina is certainly favorable to manufacturers and their defense counsel, plaintiff may choose to pursue an appeal to the Appellate Division. Given the First Department's prior opinions in similar cases, this may present an opportunity to obtain a favorable appellate decision resolving this issue. Of course, defense counsel should continue efforts to elicit testimony that plaintiffs either ignored or otherwise failed to observe product warnings as a basis to defeat proximate cause. However, as demonstrated by the Castorina case, this is a developing area of the law that should be monitored by all attorneys handling failure to warn cases going forward.

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Controlling Costs and Verdicts through Intercompany Arbitration Agreements

BY: ANDREA M. ALONSO* & KEVIN G. FALEY**
PARALEGAL: ANTHONY RIVERSO

Intercompany Arbitration is a process through which disputes between insurance compa-nies are resolved. There are many benefits that arise from submitting cases to intercompany ar-bitration and, since its implementation in 1957, there has been a large increase in the use of these proceedings. The intercompany agreement has gained national recognition for reducing litigation costs and improving work relationships between insurance companies.

Effective Expert Witnesses are Good Communicators

The move toward intercompany arbitration began in New York during 1943 when the

NYC Claim Managers' Council agreed to arbitrate certain automobile physical damage subrogation claims.[i] By 1951, the recognized successes of the New York program, such as reducing litigation costs and improved intercompany working relationships, lead to the creation of the Na-tionwide Inter-Company Arbitration Agreement.[ii] In the 1950's, the program also began to expand when the Combined Claims Committee created two additional programs, the International Agreement and the Special Arbitration Agreement.[iii]

By the late 1970's, the Insurance Arbitration Committee became the largest system of its kind in the world and in 1981 it incorporated itself under the corporate name of Insurance Arbi-tration Forums, Inc. However, its name has since been changed to Arbitration Forums, Inc. in order to reflect the expansion of programs to include arbitration situations outside the original intercompany arena.[iv]

Today Arbitration Forums, Inc. is the nation's largest arbitration and subrogation services provider, with its members annually filing over 600,000 arbitration disputes and 1,200,000 subrogation demands collectively worth over $7.7 billion in claims.[v] Of the seven different arbitration agreements administered by Arbitration Forums, Inc., the Special Arbitration Agreement in particular provides a multitude of benefits to its signatories.

The Special Arbitration Agreement

In 1957 the Combined Claims Committee created the Special Arbitration Agreement. The main purpose of the Special Arbitration Agreement is to determine contribution or apportionment of liability among third-party insurers and to resolve overlapping coverage disputes.[vi] The arbitration is administered by a private not-for-profit ADR provider. Insurers usually enter into a Special Arbitration Agreement once their policy is implicated and it becomes clear that settlement is a mutually desirable outcome which may be hindered by other issues that can be resolved through the arbitration. Among the issues that can be resolved using Special Arbitration are contribution, concurrent coverage and workers compensation subrogation disputes. Special Arbitration can also be used to enforce indemnity agreements where a carrier, at any time follow-ing their first payment, may recoup their litigation and investigative costs should they be able to prove coverage was owed by another party. Thus, even if a settlement of the plaintiff's case has not been achieved, the forum can be used to recover ongoing defense costs through a contract.

There are many benefits to settling disputes under the Special Arbitration Agreements including reducing litigation costs, limiting "runaway verdicts,"

Continued on next page

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increasing productivity through faster closings, preventing potential bad case law that can result from cases going to trial and reducing the severity of the underlying claim by capping exposure.vii Damage claims will not ex-ceed $250,000 unless expressly agreed upon by the parties.

Typically, the rules and regulations governing the proceeding are set forth in the agree-ment. A common provision provides that disputes under a certain threshold are heard by one arbitrator while disputes in excess of that amount are heard by a panel of arbitrators. Other provisions may dictate terms such as the location, qualification criteria of the arbiters and fee payment.

CPLR § 7501 gives statutory authority to the Special Arbitration Agreement by providing that "[a] written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award."[viii]

Enforcement and Value of Special Arbitration

Aetna Causalty & Surety Co. v. Lumbermans Mut. Casualty Co.[ix] established the elements that must be present in order for a Special Arbitration proceeding to be upheld. In Aetna, Lumbermens Mutual Casualty Company settled a case involving an automobile accident for $17,500 and then filed an application for intercompany arbitration with Aetna Casualty and Surety Company based on the assertion that Aetna's insured was at fault for the victims' injuries. Both companies were signatories to a Special Arbitration Agreement.

The Court proceeded to deny Lumbermen's request for intercompany arbitration with Aetna because Lumbermens had failed to pay the "overall settlement value" and did not obtain a release for Aetna's insured. It was held that the term "overall settlement value" referred to the total damages owed to the third party by the alleged tortfeasors and that in order for the Arbitration Agreement to apply, the third party's interest in the dispute must have been settled.[x] In order for the third party's interest to be settled it is necessary to obtain releases for all of the alleged tortfeasors. Once the third party's interests are removed, the arbitrator then has the jurisdiction to apportion the respective liabilities of the disputing codefendants.

Aetna served to highlight an important feature created by the Second Article of the Arbitration Agreement: "Article SECOND permits one insurer to compel arbitration for contribution, where said insurer has settled and paid a third-party claim, on notice to another insurer, but without the other insurer's consent."[xi] This innovation was added to the Special Arbitration Agree-ment in 1969 and reflected the realization that insurers were often unable to agree on the "overall settlement value" of a case which defeated the original purpose of Special Arbitration. However, the courts still needed to clarify how they defined "settlement" in the context of the Special Arbitration Agreements.

In 1996, *NY Cent. Mut. Fire Ins. Co. v. Farm Family Mut. Ins. Co.*[xii] clarified the mean ing of "settlement" in the context of the Special Arbitration Agreement. In this case three insurers signed a Special Arbitration Agreement which stated that any signatory could settle a claim without the consent of the other signatories and thereafter the apportionment of liability to each respective insurer would be subject to Special Arbitration proceedings.

Farm Family proceeded to enter into a high/low arbitration proceeding with the plaintiff where the maximum recovery was set at $60,000. Following the arbitration proceeding, the plaintiff was awarded the $60,000 maximum. In addition, Farm Family also secured releases for the other two insurers who failed to object to the high/low arbitration proceeding when notified of it. The other two insurance companies later objected to the arbitration award as constituting a "settlement" within the meaning of the Special Arbitration Agreement and successfully obtained a permanent stay of the Special Arbitration proceedings from a trial court.

Farm Family successfully appealed the trial court's ruling and the insurance companies were

Continued on next page

ordered to enter into Special Arbitration to determine the apportionment of liability from the "settlement." The Appellate Court held that "[a] rbitration agreements are to be construed so as to give effect to the intentions of the parties thereto."[xiii] The Court reasoned that the parties' intent when signing a Special Arbitration Agreement was to let an arbitrator apportion liability once any one of them settled. For this purpose, there is no difference between Farm Family settling for $60,000 with the plaintiff on their own or by obtaining a $60,000 settlement through an arbitrator; either way the case was "settled."

A Special Arbitration Agreement between two parties can also be highly beneficial even when an important third party is not a signatory. In *Allstate v. Vega*,[xiv] defendants Jorge Vega and Ambulette August were involved in an automobile accident with plaintiff's insured, Christopher Debrady. As a result of the accident, Debrady's insurer, Allstate (plaintiff), sought to recover $3,285.92 from the defendants. Vega's insurance carrier (Maryland Casualty Company) and plaintiff were signatories to a Special Arbitration Agreement as required by Intercompany Arbitration Rules, however, Ambulette August's carrier (Reliance National Indemnity Insurance Company) was not a signatory to the Arbitration Agreement.

During the following arbitration between Allstate and Maryland Casualty Company, it was determined that Ambulette August was the proximate cause of all damage sustained by plaintiff's insured. Defendant Vega then sought leave to amend his answer and move for summary judgment in the lower court proceeding.

The Court granted Defendant Vega's motion for summary judgment on the grounds that an unconfirmed arbitration award had a collateral estoppel effect on the litigation. The reasoning was that "while CPLR Article 75 provides the mechanism for obtaining a judicial confirmation of an arbitrator's award, there is no requirement that one must be obtained in order for the arbitration to have a legally binding effect."[xv] Accordingly, the Special Arbitration provided value to the parties involved because the determination made regarding apportionment of liability had preclusive effect in the controversy between the same carriers in a subsequent action arising out of the same accident.[xvi]

There have also been several cases in which companies have tried, unsuccessfully, to stay the arbitration in favor of litigation. In State Farm Fire & Cas. Co. v. Assurance Co. of America/Zurish, U.S.xvii the petitioner attempted to stay the Special Arbitration proceeding pursuant to CPLR Article 75. The Court denied the petitioners request since a provision of the Special Arbitration Agreement stated that the signatories agree "[t]o forego litigation and arbitrate unresolved disputes between two or more signatories wherein each has issued: (a) a policy of casualty insurance covering one or more of a number of parties each asserted to be legally liable for an accident or occurrence out of which a claim or suit for bodily injury or property damage…arises."[xviii]

The petitioner's request was denied as the dispute at issue was unresolved and the Article First of the Special Arbitration Agreement applied.

Similarly, in Government Empls. Ins. Co. v Technology Ins. Co., Inc.,xix the Court re-viewed the language of the Special Arbitration Agreement to decide the petitioner's motion to stay arbitration of the underlying workers' compensation claim pursuant to CPLR Article 75. The first issue under consideration was whether or not the petitioner waived its right to stay the arbitration by participating in the process. The Court held that since the petitioner only appeared in the arbitration to request an adjournment it did not constitute participation in the Special Arbitration proceedings and did not waive its right to petition the Court for a stay in arbitration. Submitting an answer to the Special Arbitration proceeding following the petition to stay the arbitration also did not have the effect of a waiver.

However, case law holds that "an agreement to arbitrate must be express, direct, and unequivocal as to the issues or disputes to be submitted to arbitration."[xx] The Court then reviewed the Special Arbitration Agreement and found that workers

Continued on next page

compensation reimbursement was among the arbitrable disputes listed. Since the petitioner was the insurer of the alleged tortfeasor and the respondent was seeking to recover reimbursement of workers' compensation benefits it was proper to deny the petitioner's request for a stay in the arbitration.

The petitioner also attempted to argue that their dispute fit into an "Exclusion" category of the Special Arbitration Agreement. "Article Second" of the Special Arbitration Agreement states that "[n] o company shall be required, without its written consent, to arbitrate any claim or suit if: (d) Any payment which such signatory company may be required to make under this Agreement is or may be in excess of its policy limits. However, a company may agree or accept an award not to exceed policy limits."[xxi] Well aware of this exception, the respondent had stated in its initial opposition papers that it was willing to limit its recovery to the petitioner's $100,000 policy limits. In this case, the clear language of the Special Arbitration Agreement rebutted the petitioner's argument for a stay of the arbitration proceeding and both parties were compelled to participate.

Conclusion

dispute which reduces the chance of a jury delivering a "runaway verdict" that would be unfavorable to all parties involved. The Arbitration process also decreases litigation expenses for in-surers because their exposure and costs have already been severely capped by the settle and arbitrate two-step. The arbitration proceedings also provide future benefits to insurers because they prevent the potential creation of bad case law.

The Courts have also looked favorably upon the Special Arbitration Agreement and its proceedings. They have enforced the terms of the agreement, upheld several means of settling underlying disputes and given an arbitrator's decision the effect of collateral estoppel.

[i] Arbitration Forums, Inc., *The History of AF*, (December 18, 2015, 10: 35 AM), https://www.arbfile.org/webapp/pgStatic/content/pgHistory.jsp.

[ii] See Id.

[iii] See Id.

[iv] See Id.

[v] See Id.

[vi] Arbitration Forums, Inc., *Reference Guide to Arbitration Forums' Agreements and Rules,* (November 6, 2015, 2:20 PM), https://www.arbfile.org/af-static/res/Downloads/Reference_Guide_Rules_061513.pdf.

[vii] Arbitration Forums, Inc., Special, (October 23, 2015, 10:23 AM), https://www.arbfile.org/webapp/pgStatic/content/pgForumSpecial.jsp

[viii] NY CLS CPLR § 7501

[ix] 154 Misc. 2d 780, 780 (N.Y. Sup. Ct. 1992)

[x] Id at 782.

[xi] Id at 783.

[xii] 231 A.D.2d 722, 722 (N.Y. App. Div. 2d Dep't 1996).

[xiii] Id at 723.

[xiv] 2000 N.Y. Misc. LEXIS 626, *1 (N.Y. Civ. Ct. July 16, 2000).

[xv] Id at *6.

[xvi] Id at *4

[xvii] 276 A.D.2d 704, 704 (N.Y. App. Div. 2d Dep't 2000)

[xviii] Id. at 705.

[xix] 2015 N.Y. Misc. LEXIS 3619, *1 (N.Y. Sup. Ct. Oct. 2, 2015).

[xx] Id. at *6.

[xxi] Id. at *8.

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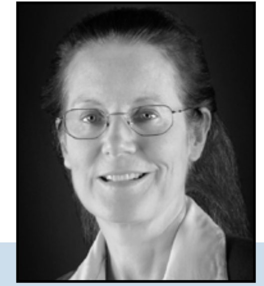

BY: EILEEN E. BUHOLTZ, ESQ.*

A. Preserving One's Right to a Jury Trial

New York State constitutional guarantee of a jury trial and to jury service. Article 1, section 2 of the New York State Constitution guarantees the litigants' right to jury trials in "all cases in which it has heretofore been guaranteed by constitutional provision. The parties to a civil case may waive the right to a jury trial in the manner to be prescribed by law. The legislature may provide that in civil cases, a verdict may be rendered by not less than five-sixths of the jury." From the public's perspective, service on a jury trial is a civil right which cannot be arbitrarily denied. New York State Constitution, article I, § 1; Civil Rights Law § 13.

CPLR provisions governing civil jury trials – CPLR article 41. Article 41 of the CPLR governs civil jury trials. CPLR 4101 restates the state constitutional right to a jury: issues of fact shall be tried by a jury in:

- actions based on facts that permit a judgment for a sum of money only;
- actions for ejectment, dower, waste, abatement of and damages for a nuisance, recovery of a chattel, and actions to compel determinations of claims to real property; and
- any other action in which a party is entitled by the constitution or by express provision of law to a trial by jury.

Equitable defenses and equitable counterclaims, however, are tried by the court, i.e., without a jury.

Demand for a jury trial. A jury trial must be requested via a "demand". CPLR 4102(a). The demand may be made by filing a note of issue that contains a demand for trial by jury. Any party served with a note of issue that does not contain a demand for a jury trial may demand a jury trial by serving a separate document denominated "demand for jury trial" on all opposing counsel and filing it in the office where the note of issue was filed within fifteen days after service of the note of issue.

▶ **Practice pointer:** for the party receiving the note of issue (typically the defendants), on the day that a note of issue arrives in your office, you and your staff must check to see whether the filing attorney checked the box to demand a jury trial. Plaintiff's attorneys, who are typically the ones who file the note of issue, frequently opt for a non-jury trial. Sometimes plaintiff's counsel prefer to have the assigned judge be the trier of fact and sometimes the plaintiff's attorney merely wishes to shift the cost for jury demand to the defendant.

In the demand, whether it be via the note of issue or by a stand-alone demand, a party may specify the issues that s/he wishes be tried by jury; otherwise s/he shall be deemed to have demanded trial by jury of all jury-triable issues. If s/he has demanded trial by jury of only some of the issues, any other party within ten days after service of the demand may serve and file a demand for trial by jury of any other issues in the action that are triable to a jury. CPLR 4102(b).

Waiver of a right to a jury trial. A party who has demanded the trial of an issue of fact by a jury under this section can still waive his right by failing to appear at the trial, by filing a written waiver with the clerk, or by oral waiver in open court. CPLR 4102(c). A waiver does not withdraw a demand for trial by jury without the consent of the other parties. CPLR 4102(c). A party does not waive the right to trial by jury of the issues of fact arising upon a claim by joining it with another claim as to which there is no right to trial by jury and that is based upon a separate transaction, nor does a party waive the right to a jury trial of the issues of fact arising upon

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a counterclaim, cross-claim or third-party claim, by asserting it in an action in which there is no right to trial by jury. CPLR 4102(c).

The chief administrator of the courts may by rule provide that a party shall be deemed to have demanded trial by jury by filing a note of issue not containing an express waiver of trial by jury. CPLR 4102(d).

The court may relieve a party from the effect of failing to comply with this section if no undue prejudice to the rights of another party would result. CPLR 4102(e). But the courts can be unforgiving about parties' missing these deadlines.

When the right to a jury trial appears in the course of a trial. In cases where a party does not demand a jury trial at the outset, it may appear during the course of a trial that the relief required entitles the adverse party to a trial by jury of certain issues of fact. Should that occur, the court shall give the adverse party an opportunity to demand a jury trial of such issues. Failure to make such demand within the time limited by the court shall be deemed a waiver of the right to trial by jury. Upon such demand, the court shall order a jury trial of any issues of fact which are required to be tried by jury. CPLR 4103.

B. Change of Venue Requests

CPLR 510 provides the grounds for changing the place of trial. Pertinent to this discussion is subdivision 2: when there is reason to believe that an impartial trial cannot be had in the proper county. The issue arises when a party is well known to the community or there has been extensive pretrial publicity in the community from which the jurors will be selected.

In a medical malpractice action pending in Suffolk County, plaintiff commenced an action against a neurosurgeon alleging that the doctor had performed unnecessary surgery. During the pendency of that lawsuit, the Long Island newspaper Newsday published a dozen articles about the subject case and many other similar actions instituted against that neurosurgeon. The neurosurgeon moved for a change of venue on the ground that it would be impossible for him to secure a fair trial in Suffolk County. The motion judge denied the neurosurgeon's motion with leave to renew the motion before the trial judge. The Second Department affirmed, stating that it may well be that a jury could readily be selected from persons who have never heard of the appellant or who have not read any of the articles in question. *Wiedemann v. Smithtown General Hospital*, 56 A.D.2d 649 (2d Dep't 1977).

The Third Department was unpersuaded by a defendant's statistical argument that a fair and impartial jury could not be empaneled in a consolidated toxic-tort case consisting of nine actions brought by a total of 943 plaintiffs who lived in Broome County, the plaintiffs' chosen venue. *Blaine v. International Bus. Machines Corp.*, 91 A.D.3d 1175 (3d Dep't 2012). The case arose out of defendant IBM's environmental contamination at its manufacturing facility in the village of Endicott in Broome County, which allegedly caused medical problems and real estate devaluations. Defendant presented statistical evidence showing a 28.6% likelihood that any randomly chosen jury in Broome County would have at least one member who would be automatically disqualified due to a close family relationship to one of the parties.

Both the trial court and the Appellate Division rejected the defendant's argument in *Blaine* because juries are not randomly selected. Jury questionnaires and the voir dire process would filter out most relatives and decrease the chances of empaneling such a person. The *Blaine* decision stated that the possibility of a tainted jury was further reduced by the trial court's severance of two of the actions for the purpose of conducting a separate "first trial" involving only eight of the plaintiffs. This severance limited the possibility of close relatives from showing up in a jury panel in that trial. Under CPLR 4110(b), close relatives are automatically disqualified only if they are related to "a party" to the action being tried. Thus, in the separate trial of the eight severed plaintiffs, the close family members of the other 935 plaintiffs whose suits remained consolidated would not be disqualified unless shown to harbor an actual bias. So, after excluding close family members, defendant's former employees, and Endicott

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residents, there would still be a potential jury pool of over 67,000 people "leaving plenty to choose from." As a safety valve, the denial of the defendant's motion for change of venue was without prejudice to renewal at the close of voir dire. Important to the court's decision was the burden placed on those who seek a change of venue pursuant to CPLR 510(2) to show a "strong possibility" that an impartial trial cannot be obtained, which was not met here.

C. Judicial Supervision of and Time Limits on Voir Dire

22 NYCRR §202.33 governs the conduct of voir dire. According to the rule [and absent the parties' and the court's agreement to a different procedure], the trial judge (or other judge designated by the administrative judge) must meet with trial counsel before the commencement of jury selection to attempt to settle the case. 22 NYCRR §202.33(a), (b). The trial judge must advise of the method of jury selection. 22 NYCRR §202.33(c).

Time limits on jury selection. According to the court rule, the trial judge must set time limits for the questioning of prospective jurors during the voir dire, which in the court's discretion may be a general period for the completion of the questioning, a period after which attorneys shall report back to the judge on the progress of the voir dire, and/or specific time periods for the questioning of panels of jurors or individual jurors. 22 NYCRR §202.33(d).

Time limits imposed on jury selection are proper. *Horton v. Associates in Obstetrics and Gynecology, P.C.*, 229 A.D.2d 734 (3d Dep't 1996). In Horton, the Supreme Court permitted plaintiffs' attorney 60 minutes for questioning in the first round of 12 prospective jurors and then required plaintiffs' counsel to exercise his challenges before similar questioning and peremptory challenges were done by defendant's attorney. The jurors surviving the first round were sworn in and removed to a separate room. The process then continued with round two, conducted in the same fashion except that the questioning by each side was limited to 30 minutes. Using that methodology, two rounds of questioning yielded six jurors and two alternates.

At the start of the trial in *Horton*, plaintiffs objected that the severe time limitations deprived them of proper legal representation and the right to a fair and impartial jury. In plaintiffs' subsequent motion, plaintiffs' greatest concern was the selection of an alternate juror (Juror No. 8) who was employed at a major area medical center. Plaintiffs moved for a mistrial or alternately that Juror No. 8 be struck. The trial judge denied plaintiffs' motion for a mistrial but offered to question Juror No. 8 in chambers to determine whether he had any predisposition concerning medical malpractice claims. Plaintiffs agreed to that arrangement and to the court's further suggestion that the juror would be excused if found to harbor undue prejudice. Supreme Court's questioning of juror No. 8 disclosed no evidence of partiality and plaintiffs then indicated that they were satisfied. The trial resulted in a verdict in favor of defendants and plaintiffs appealed, asserting that Supreme Court erred in denying their motion for a mistrial. The Third Department disagreed, stating that plaintiffs pointed to no persuasive legal authority in support of their contention, and plaintiffs identified no juror other than juror No. 8, who was an alternate juror whom plaintiffs accepted and who took no part in the deliberations.

Compare *Zgrodek v. McInerney*, 61 A.D.3d 1106 (3d Dep't 2009), which was a damages trial involving close factual and medical issues, expert evidence, multiple injuries, and several questions about causation. The Third Department held that Supreme Court's time limit of 15 minutes per side was unreasonable and constituted reversible error.

Judicial supervision of voir dire. 22 NYCRR §202.33(e) provides that, in order to ensure an efficient and dignified selection process, the trial judge must preside at the commencement of the voir dire and open the voir dire proceeding. The trial judge must determine whether supervision of the voir dire should continue after the voir dire has commenced and, in his or her discretion, may preside over part of or all of the remainder of the voir dire.

CPLR 4107 provides that upon application of any party, the judge shall be present during the entire voir dire process. The denial of such an application is reversible error. *Brooks v. Mount Vernon*, 280 A.D.2d 631 (2d Dep't 2001) (Supreme

Continued on next page

Court's denial of plaintiff's request to have a judge present during jury selection was reversible error). See, also, *Guarnier v. American Dredging Co.*, 145 A.D.2d 341 (1st Dep't 1988) (although there was a series of objections by defendant to the conduct of plaintiff's counsel during the jury selection, the trial court denied defendant's application to continue jury selection in the presence of the court. The court later assigned a law assistant to supervise the voir dire and still later presided itself at the selection. Nevertheless, defendant's right to have a judge present at the examination of the jurors was violated, which was reversible error).

Court's conducting the voir dire. As previously stated, the trial judge must determine whether supervision of the voir dire should continue after the voir dire has commenced and, in his or her discretion, may preside over part of or all of the remainder of the voir dire. 22 NYCRR §202.33(e).

The court did not commit reversible error by conducting most of the voir dire in a products liability action against a drug manufacturer for plaintiff's mother's ingestion of defendant's drug during pregnancy, but counsel had an opportunity to scrutinize the prospective jurors and did not challenge for cause a juror who was the wife of a druggist. *Bichler v. Eli Lilly and Co.*, 79 A.D.2d 317 (1st Dep't 1981).

D. Controlling Jury Social Media Use - Prevention and Penalties

Section 1:11 of the New York Pattern Jury Instruction is read to every jury. Section 1:11 states:

> PJI 1:11 Discussion With Others—Independent Research
>
> In fairness to the parties to this lawsuit, it is very important that you keep an open mind throughout the trial. Then, after you have heard both sides fully, you will reach your verdict only on the evidence as it is presented to you in this courtroom, and only in this courtroom, and then only after you have heard the summations of each of the attorneys and my instructions to you on the law. You will then have an opportunity to exchange views with each member of the jury during your deliberations to reach your verdict.
>
> Please do not discuss this case either among yourselves or with anyone else during the course of the trial. Do not do any independent research on any topic you might hear about in the testimony or see in the exhibits, whether by consulting others, reading books or magazines or conducting an internet search of any kind. All electronic devices including any cell phones, smartphones, laptops or any other personal electronic devices must be turned off while you are in the courtroom and while you are deliberating after I have given you the law applicable to this case. [In the event that the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court's practice.]
>
> It is important to remember that you may not use any internet services or social media, including Google, Facebook, Twitter, to individually or collectively give or get information about the case or to research topics concerning the trial. Some of the topics you are not to research or discuss through the use of your computers or personal electronic devices are the law, information about any of the issues in the case, the parties, the lawyers or the court. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means.
>
> For now, be careful to remember these rules whenever you use a computer or other personal electronic device during the time you are serving as a juror but you are not in the courtroom.
>
> While this instruction may seem unduly restrictive, it is vital that you carefully follow these directions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to affect your judgment, is unfair and prejudicial to the parties and could lead to this case having to be retried.
>
> Accordingly, I expect that you will seriously and faithfully abide by this instruction.

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E. Uncovering Juror Misconduct and Dealing with It

The options for dealing juror misconduct are straightforward. The difficulty lies in uncovering the misconduct. An article in the Wall Street Journal asserts that in 2011, 79% of judges who responded to a survey question by the Federal Judicial Center said that they had no way of knowing whether jurors had violated a social-media ban. *Jurors' Tweets Upend Trials*, Wall Street Journal (March 5, 2012) http://www.wsj.com/articles/SB10001424052970204571404577255532262181656.

When judges do find out, according to this article, the judges responding to the survey stated that they employed various measures: nine jurors were removed; eight jurors were cautioned but allowed to remain on the jury; four mistrials were declared; one juror was held in contempt of court; and seven "other" (unspecified) remedies were invoked.

Typically, other jurors bring the misconduct to the court's attention. The trial judge then determines, either by way of a hearing or oral argument, whether the misconduct tainted the verdict.

For example, in *Olshantesky v. New York City Transit Authority*, 105 A.D.3d 600 (1st Dep't 2013), the First Department has held that a new trial on liability was warranted where the jury consulted an on-line dictionary to define the word "substantial", which was a term critical to the decision on liability. Procedurally, the following occurred: immediately after receiving the verdict, the judge thanked the jury for its service. The jury remained in the courtroom and during an off-the-record discussion with the judge revealed the misconduct. The First Department held that regardless of whether the jury had been discharged at that point, the trial judge properly inquired about external influences on the jury and properly determined that the jury's consulting an outside dictionary on a term critical to its decision constituted misconduct warranting a mistrial, especially since the foreperson indicated that the jury was "confused" about the term "substantial", and the court at that point was unable to give curative instructions. But because the jury's misconduct related only to the issue of liability, and there is no evidence that it affected the jury's determination on damages, the verdict on damages was reinstated and the case remanded for a new trial on only the issue of liability.

In *Ryan v. Orange County Fair Speedway*, 227 A.D.2d 609 (2d Dep't 1996), a new trial on damages was ordered because testimony at a post-trial hearing established that a juror who held herself out as more knowledgeable than the others on the issue of personal injuries had disseminated information to the jury from an outside source, which was not evidence in the case or otherwise properly before the jury. There was also evidence that this outside information influenced the jury's decision as to damages. The probability that the juror misconduct resulted in a lower damage award than that which would have been awarded if the verdict had been based entirely on the evidence presented at trial was held to be high enough to require a new trial on damages.

In *Fitzgibbons v. NYS University Constr. Fund*, 177 A.D.2d 1033 (4th Dep't 1991), the Fourth Department held that the verdict was tainted by an improper outside influence, specifically, one juror's communications to the others about the workers' compensation benefits that plaintiff would receive. The juror had told the other jurors about the workers' compensation system and her experience with it, and had therefore injected "significant extra-record facts" into the deliberation process and thereby became an unsworn witness to "nonrecord evidence". By persuading the other jurors that plaintiff "was eligible to have his medical bills paid and to receive other workers' compensation benefits for the rest of his life", the juror improperly introduced her own legal notions into the case, thereby leading the jurors to depart from the law set forth in the court's charge. This misconduct sufficiently proved prejudice to plaintiff. Procedurally, plaintiff's attorney submitted unrefuted affidavits of two jurors that the jury awarded plaintiff less for medical bills and other items of damages than it would have awarded absent those communications.

In *Edbauer v. Board of Educ. of North Tonawanda City School Dist.*, 286 A.D.2d 999 (4th Dep't 2001), the Fourth Department ordered a new trial on damages because the verdict was tainted by an

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improper outside influence, specifically, a juror's own experience in her own personal injury action. After trial, plaintiff submitted affidavits of all of the other jurors averring that the juror at issue had recounted her own experience in receiving a lump-sum settlement in a personal injury case and that that juror had assured the remaining jurors that plaintiff would receive the verdict in a lump sum which he could then invest. The five other jurors uniformly averred that they had intended to award plaintiff ten million dollars but had instead awarded four million two hundred thousand dollars, which if invested would generate ten million dollars. The Fourth Department noted that the jurors' consideration of this subject also contravened the trial judge's explicit instructions per CPLR 4111(f) to award plaintiff the full value of his future damages without reduction to present value.

In *City of N.Y. v. ExxonMobil Corp. (In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.)*, 739 F. Supp. 2d 576, 609-12 (S.D.N.Y. 2010), the Hon. Shira Scheindlin denied defendant's motion for a mistrial based on jurors' internet searches during deliberation. Judge Scheindlin stated that during the jury's Phase III (compensatory damages) deliberations, she (Judge Scheindlin) learned from the jurors that a juror (Juror No. 8) had performed limited internet research relating to this case. Noting that search engines have created significant new dangers for the judicial system, she held that in this case, the jury was not so polluted by the receipt of extra-judicial information that it was prevented from rendering a fair verdict based on the evidence introduced at trial. Although juries are required to decide cases on the evidence introduced at trial, a new trial is not required solely because the jury was exposed to extrinsic information. The issue is not the mere fact of jury infiltration but the nature of what has been infiltrated and the probability of prejudice. While a court may question a jury about what they learned in making this determination, after deliberations have begun, it is inappropriate for a court to inquire into the degree upon which the extra-record information is being used in deliberations and the impression which jurors actually have about it. Rather, courts must apply an objective test focusing on two factors: (1) the nature of the information or contact at issue, and (2) its probable effect on a hypothetical average jury.

After the jury advised Judge Scheindlin that Juror no. 8 had obtained improper information during Phase III deliberations, Judge Scheindlin immediately excused Juror No. 8. The remaining jurors appeared candid and forthcoming in answering the judge's questions about the information they had learned. Although Juror No. 8 had initially painted a picture of a jury that was engaging in rampant outside research, Judge Scheindlin found that his assertion that "everybody was doing it" was only a defensive tactic after he had been caught with his hand in the proverbial cookie jar. When Juror No. 8 and the other jurors were questioned further, it became apparent that the limited information Juror No. 8 had communicated to them was decidedly vague.

But it does appear from Judge Scheindlin's opinion that the jurors were conducting a fair amount of internet research. Juror No. 11 had learned that there was going to be a fourth phase of the trial - which Juror No. 11 described as "some other penalty part." In fact there was going to be a punitive damages phase (Phase IV), but Judge Scheindlin held that mere knowledge of a possible penalty phase was insufficient to create prejudice. When the jury was charged on Phase III compensatory damages, the jury was given detailed instructions on how to calculate compensatory damages. Judge Scheindlin stated that if such instructions (which are commonly given) are not deemed to prejudice the jury's deliberations, then neither should a juror's vague knowledge that there may be a further penalty phase.

Juror No. 5 learned that ExxonMobil was the only remaining defendant in the case and that many of the other defendants had settled for approximately one million dollars each. The jury, however, was already well aware from the evidence introduced at trial, as well as from Judge Scheindlin's instruction that it must apportion liability among all responsible oil companies operating in the area in question who had caused contamination. As such, a juror could easily assume that these other defendants had settled, without learning about it from the internet. Moreover, Juror No. 5's knowledge of these

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supposed settlements was so limited and vague that it was highly unlikely to have prejudiced the average juror's deliberative process.

Lastly, two other jurors performed some limited outside research on their own. Juror No. 4 tried to drive by the area in question but failed to find it. Juror No. 6 looked up Judge Scheindlin on Wikipedia and read an article about water contamination caused by coal companies. But neither of these attempts at research warranted a mistrial. Juror No. 4 failed to find the area in question and Juror No. 6's information about the judge had only a tangential relationship to this case.

In the California case *Juror Number One v. The Superior Court of Sacramento County*, 142 Cal. Rptr.3d 151, 206 Cal.App.4th 854, 95 A.L.R.6th 749 (3d App. Dist. 2012), other jurors reported on offending jurors, one of whom had posted extensively on Facebook about the trial as the trial unfolded. The trial judge required the offending juror to sign a consent pursuant to the federal Stored Communications Act authorizing Facebook to provide the juror's posts during a specified time period. By way of background, after the criminal defendants had been convicted of assault, the trial court learned that Juror No. 1 had posted one or more items on his Facebook account about the trial while it was in progress, in violation of an admonition by the trial court. The trial court conducted a hearing at which Juror No. 1 and several other jurors were examined about this violation and other claimed instances of misconduct. After the hearing, the trial court found that Juror No. 1 had committed misconduct but that it was unclear as to whether the misconduct was prejudicial. To determine the extent of prejudice, the trial court issued an order requiring Juror No. 1 to execute a consent form pursuant to the Stored Communications Act (SCA) (18 U.S.C. § 2701 et seq.) authorizing Facebook to release to the court for an in-camera review of all items that Juror No. 1 had posted during the trial. Juror No. 1 filed a petition of prohibition to prevent enforcement of that order. Held: the trial court had the authority to order Juror No. 1 to disclose the messages he posted to Facebook during the criminal trial as part of the trial court's inherent power to control the proceedings before it and to assure that the real parties in interest had received a fair trial. Regardless of whether Juror No. 1's Facebook postings were protected by the Stored Communications Act, that protection applied only to attempts to compel Facebook to disclose the requested information. Here, the compulsion was on Juror No. 1 to execute a consent to Facebook to release to the court for in-camera inspection of all items Juror No. 1 posted during a trial.

F. Excusing Sworn Jurors

Once a juror is sworn, it is much more difficult to excuse that juror. The time to raise all issues (and ask all questions to raise issues) is during voir dire. There are two issues where the questions arise after the juror is sworn: the juror's qualifications and the juror's bias.

Qualifications. In order to qualify as a juror, a person must:

- (1) be a citizen of the United States and a resident of the county in which the case is tried;
- (2) be not less than 18 years of age;
- (3) not have been convicted of a felony; and
- (4) be able to understand and communicate in the English language.

Jud. Law §510.

Judiciary Law §518 states that the court must discharge a person from serving as a trial or grand juror whenever it satisfactorily appears that he or she is not qualified, but the court must find that the juror is unqualified to continue his service, which must be based on the juror's presence in court and an inquiry by the court.

With regard to citizenship, to avail oneself of an objection on this ground, a party to an action must make it by challenge during jury selection and not at any later stage of the proceeding, per CPLR 4108 (an objection to the qualifications of a juror must be made by a challenge unless the parties stipulate to excuse him). Where fundamental rights are involved, a motion should be made at the earliest possible opportunity to discharge the jury and for a mistrial where the trial has not terminated, in order that the court may speedily and fairly inquire into the conduct of the juror so as to determine his fitness further to serve. If the objection is merely technical

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and is withheld by a party and the objection does not affect the juror's intelligence and fairness, the objection is waived; otherwise no judgment would ever be safe from attack, and no trial could ever be confined to anything like well-defined or limited issues. *People v. Cosmos*, 205 N.Y. 91 (1912).

With regard to residency in the county, defendant City of New York moved unsuccessfully for a mistrial after a verdict against it in the liability phase of a bifurcated personal injury trial. The City moved on the ground that one juror was not a resident of the county in which the action was tried. The Second Department held, however, that the City waived its objection by failing to ask the juror his residence and challenge the juror on that ground. The juror's residence did not affect his intelligence and fairness. *Mehar v. City of New York*, 260 A.D.2d 554 (2d Dep't 1999).

With regard to citizenship, the technical qualification that a juror be a citizen may be waived either with knowledge or by failure to make any inquiry when the prospective juror is called and before he or she is sworn. *People ex rel. Ostwald v. Craver*, 272 A.D. 181 (3d Dep't 1947).

With regard to the ability to comprehend and communicate in English, although a juror must be able to understand and communicate in the English language in order to qualify as a juror, a party is not entitled to have a prospective juror struck for cause merely because the juror indicates that his or her knowledge of the English language is limited where the court and counsel are able to communicate effectively with the juror and determine that his or her command of English is sufficient for jury service. *People v. Harris*, 63 A.D.3d 480 (1st Dep't 2009), *leave to app den'd* 13 N.Y.3d 796 (2009); *People v. Barry* 43 A.D.3d 1365 (4th Dep't 2007), *leave to app. den'd* 9 N.Y. 3d 1031 (2008). Nor is a prospective juror who speaks the English language subject to challenge for cause based on his or her inability to read or write it. *People v. Arguinzoni*, 48 A.D.3d 1239 (4th Dep't 2008), *leave to app. den'd* 10 N.Y.3d 859 (2008).

Judiciary Law §524(a) renders incompetent any person who has served on a grand or petit jury in any court of the unified court system or in a federal court for six years after the last day of service (and for eight years under certain circumstances). But nothing invalidates a verdict returned by trial jury or an indictment returned by a grand jury when the trial jury or grand jury includes one or more trial or grand jurors who were not competent by virtue of recent previous service. Jud. Law §524(b). NB: To be disqualified for jury service by reason of prior service, an individual need not previously have been impaneled as a trial or grand juror; rather, it is enough that the individual fulfilled his or her jury service obligations by responding to a summons for jury duty through either actual physical attendance or telephone standby service. *People v. Wynter*, 95 N.Y.2d 504 (2000).

As already stated, objections to the technical qualification of the juror must be made during election. Once seated, the juror's technical qualifications cannot be challenged later. *People v. Cosmos*, 205 N.Y. 91 (1912); *People v.Spiegel*, 149 Misc. 439 (Ct. Gen Session N.Y. Co. 1933). But where the objections are not strictly legal and technical but go to the character of the juror and show that he labored under prejudices and prepossessions which rendered him incapable of acting impartially in the case, and that in all human probability there has not been a fair trial, it would be competent and proper for the court to set aside a verdict; but such objections must be characterized by very strong and peculiar circumstances. *People v. Cosmos*, 205 N.Y. 91 (1912).

<u>Juror's bias.</u> I had this issue come up in a case that I tried in Chautauqua County in April of 2016. Immediately after being sworn and as he was leaving the court room, a designated alternate launched into a diatribe about how unhappy he was at being selected to serve on the jury because he would lose his job which he had just started. My opponent and I conferred over the weekend and agreed that he should be excused. The court, however, refused to excuse him. Instead, the court had the juror sequestered when he came in the next day. The court then brought him into the courtroom in the presence of all counsel but outside the presence of the rest of the jurors and obtained assurances from the alternate juror that he could participate as an alternate and if chose to deliberate, he would be fair and open-minded.

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Neither the court's law clerk nor counsel found any civil cases on the subject. But the following criminal cases are instructive, with the caveat that the Criminal Procedure Law has certain specific provisions that do not apply to civil cases.

In *People v. Argibay*, 45 N.Y.2d 45 (1978), defendants challenged the trial court's refusal to declare a mistrial after learning that a juror during the trial had said to defendants' counsel, "I hate you." On the last day of trial before summations and the charge to the jury, defendant no. 1's trial counsel informed the court that, as the jurors had filed out of the jury room at the end of the day, one of the jurors had stopped in front of him and said "I hate you." Counsel for defendant no. 2 reported that he, too, had heard the remark. A motion was made for a mistrial or, in the alternative, for replacement of the juror by an alternate. When the motion was denied, an application was made for the court to examine the juror the next morning as to any bias that "would prevent her from rendering a fair verdict". Although the application had been initially denied, the court had reconsidered by the next morning, and offered to question the juror. Counsel for defendant no. 1, however, had changed his mind, and requested the court not to conduct an examination of the juror, even after the court had indicated the juror would not be disqualified unless she was first questioned. No further inquiry was conducted.

The juror in *Argibay* was charged that if the jury found that defendant no. 2 to be solely an agent of the buyer, they should find him not guilty of the sale of the drugs. In explaining the agency charge, however, the court said "If he received or is promised any advantage, benefit or compensation for his part, he is not an agent." No objection was taken to this charge. As to defendant no. 1, despite a request, no agency charge was given. Each defendant was convicted and sentenced to a term of from six years to life imprisonment. The Appellate Division had affirmed, with one Justice dissenting.

The Court of Appeals stated that extended discussion of the juror misconduct issue was not warranted. Had the trial court refused to investigate the juror's remark to defense counsel, reversal might be mandated. But investigation was offered and it was defense counsel, after requesting a voir dire examination only the night before, who declined the next morning to have the examination conducted. Therefore, the trial court could not be faulted for refusing to disqualify the disputed juror without conducting any inquiry into the meaning of and the circumstances surrounding the objectionable statement. By declining the inquiry, defendants thus waived any rights they might otherwise have had on appeal.

In *People v. Lombardo*, 61 N.Y.2d 97 (1984), the trial judge received a note from Juror No. 11 during jury deliberation that read, "Your Honor, at this point of deliberation, I find that I cannot render a fair and a just verdict in accordance with the court's instruction." The trial judge informed counsel of the fact and content of the note. The prosecution suggested that the entire jury be recalled and recharged, or in the alternative that the court explore the problem further with juror no. 11. Defense counsel did not join in either suggestion, but instead pressed a motion for a mistrial, stating that if the juror were discharged, the defense would not consent to the substitution of an alternate juror. The trial court denied the defense's motion for a mistrial and recalled the jury. After disclosing the content of the note, the court recharged the jury. Following further deliberations, the jury found defendant guilty on all counts charged.

Defendant in *Lombardo* appealed claiming that the trial court should have questioned juror number 11 before proceeding, but the Court of Appeals stated that that issue was not preserved for review because defense counsel failed at the time to request such relief or to join in the prosecutor's suggestion. So the only asserted error preserved for review was the denial of defendant's motion for a mistrial. The Court of Appeals held that under the circumstances, it was not error to have denied that motion. Inquiry of the juror might have elicited information warranting a mistrial in the absence of defendant's consent to replacement of the juror (per Crim. Proc. Law §270.35). But here, after being reinstructed, juror number 11 continued to participate in the jury deliberations and joined in the unanimous verdict of guilty. The mere delivery of the note, without more, which was the basis for defense counsel's motion,

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did not mandate the declaration of a mistrial.

In *People v. Pickett*, 61 N.Y.2d 773 (1984), while the jury was being polled after delivering its verdict of guilty, one juror, when asked whether the verdicts were hers, responded, "Yes, under duress, I'm saying yes". The Trial Judge then asked her, "Are they your verdicts, yes or no?", to which the juror replied, "Yes." Defense counsel thereupon requested the court to hold a hearing to make a determination as to what the stated duress consisted of, which the trial court denied. The Court of Appeals agreed with the Appellate Division that the denial of this request was error.

In light of the juror's reference to "duress", the trial court should have addressed the juror out of the presence of the other jurors, instructing her that communications among the jurors that were a part of their deliberative process (including their efforts by permissible arguments on the merits to persuade each other) were secret and not to be disclosed to him. The Judge should then have inquired of her whether, within that limitation, she could relate to him the circumstances to which she had referred as "duress". If she could not tell him what she meant by duress without violating the secrecy of the jury deliberations, she should tell him nothing. The court would then have had no occasion for further action other than to accept the verdict of the juror. On the other hand, if the juror could tell him what she meant by duress without violation of jury secrecy, the court should have asked her to explain the circumstances, remaining alert, however, to interrupt and preclude any disclosure of aspects of the deliberative process. If it then appeared that the duress arose out of matters extraneous to the jury's deliberations or not properly within their scope, although perhaps occurring within the jury room, the Trial Judge would have been called on to determine what remedial action, if any, would have been suitable, ranging from directing the jury to continue their deliberations, through taking reasonable steps to remove or dissipate the cause of the duress, to replacing the juror with the consent of the defendant (Crim. Proc. Law §270.35) or possibly declaring a mistrial (CPL §280.10). The appropriate action to be taken would necessarily have depended on the factual elements of the particular situation and the practicality and probable effectiveness in the circumstances of any particular procedure to eradicate the effect of the duress.

See, also, People v.Mercado, 230 A.D.2d 488 (1st Dep't 1997), *affd*, 91 N.Y.2d 960 (1998), in which a juror when being polled about the verdict declined to answer after the same question was reiterated several times despite indicating that she heard and understood the question. The court then stated:

[I]t's obvious that you're very emotional about this and that you are taking your job as juror seriously. We understand that. But you have indicated your verdict in the jury room and it is necessary for us to confirm it here if, in fact, that was your verdict. And therefore you are being asked whether that, in fact, is your verdict, yes or no? Please make a response to my question.

The juror then responded "yes". On appeal, defendant argued that the failure of the court to conduct an inquiry to determine whether the juror's verdict was a product of coercion or duress created an uncertainty as to the unanimity of the jury verdict that mandates reversal.

When the juror repeatedly did not respond to the court's query whether the verdict announced by the foreperson was her verdict, defense counsel only requested a sidebar and the application was denied so that the court could repeat its question to the juror. Defense counsel did not request further relief, rendering unpreserved the appellate claim that the court erred in accepting the verdict without conducting a hearing as the juror.

In *People v. Harris*, 57 N.Y.2d 335 (1982), which was the trial of Jean S. Harris in Westchester County for the murder of Dr. Hermann Tarnower, defendant argued that she was denied a fair trial before an impartial jury when the trial court refused to allow defense counsel to exercise a peremptory challenge to a sworn juror, or, in the alternative, to excuse that juror for cause, on the basis of information acquired after the juror was sworn. During the voir dire, the juror revealed that her daughter had been arrested about a year earlier in Westchester County, but that she did not know the eventual disposition of the case. The juror thought that the grand jury had not returned an indictment against her daughter

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because there was insufficient evidence. The juror was accepted by both sides and sworn. Several days later, an assistant district attorney who was involved in the daughter's prosecution discovered that he had handled the case referred to by the juror and that he had been instrumental in having the indictment against the juror's daughter dismissed in the interest of justice. When the assistant prosecutor disclosed this information to the trial court, defense counsel asked that the juror be excused for cause, or that he be allowed to exercise a peremptory challenge. The trial court denied both requests.

The Court of Appeals held that the denials were proper. In criminal cases, the exercise of peremptory challenges is governed by CPL§270.15, which provides that after each side has been given an opportunity to challenge a juror for cause, the court must permit peremptory challenges, with the People being required to exercise such challenges before the defendant. Subdivision 4 of CPL §270.15 specifically states the circumstances under which a juror, once sworn, may be challenged *for cause.* Where a challenge for cause is made upon a ground not known to the challenging party before the juror was sworn, the court may allow the challenge prior to the time that the first witness is sworn at the trial. This express provision for the exercise of a challenge for cause after a juror is sworn must be taken as a legislative direction that any other type of challenge to a sworn juror is impermissible. The Court of Appeals held that this interpretation of the statute was entirely consistent with the perceived need to place appropriate limitations on one of the most time-consuming aspects of criminal jury trials, while still allowing challenges to sworn jurors where good cause to excuse the juror is demonstrated.

The Court of Appeals stated that it was nevertheless within the trial court's power to entertain the request that the sworn juror be excused for cause. The defense relied upon CPL §270.20(1)(c) as the ground for its challenge, i.e., the existence of a relationship between the juror and counsel for the People that is likely to preclude the juror from rendering an impartial verdict.

Here, defense counsel knew that the juror's daughter had been arrested in Westchester County and that although she did not know the precise disposition of the case, the defense attorney knew that the result was favorable to the juror's daughter. With this knowledge, defense counsel accepted the juror. The information acquired after the juror was sworn, which was all that could be considered in determining defendant's challenge for cause, was that an assistant district attorney involved in the present case had handled the case against the juror's daughter and had himself sought dismissal of the indictment therein. There is no indication that the juror knew this assistant district attorney or that he knew the juror. Nor did it appear that the juror knew that anyone associated with the District Attorney's office, least of all this particular trial assistant, had been responsible for the dismissal of the indictment. Nor did defense counsel seek an opportunity to further explore these possibilities. So it was not error for the trial judge to deny defendant's challenge for cause.

See, also, People v. Rodriguez, 100 N.Y.2d 30 (2003), in which defendant sought reversal of his conviction because during voir dire a juror failed to reveal his friendship with a New York County assistant district attorney who was not involved in the prosecution of defendant's case. The Court of Appeals agreed with the Appellate Division that the trial court, after conducting a hearing, properly concluded that there was no basis to order a new trial.

<u>Criminal standard of "grossly unqualified to serve".</u> In the criminal context, there is also the "grossly unqualified to serve" standard for discharge of a sworn juror. N.Y. Crim. Proc. Law §270.35(1). This statute has been applied in the following cases:

- A sworn juror who had, according to another juror, "joked" immediately after jury selection that the jury could reach a guilty verdict without hearing the evidence, was not grossly unqualified to serve, where, after inquiry, the juror gave unequivocal assurances of his impartiality. *People v. Gordon*, 11 A.D.3d 342 (1st Dep't 2004), *leave to appeal denied*, 4 N.Y.3d 744 (2004).
- The Court of Appeals declined to hold that a sworn juror was "grossly unqualified to serve" where (1) a jury forewoman questioned the

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propriety of two prosecution witnesses' leaving the courthouse in the same car; and (2) a juror had personal knowledge of the fatal shooting of the defendant's friend (the defendant had proffered the shooting as an explanation for his wearing of a bulletproof vest). *People v. Buford (Kermit)*, and *People v. Buford*, 69 N.Y.2d 290 (1987). But cf. *People v. Rodriguez*, 71 N.Y.2d 214 (1988), where in contrast to the minor incidents and the unclear question of bias existing in *People v. Buford* and *People v. Smitherman*, the juror stated unequivocally that she was racially biased against Hispanics and was holding this against the Hispanic defendant. There was therefore more than equivocal indications of bias, as was found in *Buford* and *Smitherman*. Here, rather, the juror forthrightly expressed racial bias. Moreover, here it was the defendant who sought discharge of the juror in order to protect his right to be tried by an impartial jury. Therefore, under the particular facts of this case, and after a hearing on the issue, the trial judge should have determined that the juror was grossly unqualified to serve.

- In *People v. Anderson*, 70 N.Y.2d 729 (1987), the Court of Appeals held that before a sworn juror may be discharged as "grossly unqualified", the trial court—based on tactful and probing inquiry—must be convinced that the juror's knowledge will prevent that person from rendering an impartial verdict. The court may not speculate as to the possible partiality of a sworn juror based on equivocal responses (citing *People v. Buford (Kermit), supra*). It was concluded in this case that discharge of the juror was supported neither by the trial court's probing inquiry nor by the juror's unequivocal responses, indicating gross disqualification to serve impartially. But the Court of Appeals refused to apply harmless-error analysis based on the proof of the defendant's guilt, or based on the fact that the defendant participated in selecting the alternate who replaced the discharged juror. A defendant has a constitutional right to a trial by a particular jury chosen according to law, in whose selection the defendant has had a voice. To deny this defendant a chosen jury on an improper basis is a deprivation of the constitutional right to a jury trial and harmless-error analysis is therefore unavailable.
- The Court of Appeals held the county court trial judge erred in dismissing a juror who indicated that she had a vague recollection of the victim as having worked with her at one time and being fired for an incident that involved a gun, but that she didn't know the complainant very well, was not involved in the gun incident, and was "100 percent sure she could remain impartial and would not allow this information to influence her decision." The juror also stated she would not mention this information to other jurors. The Court of Appeals stated that pursuant to CPL §270.35(1), a court may not dismiss a sworn juror unless it is determined that he or she is "grossly unqualified to serve in the case," which occurs when it becomes obvious that a particular juror possesses a state of mind which prevents the rendering of an impartial verdict. Here, the court should have more carefully considered the juror's answers and demeanor to ascertain whether her state of mind would have affected her deliberations and as such the Court of Appeals reversed. *People v. Dukes*, 8 N.Y.3d 952 (2007).
- The Fourth Department held that contrary to defendant's contention, the trial court properly denied his request to dismiss a sworn juror as grossly unqualified to serve in the case under CPL §270.35(1). The court noted that although the juror initially expressed some concern over the defense of extreme emotional disturbance, he ultimately assured the court in unequivocal terms that he would be fair and impartial and would follow the court's instructions. *People v. Shaw*, 66 A.D.3d 1415 (4th Dep't 2009).
- A trial judge committed reversible error where in excusing a juror as being grossly unqualified to serve, the judge failed to sufficiently engage in a probing inquiry assessing the juror's knowledge as it relates to the juror's state of mind under CPL § 270.35(1). Here, the dismissed juror informed the County Court that his employer

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had leased merchandise to the individual tenant in the apartment where the murder occurred. However, the juror had not been in the apartment for three to four years and did not know the victim well, and, he was informed that the layout of the town house apartment was sufficiently renovated and no longer looked the same as it was when he was last there. Given that the juror's statements taken as a whole will not prohibit his ability to be fair and impartial and considering the juror's fleeting contact of the location of the murder, the circumstances did not constitute a sufficient relationship to render the juror as grossly unqualified. *People v. Henderson*, 74 A.D.3d 1567 (3d Dep't 2010), *modified* 77 A.D.3d 1168 (3d Dep't 2010).

- Where a sworn juror during deliberations sent a note to the trial judge indicated that her marriage was breaking up and that one of the male lawyers who sat at the prosecutor's table was a “cutie” and asked for the lawyer's phone number when the trial was over, such conduct did not require the juror's dismissal and disqualification. Upon obtaining the note, the trial judge interviewed the juror in the presence of the attorneys and explained that the note was inappropriate and obtained her assurance that she would remain fair and impartial to both sides for the course of deliberations. The Court of Appeals, in affirming the conduct of the trial judge, noted that mere eccentricity is not sufficient to terminate a juror under the standard of disqualification so long as fairness could be ascertained by the appropriate interview process. Accordingly, the judgment was affirmed pursuant to CPL §270.35(1). *People v. Lewie*, 17 N.Y.3d 348 (2011).

G. Bonus Case

The trial court's procedure of randomly drawing an alternate juror to substitute for a discharged juror, rather than substituting an alternate juror sequentially according to the designation of alternate jurors, was permissible. *Rivera v.New York City Tr. Auth.*, 92 A.D.3d 516 (1st Dep’t 2012). During a medical malpractice trial in which a regular juror was unable to complete jury service, the trial court was required to replace the regular juror by a random drawing between two alternate jurors rather than with the first alternate juror, even though the criminal rule regarding juror replacement required replacing a regular juror with the first alternate juror; the civil rule regarding juror replacement did not specifically state that a regular juror should be replaced by the first alternate juror; thus, the intent was for the alternate to be drawn randomly. *Yu v. New York University Medical Center*, 4 Misc. 3d 602 (Sup. Ct. Queens Co. 2004).

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I am sorry! Please forgive me! Vacating a Default Judgment in Instances Where Counsel was Inadvertently not Timely Assigned.

BY: THOMAS E. LIPTAK, ESQ., RICHARD T. SARAF, ESQ., AND HENRY A. ZOMERFELD, ESQ.*

Default judgments are something greatly feared, and for good reason. While courts prefer cases to be decided on the merits, default judgments are a necessary prophylactic intended to ensure that defendants appear, answer, or otherwise plead their case in a timely way. Without default judgments, what remedy would a plaintiff have for a defendant's non-appearance?

Certainly, default judgments are a nightmare for defendants. Perhaps worse than a default judgment is the enforcement of that judgment. Imagine waking up to find out that your bank account has been frozen or garnished. To add to the dynamic, imagine the sheer anxiety and confusion when the matter was something the insured thought his insurance carrier was addressing through its assigned attorneys all along. Yes, the dreaded "oops, we failed to assign counsel to defend this matter." What does one do in this situation?

Answering this question under New York law, vacatur of a default judgment requires the defendant to move expeditiously, usually by order to show cause. Where the enforcement of the judgment has already taken place, one will also want to seek a temporary restraining order to prevent the ongoing enforcement until the issue is resolved, and hopefully, the default judgment is vacated. Remember, merely having the order to show cause granted only entitles the defaulting defendant the opportunity to be heard; counsel still needs to prevail at the motion hearing.

To successfully vacate a default, a party must do so within one year of the judgment, and demonstrate both a reasonable excuse for the non-appearance and a meritorious defense to the action.[ii] Additionally, an argument can and should be made that the interests of justice support vacating the judgment.[iii]

More often than not, a default judgment is taken before a party appears and before there is a judicial assignment. Thus, the default is entered by the County Clerk's Office where the matter is venued. A key basis for a clerk-entered default under the CPLR is that the allegations be for a "sum certain" meaning that the damages are quantifiable without extrinsic proof.[iv] As the statute provides, a negotiable instrument or a contract are such matters where a sum certain would likely be readily provable. A property damage or personal injury claim, however, would not likely qualify. In those instances, the County Clerk may order an inquest to have the party submit evidence substantiating the allegations. Thus, if you are the party seeking a default, be prepared to prove your allegations when seeking a default. On the other hand, if you are attacking a default, look to see, since often such evidence is not offered with a complaint, whether the moving party obtained a clerk-entered default, whether any substantiating evidence was submitted, and if not, whether an inquest was held. If none of those occurred, this would serve as an additional basis to attack the default judgment.

When, as in the above example, the matter deals with insurance carriers and the failure to assign counsel, New York attorneys should be mindful that there are distinctions among the Appellate Divisions as to whether insurance carrier failure constitutes a reasonable excuse under the law. Generally speaking, however, it appears that the Second Department is less

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forgiving than the other Appellate Divisions.[v]

As with many cases, the above-cited authority offer general propositions in the Appellate Divisions. Of course, one may come across cases where a court declined to accept an insurance carrier's failure as a reasonable excuse. For instance, while the courts tend to forgive an unusual or isolated mistake, they will not be so forgiving for repeated transgressions.[vi] In addition, bare or conclusory assertions will be insufficient to prove a reasonable excuse, particularly in cases involving office failure.[vii] Thus, those seeking to vacate a default should submit an affidavit from someone with personal knowledge of the facts.[viii]

As an additional consideration, defense counsel in these situations must be mindful that their duties and obligations are first and foremost to the insured, not the carrier, even though the carrier pays their bill at the end of the day. These situations can pose difficulties, particularly where the insurance policy may be less than the default judgment and damages alleged in the complaint. However, considering the interests of the insured in these situations is a necessity. Notably, the carrier's duty to defend is exceedingly broad and often the aspect of coverage is a non-issue.[ix] Therefore, insureds will reasonably rely on carriers to defend actions even in questions involving whether their insurance coverage is triggered.

In considering all of this, the reality is that "stuff" happens. Sometimes, things do get lost in the shuffle; sometimes there is a transition in staffing; sometimes, very simply, someone drops the ball. Fortunately, the courts do prefer that matters are decided on the merits and default judgments are disfavored. However, vacating a default is not as simple as it appears. Attorneys who are seeking to vacate a default must ensure that they marshal all of the facts before proceeding, in order to protect their client's interests. Motions to vacate default judgments are not by any means boilerplate, and attorneys should carefully draft factual affidavits to support their motions, as so many of these motions to vacate are fact-specific.

The hope is that both the law and the facts are on your client's side. However, in matters where you are not so fortunate, consider the old adage of many litigators: "If you have the facts on your side, hammer the facts. If you have the law on your side, hammer the law. If you have neither the facts nor the law, hammer the table."[x]

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ii CPLR §5015[a][1]; *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 N.Y.2d 138 [1986].

iii CPLR §2005; *Pollack v. Eskander*, 191 A.D.2d 1022, 1023 [4th Dept. 1993].

iv CPLR §3215[a].

v See Price v. *Polisner*, 172 A.D.2d 422, 423 [1st Dept. 1991], reasoning that the "innocent insured" should not be punished for an unintentional default where the insurance carrier admitted the file was "lost in the shuffle." *See also Dodge v. Commander*, 18 A.D.3d 943, 945 [3d Dept. 2005], reasoning that proof of a failure by the insurance broker or its agent is akin to law office failure, which is a reasonable excuse. *See also Accetta v. Simmons*, 108 A.D.3d 1096, 1097 [4th Dept. 2013], overruling the Court's previous holding in *Smolinski v. Smolinski*, 13 A.D.3d 1188, 1189 [4th Dept. 2004] that "'an excuse that the delay in appearing or answering was caused by the defendant's insurance carrier is insufficient'" to establish a reasonable excuse for a delay in answering or vacating a default. *But see O'Shea v. Bittrolff*, 302 A.D.2d 439, 439 [2d Dept. 2003], reasoning that the defendant's insurance carrier's failure to timely serve an answer was not a reasonable excuse.

vi *See Chery v. Anthony*, 156 A.D.2d 414, 414 [2d Dept. 1989], affirming Supreme Court's denial of motion to vacate default judgment on the basis that the plaintiff's default was due to repeated neglect and delays, which were avoidable and could have been remedied before the plaintiff sought relief by order to show cause.

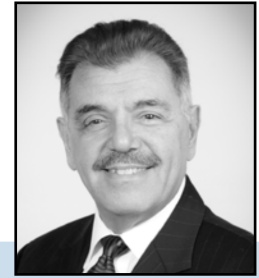
vii *See e.g., Piton v. Cribb*, 38 A.D.3d 741, 742 [2d Dept. 2007], holding that "a conclusory and unsubstantiated claim of law office failure will not rise to the level of a reasonable excuse."

viii *See Nieves v. 331 East 109th Street Corp.*, 112 A.D.2d 59, 61 [1st Dept.1985], reasoning that where law office failure was based on counsel's illness, but no supporting affidavit of a physician was offered in support of that defense, the defense could not stand.

ix *See Automobile Ins. Co. v. Cook*, 7 N.Y.3d 131, 137 [2006], reasoning that an insurance carrier's duty to defend is "exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage." (Internal citations omitted).

x Jerome Michael, 1953 March, COLUMBIA LAW REVIEW, Page 304-306, Volume 53, Number 3, Columbia Law Review Association, Inc.

Demonstrative Evidence: Laying a Foundation and Winning



BY: THOMAS M. LAQUERCIA, ESQ.*

In the twenty-first century, courtroom dramas in movies and on television have changed the way jurors view a case. Jurors are used to dynamic presentations, involving photograph displays, video demonstrations, and computer reconstructions to illustrate the various issues to be determined. Lawyers, however, have been slow to adapt the way evidence is presented to the jurors which is still, for the most part, done verbally. In today's world of instant media access on the internet, attorneys need to incorporate more and more interesting methods of communicating with the jury. It seems clear that the days when the jury would sit and simply listen attentively are long gone. Thus the easiest and best way to hold the attention of the jury is through the use of demonstrative evidence which shall be shown to you below.

It has been found that seventy-five (75) percent of all knowledge a person gains comes through the sense of sight.[1] Furthermore, studies have determined that there is a "100 percent increase in juror retention of visual over oral presentations, and a 600 percent increase in juror retention of combined visual over oral presentations alone."[2] To further illustrate, after 72 hours people will retain a staggering 65 percent of what is simultaneouslyheard and seen as compared to only 10 and 20 percent when either heard or seen alone.[3] The foregoing studies, then, prove the use of demonstrative evidence to reinforce the verbal arguments made during the trial becomes vitally important.

Black's Law Dictionary defines demonstrative evidence as "Physical evidence that one can see and inspect (i.e. an explanatory aid, such as a chart, map, and some computer simulations) and that, while of probative value and usu[ally] offered to clarify testimony, does not play a direct part in the incident in question. This term sometimes overlaps with and is used as a synonym of real evidence."[4] The traditional view of demonstrative evidence is that it has no evidentiary value in and of itself, that it serves only to assist the trier of fact in understanding and digesting the other evidentiary material presented during the course of a trial.[5] Despite this traditional view, as noted as early as 1935, it has been stated that

"There remains a source of proof, distinct from either circumstantial or testimonial evidence, viz., what the tribunal sees or hears by its own senses. Whether this should be termed 'evidence' or not is a question of words, open to difference of view. But it is universally conceded to be an available source of proof."[6] We contend that theuse of demonstrative evidence has grown through the development of brightly colored charts, to films known as "a day in the life" of a person, accident reconstruction films, and computer generated animations and simulations to take on a life of its own, meaning it has risen to the level of proof, not mere support.

Thus, while it is true that in most cases "[d] emonstrative evidence differs from substantive evidence in that the former has no evidentiary value in and of itself," however demonstrative evidence, such as photographs, videotapes, and computer generated simulations, may become expert proof of an ultimate issue of the litigation.[7] It is the opinion of this author that demonstrative evidence has evolved to the point that it may be used as evidence in chief to resolve some important issues of fact at issue at trials. The use of demonstrative evidence, specifically computer generated simulations cease to be a cartoon where there is a scientific basis for what is depicted, such as the movement of vehicles in an accident using the MSMAC program. Each frame of the video is an accurate simulation of the movement. The movie that is perceived though, is

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actually an illusion of movement that the brain sees upon the playing of frame after frame.

General Use

There are several different types of demonstrative evidence, the most common being photographs, video,[1] and x-ray but demonstrative evidence also includes charts, maps, models, and demonstrations.

In federal practice demonstrative evidence may be admitted when it, by virtue of its nature, has "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[8] However, despite its effective uses, demonstrative evidence may be excluded where the probative value of the evidence is outweighed by its prejudicial effect.[9]

In New York, like real evidence, for "demonstrative evidence to be admissible, it must be properly identified with respect to the question in issue and it must be shown that it has not sustained any substantial change by reason of lapse of time, or otherwise, since the time in issue."[10] In many cases, the use of demonstrative evidence is vital in supporting and illustrating an expert witness' opinion to the jury. "Demonstrative evidence generally is the expert's 'support' medium by which the jury can see and 'feel' the involved structures instead of only picturing them via word images or crude illustrations on a sketch pad."[11] It is important to remember that demonstrative evidence, films, photographs, video tapes, and audio tapes, must be exchanged pursuant to CPLR 3101.[12] In some instances, such as the use of computer generated simulations, the disclosure must also be accompanied by a CPLR 310l(d) expert disclosure of the person who will lay the foundation for the film or simulation to go into evidence or risk being excluded by the court. Typically, like all evidence, admissibility of demonstrative evidence should be within the "sound discretion" of the trial court.

The summaries below highlight some of the key foundational elements for the admission of different forms of demonstrative evidence.

1 *It is noted that the term video is all encompassing and includes all moving images submitted in electronic form.*

Models, Maps, and Diagrams

In general models, maps and diagrams are treated similarly by the courts. The courts have found that the admissibility of maps, drawings, and diagrams illustrating the scene of the event is within the discretion of the trial court.[13] In order for the map,[14] drawing, or diagram to be deemed admissible by the court, it must show the relative locations of objects at the time of the subject occurrence in a reasonably accurate manner and must be verified as a fair and accurate depiction.[15] Verification must be made in the form of trial testimony, but can be offered by anyone familiar with the location depicted. As with photographs offered into evidence, maps and diagrams are properly excluded absent verification by witness testimony.[16]

Additionally, a map or diagram may be admitted even in the event that it contains some inaccuracies, provided that the prejudicial and misleading effect is prevented or somehow remediated.[17] Significantly, the information used to generate the diagram must be based on factual observations as opposed to hearsay or statements made by the parties involved in the incident.[18]

Based on the above, in order for a map or diagram to be admissible, the key foundational elements to be laid are testimony that the map is a fair and accurate representation of the scene; and testimony regarding absence of change in the area depicted in the map between the time of the occurrence and the observations used to create the map.[19]

Similarly, models have been deemed admissible as demonstrative evidence where the model is verified to be a true representation of the subject depicted.[20] Again, like maps and diagrams, the model may be admissible despite certain differences from the original.[21] In the instance of models, the differences must be "adequately explained to the jury".[22] Although models may be admissible, in-court demonstrations utilizing models have been found to be both admissible[23] and inadmissible.[24] The courts have stated that the use of models for in-court demonstrations is within the discretion of the trial court. The admissibility of the demonstration will depend upon how closely the demonstration can replicate the conditions of the occurrence.[25]

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The admissibility of models is also dependent upon testimony verifying that the model is a true representation of the original.[26]

Medical Records

Typically, hospital records are submitted to the court with a verification of authenticity from the provider and are thereafter admitted under the business record exception to the hearsay rule.[27] Once the records have been admitted, it is recommended portions of the record be read to the jury or blown up to poster size to assist the jury in reading the records and understanding the alleged injuries, and marked with the same exhibit number or letter with the addition of a symbol to indicate that it is a duplicate of something already accepted in evidence.

However, CPLR 4532a provides for the admission of a specific X-ray or graphic test result provided the name of the injured party, the date of the test, and additional identifying information is inscribed by the medical practitioner or medical facility is on it, and that pretrial disclosure has been performed.[28] Employing a shadow box or enlarging portions of the exhibit may well assist the jury in their understanding by making it easier to see while accompanied by a medical expert's testimony.

There is also an alternative method, commonly referred to as the "Silent Witness", for the admission of x-ray or graphic test records. That requires a) testimony as to the chain of custody that the specific machinery was properly operated by a qualified technician at the given location on the given date; and b)proof that there has been no alteration. This method avoids the need to call the radiologist who performed the test to testify to the authenticity of the record.[29]

Photographs

It is well settled in New York that a photograph may be admissible provided that the photograph is authenticated as providing a correct representation of the person or object. Such authentication must be by the testimony of a person familiar with the object of the photograph.[30] A photograph may also be used as "independent probative evidence of what it shows".[31]

A significant issue when dealing with the admissibility of photographs is the time between the occurrence and when the photographs were taken. The key issue is if there was a significant or substantial change in conditions between the time of the occurrence and the time of the photographs.[32] Additionally, the courts have found that photographs of an accident scene have no value in a personal injury matter, unless the photographs depict the scene as it looked at the time of the alleged incident.[33]

Similar to the "Silent Witness" method for admission of an x-ray or other diagnostic films, a photograph may be admitted by showing foundation evidence including the date, time and location of the photograph, the mechanics and operation of the camera, and expert testimony that there has been no alteration of the film or prints (chain of custody evidence may be used instead of expert testimony).[34] This obviously is a more arduous task but may be necessary if no witness is available to authenticate the photograph in the manner described above.

The use and disclosure of surveillance photographs are governed by the CPLR.[35] The statute requires disclosure of" all portions of such material, including out-takes, rather than only those portions a party intends to use."[36] However the statute does not provide guidance on the admissibility of the surveillance photographs when being used by a party who did not prepare them.[37] The courts have differed on whether the photographs (and video) are admissible under these circumstances.[38] Thus, in a personal injury action on damages the defense surveillance videotapes of plaintiff's physical activities were deemed inadmissible when the plaintiff attempted to utilize them as part of his prima facie case.[39] However, a post accident surveillance video taken by the plaintiff's employer was admissible where it was found to be probative of the plaintiff's damages claims.[40]

Again, the most significant hurdle to the admission of this form of demonstrative evidence is verification that it fairly and accurately depicts what is shown. Verification, as noted above, may be provided by anyone familiar with what is shown, and does not necessarily need to be the photographer who created the photograph.

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Videos

The admissibility of video raises the same issues as photographs, i.e., foundation. As discussed above, the foundation that will need to be laid is testimony from someone familiar with the subject of the video stating that the video fairly and accurately depicts the subject.[41] It may also be necessary to elicit testimony as to the methods utilized to make the video to show that the video has not been altered or edited.[42]

As with photographs, the time when the video was made in relation to the time of the occurrence will be a key issue in determining the admissibility of the evidence.[43]

A few unviewable or inaudible portions of a video will, typically, not be sufficient to change the admissibility of a videotape. However, deficiencies of sufficient length uthat a jury would have to speculate as to its contents" would be grounds for exclusion of the video.[44] Regardless, be aware that courts are more skeptical of admitting videos of experiments, reenactments and demonstrations, skills, and the effects of physical injuries because they have a higher risk of misleading and confusing the jury.[45]

A video, much more than a still photograph, such as surveillance recording depicting the circumstances of an alleged incident, may become independent probative evidence of what it shows.[46] In one case, the court found that, urn a fast developing technological age, where cell phones and texting devices are used handily not only to talk and send messages, but also to photograph, the usefulness of a video surveillance tape to help get at the truth of a disputed factual issue is undebatable and undeniable."[47]

Another invaluable way in which video presentation can assist in the jury's retention of the significant facts at issue is through the use of video depositions. Generally, in New York, unlike under the Federal Rules, a party taking a deposition is free to record it on videotape without the showing of special need, provided that all parties have the opportunity to question the witness.[48] The court rules provide that the videotape must be accompanied by a certification from the officer before whom the deposition was taken that the video is a true record of the testimony given.[49] Such certification would then be signed by the deponent in accordance with CPLR §3116.[50] The use of a videotaped deposition, assuming it meets all requirements of CPLR §3113 and the Uniform Court Rules,[51] is a way to capture the jury's attention and put the credibility function of the fact finders to better use because they will be able to see the mannerisms, appearance, and tone of the deponent as well as the time lapse between question and answer.

Demonstrations

Generally, the trial judge has the discretion to allow tests, demonstrations and/or experiments for the purpose of determining the truth of the facts alleged.[52] The trial court also has discretion to determine whether the tests, demonstrations, and experiments may be performed in or out of court, or in the presence of the jury.[53] Further, the court may allow such test, demonstrations, and experiments, even in instances where they will result in the partial destruction of real evidence provided that they play a positive and helpful role in determining the truth of the matter in question.[54] Nevertheless, the key question in determining whether a proposed test, demonstration, or experiment will be deemed admissible is whether an illdesigned or non-relevant test will mislead, confuse, divert, or otherwise prejudice the fact-finder from determining the truth of the matter.[55]

The critical foundation that must be laid for the admissibility of a test, demonstration, or experiment is evidence that meets the tests of reliability and scientific acceptance,[56] and like all scientific expert testimony, that it was conducted in a way to ensure reliable results,[57] and substantially replicated the conditions to which the test or demonstration pertains.[58] Substantial similarity between the conditions that existed at the time of the occurrence and the test is necessary but there typically do not need to be identical conditions.[59]

Computer Animation and Computer Generated Simulation

Computer animation and computer generated simulations attempt to recreate the accident or event in a manner which allows the jury to witness the event.[60] Parenthetically, we emphasize that before admissibility can be addressed, the proposed evidence must be exchanged in accordance with the requirements of CPLR § 3101.

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In New York, the requirements for admissibility of a computer generated exhibit remain the same as with other types of demonstrative evidence. Simply put, it must be relevant and it must "fairly and accurately reflect the oral testimony offered and that it be an aid to the jury's understanding of the issue."[61] The admission of computer generated animations is most often done for the limited purpose of illustrating an expert's opinion as to the happening of the occurrence.[62] To reiterate our comment that you are not offering a cartoon video, the litmus test should be whether you can show the scientific basis of the computer generated exhibit to avoid exclusion on the ground that the exhibit will cause the jury to "confuse art with reality. "[63]

There is a real difference between an animation and a simulation. "An animation is used to illustrate a witness's testimony by recreating a scene or process, and properly is viewed as demonstrative evidence. "[64] An animation[2] does not attempt to reconstruct the alleged occurrence.[65]

In contrast, computer generated simulations are typically designed to assist the expert in generating an opinion and serve some function beyond a simple portrayal or illustration of the opinion. Stated more simply, a simulation is not a copy or graphic expansion of sworn testimony but is offered as proof of the matter at issue.

The development of sophisticated computer programs that allow the accurate and reproducible recreation of accidents allows engineers to reconstruct accidents and create simulations that can be shown to the jury and should be entered as evidence in chief in a DVD format.

Computer generated simulations serve to allow the expert to develop new evidence, independent from mere opinion by an expert, by allowing a computer program to create a projection of the occurrence based on the data that is input. Hand in glove, to get the simulation in evidence one must also serve a CPLR § 310l(d) disclosure notice for the expert witness who generated the simulation and who will explain the video consonant with CPLR §3101 (d) (1).[66] That statute is so important as to require setting it forth here: it states that "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, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion."[67]

The submission of the expert disclosure is a threshold issue to determining admissibility of computer generated simulations. Specifically, the expert must be able to testify that the measurements, data entry, software, and hardware used to create the simulation conform with the generally accepted engineering customs and practices and that the computer program acted in a sound and reproducible way. This not only allows the experts to confirm or rebut the happening of an accident or event to a reasonable degree of engineering certainty but also to show the jury a visual representation of how the opinion was reached.

In instances where a computer program is used in this manner, to more than simply illustrate the expert's opinion, the proponent of the evidence will have to satisfy the Frye standard for scientific evidence, i.e. , to give an opinion as to the general acceptability among the scientific community of the tests and confirm that the software and hardware used in the development of the simulation was performed in an accurate and reproducible manner.[68] In comparison, in the Federal court system, authentication of computer generated simulations are governed by Federal Rules of Evidence 901 (b) (9).[69]

What may we expect from the courts when we offer a computer generated simulation? So far its admission, as with other types of evidence, has been held to be within the "sound discretion" of the trial court. In Feaster v. New York City Transit Auth., 172 A.D.2d 284, 285, 568 N.Y.S.2d 380, 381 (1st Dept. 1991), the First Department found that it was within the trial court's "sound discretion" whether to admit a computer generated simulation. To us, "sound discretion" implies, "the absence of arbitrary determination, capricious disposition or whimsical thinking,"[70] or "a discretion that is not exercised arbitrarily or willfully .... "[71] As such, by use of this

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[2] *Be aware that most courts view computer generated animations as "demonstrative" and are not therefore considered "evidence" to be included as part of the record. See NYPAC-EVID § 11:20.*

phrase, the First Department showed its support of the use of the computer simulations but implied that knowledge of the facts and circumstances of each individual case must be weighed to determine admissibility by the trial court who may not decide that issue arbitrarily.

An example of this is the matter of 42nd St. Development Project, Inc., et al. v. Dream Team Associates, LLC, et al. (New York County Index No. 119921/1999). This matter involved the collapse of the Selwyn Office Building located on 42nd Street's theater row. A virtual model of the major components involved in the incident was generated by using a combination of software programs to present a competing theory on the happening of the occurrence. The use of each of the software programs was explained by the engineering expert. The model was comprised of the complete structure of the Selwyn office building prior to the collapse using actual photographs to align the virtual computer model in both scale and proportion.

In order to create the model, the expert scanned the photographs of the building, both prior to and after the incident, into digital format, imported them into one of the software programs and then used standard perspective geometry methods to obtain the dimensions of the building. A plan view and cross section of the model were developed using a drawing exchange format which was then imported into a three-dimensional software package. The expert then used a set of calculated sequential building movements to create a simulation of the building collapse. When presented to the court, it properly allowed the simulation to be shown to the jury as part of the defense's evidence in chief and a competing theory of how the incident occurred.

Another example of the attempted use of computer generated simulations occurred in the case of McCormack v. The Town of Pawling, et al. (Dutchess County Index No. 793/2000). In this case, involving a motor vehicle accident, the plaintiffs attempted to show that the subject road was inherently unsafe by the use of a computer generated simulation of the incident. The plaintiffs used engineers and roadway experts to measure the roadway, conduct "Ball-Bank" testing,[72] and to create the simulation.

Prior to trial, the plaintiffs disclosed the simulation along with CPLR 3101(d) disclosures for all experts. Notably, the CPLR 3101(d) disclosures anticipated that the expert would testify regarding the dimensions and elevations of the roadway, measurement and preparation of diagrams of the roadway, inspection of the alleged location, preparation of computer calculations measuring the subject roadway, and preparation of a detailed road condition survey. In this case, the trial court, in its sound discretion, denied a motion in limine to preclude the simulation.

Computer Animation and Computer Generated Simulation

In general, New York State courts have shown a willingness to admit a wide variety of demonstrative evidence for the limited purpose of illustration. Whether they are models, drawings, illustrations, photographs, xrays and other diagnostic films, videos, tests, experiments, demonstrations, or computer-generated animations, the most significant question is whether the evidence will assist the trier of fact in ascertaining the truth of the issues in the litigation.

Always to be remembered is that the key for admission has consistently been the verification, by testimony or substantial other identifying factors, of the accuracy of the demonstrative evidence presented. Another factor that should be kept in mind is the time between the occurrence and the creation of demonstrative evidence (such as models, drawings, photographs and videotapes) depicting the location. The courts will and have deemed inadmissible any evidence that does not accurately reflect the scene at the time of the occurrence. As such, any lengthy delay in obtaining the demonstrative evidence or any substantial change in the appearance of the scene will likely be a bar to admission.

Demonstrative evidence has been termed by one appellate court to be "the most convincing and satisfactory class of proof" and is vital to litigation in many ways.[73] Use it, knowing that its only limitation is your imagination.

Worthy Of Note

VINCENT P. POZZUTO *

1. LABOR LAW

O'Brien v. Port Authority of New York and New Jersey, Court of Appeals (2017)

The Court of Appeals, in a 4-3 decision, held that plaintiff was not entitled to summary judgment on his Labor Law Section 240(1) cause of action, finding that there were questions of fact as to whether a temporary exterior metal staircase at a construction site provided adequate protection. On the date of the accident, it had been raining periodically throughout the day. Plaintiff used the temporary exterior metal staircase to access his employer's shanty, one level below ground. The staircase was wet due to the rain, and plaintiff fell after his foot slipped off of the tread of the top step. Plaintiff also testified that the staircase was steep, slippery and smooth on the edges. In support of his motion for summary judgment, plaintiff submitted an affidavit of an expert, who gave the opinion that the stairs were not in compliance with good and accepted standards of construction site safety, were smaller, narrower and steeper than typical stairs and that they showed longstanding wear and tear. In opposition, the defense offered an affidavit of its own expert, who stated that the stairs provided traction that was acceptable within industry standards in times of inclement weather and that there was no evidence that the treads on the steps had been worn down by foot traffic. The majority opinion, in reversing the grant of summary judgment to plaintiff, stated "[t]o the extent the Appellate Division opinion below can be read to say that a statutory violation occurred merely because plaintiff fell down the stairs, it does not provide an accurate statement of the law. As we have made clear, the fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law Section 240(1)." The Court further stated that the present case was distinguishable from those cases involving ladders or scaffolds that collapse for no apparent reason, where the Courts have applied a presumption that the ladder or scaffold was not good enough to afford proper protection. The Court held that the expert opinions of each side created questions of fact as to whether the staircase provided adequate protection. In a long dissent, Judge Rivera stated that it undermines Labor Law Section 240(1) to determine the liability of an owner or contractor by reference to industry custom and practice. Judge Rivera maintained that defendants cannot escape liability under Labor Law Section 240(1) by providing an inadequate safety device merely because there is no safer staircase available. She stated that the Labor Law requires defendant to find an appropriate safety device and in the case at issue, defendants could have limited the use of the exterior metal staircase to dry days.

2. PREMISES LIABILITY

Rong Wen Wu v. Arniotes, 2017 N.Y. Slip Op. 02687 (2nd Dept., April 5, 2017)

In a slip and fall on ice case, defendant made a motion for summary judgment. The Court held that in support of such a motion, defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to when the plaintiff fell. The Court held that defendants did not meet their burden and thus the motion was denied regardless of the sufficiency of plaintiff's opposition papers.

3. INDEPENDENT CONTRACTOR

McLaughlan v. BR Guest, Inc., 2017 N.Y. Slip Op. 02906 (1st Dept., April 13, 2017)

Plaintiff brought suit against BR Guest, Inc. alleging that BR Guest was vicariously liable for an assault committed on plaintiff by a security guard on the sidewalk in front of the bar. The Court held that the record established that the security guard, Defendant

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James DiPaola, was an independent contractor when the incident occurred. The evidence showed that DiPaola was not on BR Guest's payroll, did not receive health insurance or other fringe benefits, and that BR Guest contracted for his services from defendant Presidium LLC. The Court held that the fact that BR Guest decided the number of security guards needed on a particular night, where the guards should be posted and gave them instructions relating to the manner in which they performed their work did not render the security guards special employees of BR Guest. There was also no basis for BR Guest to be held liable pursuant to the nondelegable duty to keep the bar safe, as BR Guest did take such precautions by hiring security guards through Presidium. The Court further held there was no evidence of an escalating situation because it was undisputed that the entire incident lasted no more than several minutes. Finally, while BR Guest did violate the Administrative Code of the City of New York by not obtaining proof that DiPaola was a registered security guard, this was not the proximate cause of the incident because it could have happened in the same manner even if BR Guest complied with the statute.

4. INSURANCE COVERAGE

Heartland Brewery, Inc. v. Nova Cas. Co., 2017 N.Y. Slip Op. 022908 (1st Dept., April 13, 2017)

Defendant Nova Casualty Company issued property and casualty coverage to Heartland Brewery for several of its premises throughout New York City. The policy provided limited coverage for flooding, but specifically excluded damage to property located in "Flood Zones A or V as defined by the Federal Emergency Management Agency (FEMA)." During Superstorm Sandy, plaintiff's property located at 93 South Street sustained substantial flood damage. Plaintiff made a claim under the policy, and Nova Casualty declined coverage because the property was located in FEMA zone AE. Nova asserts that zone AE is a subzone of Zone A. Plaintiff claims that Zone AE is not a subzone of Zone A but is separately defined under FEMA regulations. The Court held that where ambiguous words are to be construed in the light of extrinsic evidence or the surrounding circumstances, the meaning of such words may become a question of fact for the jury. The Court further held that FEMA's flood zone regulations raise an issue of fact rendering the exclusion ambiguous.

5. AGENCY

Stern v. Starwood Hotels & Resorts Worldwide, Inc., 2017 N.Y. Slip Op. 02882 (1st Dept., April 13, 2017)

Plaintiff was allegedly injured when she tripped over a walkway at the Four Points by Sheraton Ann Arbor Hotel in Michigan, owned by ZLC, Inc., a Michigan corporation unrelated to Defendant Starwood Hotels and Resorts Worldwide, Inc. In support of its motion for summary judgment, Starwood demonstrated that it did not own or control the hotel and that under its agreement with ZLC, ZLC was an independent contractor. The Court further held however, that Starwood's reservations website holds the hotel out to the public as a Starwood Property, and that plaintiff relied on the representations on Starwood's website in choosing to book a room at the hotel. The Court held that this could support a finding of apparent or ostensible agency, and that plaintiff was entitled to discovery concerning issues relating to Starwood's possible agency relationship with the hotel.

6. MEDICAL MALPRACTICE

Victor Q. v. Bronx Lebanon Hosp. Ctr., 2017 N.Y. Slip Op. 02742 (1st Dept. April 6, 2017)

After a Frye hearing, the Supreme Court, Bronx County, denied defendant hospital and third-party defendant doctors' motion to preclude plaintiff expert from testifying as to causation. Plaintiff alleged that the infant plaintiff suffered brain damage due to defendants' failure to diagnose and treat fetal hypoxia-ischemia. The Court held that the lower Court properly determined that the articles proffered by plaintiffs were sufficient to establish that it is generally accepted that perinatal hypoxia can be the cause of brain injury, in the absence of evidence of neurological injury in the neonatal period. The articles established that infants who experienced a hypoxic event in the neonatal period but were asymptomatic for neurological injuries might still manifest such injuries later in life. The Court further held that the literature relied on to establish general acceptance need not involve circumstances virtually identical to those of plaintiff.

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7. NEGLIGENT SECURITY

Faughey v. New 56-79 IG Assoc., L.P., 2017 N.Y. Slip Op. 02608 (1st Dept., April 4, 2017)

The case arose out of the murder of Kathryn P. Faughey by David Tarloff while in her office in a suite leased by defendant tenants in a building owned by defendant owners. The Court held that the lower Court correctly dismissed the complaint, holding that defendants owed no duty to protect the decedent from the violent actions of third parties, including former patients like Tarloff, as such actions were not forseeable, given the absence of prior criminal activity by Tarloff or other third parties in the building. The Court further held that even assuming a duty to provide "minimal precautions", that duty was satisfied by the provision of 24/7 doorman coverage, surveillance cameras, controlled building access and functioning locks on the doors of the suite and the decedent's office. It was pure speculation that additional measures, such as announcing visitors, installing an office intercom or buzzer, or keeping the doors locked after hours, would have prevented Tarloff from killing decedent. The Court further held that any claims that the doorman was negligent in failing to recognize Tarloff's suspicious behavior was not a proximate cause of decedent's death, because it was still not forseeable that Tarloff was about to engage in a murderous rampage.

8. DAMAGES

Nayberg v. Nassau County, 2017 N.Y. Slip Op. 02664 (2nd Dept., April 5, 2017)

After a jury award of damages, the Appellate Division, Second Department, sustained the award of $600,000 for past pain and suffering and $1,000,000 for future pain and suffering for dental injuries and surgery for a cervical level herniated disc. In addition, while plaintiff was not employed at the time of the accident, plaintiff's economist computed the lost earnings claim based upon plaintiff's last three years of employment with Bloomingdales, and opining that plaintiff had shown he had the "skill set and marketability to be hired at that rate of pay." The Court sustained the past and future lost earnings award which totaled $773,751.58.

9. MUNICIPAL LIABILITY

Beiner v. Village of Scarsdale, 2017 N.Y. Slip Op. 02617 (2nd Dept., April 5, 2017)

Plaintiff allegedly tripped on an unlevel slab of bluestone sidewalk in the Village of Scarsdale. The Court held that defendant made a prima facie showing of entitlement to judgment as a matter of law by providing the affidavit of the Village Clerk, which indicated that she conducted a records search and found no prior written notice of a defective condition at the location alleged by plaintiff. The Court further held that the defendant established prima facie that it did not create the allegedly defective condition through an affirmative act of negligence. The Court held that plaintiff failed to raise an issue of fact in opposition. Contrary to plaintiff's contention, evidence suggesting that the defendant actually knew of the defect did not satisfy the requirement that prior written notice be given to the Village Clerk. Further, the Court held that plaintiff did not identify any evidence demonstrating that the allegedly defective condition arose immediately upon installation.

10. LEGAL MALPRACTICE

Stein Industries, Inc. v. Certilman Balin Adler & Hyman, 2017 N.Y. Slip Op. 02688 (2nd Dept., April 5, 2017)

Plaintiff brought an action sounding in legal malpractice against a law firm retained to represent him in connection with the purchase of his brother's interest in several companies, including Stein Industries. Plaintiff alleged that Defendant Law Firm failed to discover that upon the sale of the business, an "Unfunded Vested Pension Liability" became due and owing to a union, which caused plaintiffs to be damaged in the sum of $500,000. Defendants asserted a statute of limitations defense and moved to dismiss. Plaintiffs relied on the continuing representation doctrine. The Court held that the affidavit of Andrew Stein in which he averred that he met with members of the defendant on July 26, 2012 to determine how to rectify the pension liability issue, that he was not satisfied with their recommendations and directed them to formulate another idea, sufficient to raise a question of fact as to whether defendant engaged in a continuous representation intended to rectify or mitigate the initial act of alleged malpractice.

The Year in Review: Significant Decisions from the New York Court of Appeals

BY: ROSS P. MASLER* AND SCOTT EDLEY**

This review is intended to provide defense practitioners with a concise review of the leading decisions in civil cases rendered by the New York Court of Appeals in 2016. The Court considered cases in diverse areas of the law that affect our practices, including premises cases, products liability, labor law, insurance coverage, experts, and automobile cases. This review is offered as a starting point into research and case development, but practitioners may want to read the entire decision, if interested, to understand the nuances and complexity of the Court's holding in a particular case.

The 21 cases discussed herein are a select sampling of the Court's decisions (as noted below, the Court decided 112 civil actions throughout the year), and others may have greater application in particular cases.

Before we get to those cases, however, a brief review of statistics from the Court of Appeals is necessary simply as a means of understanding the workings of that Court and the volume of cases it considers. For example, in the year 2015 (the most recent year for which statistics are available), the Court of Appeals disposed of 202 appeals. Of those, 112 were civil and 90 were criminal (down from 144 civil and 91 criminal in 2014). Three hundred twenty-two (322) notices of appeal and orders granting leave to appeal were filed in 2015 compared to 310 in 2014. Two-hundred thirty-four of the filings were civil compared to 219 in 2014 and 88 criminal matters compared to 91 in 2014. Once the notice of appeal is filed, the average length of time to the release of a decision was 417 days.

Premises

Sherman v. New York State Thruway Authority, 27 N.Y.3d 1019, 32 N.Y.S.2d 568 (2016)

The "storm in progress" defense provides that a landowner will not be held liable for injuries sustained as a result of ice or snow conditions occurring during an ongoing storm or a reasonable time thereafter. In this 4-3 decision, the Court of Appeals applied the "storm in progress" defense to a situation where the ice storm had changed to rain at the time of the accident.

The claimant, a New York State trooper, slipped and fell on an icy sidewalk outside the trooper barracks where he was stationed. The sidewalk was on property owned and maintained by the New York State Thruway Authority ("Thruway Authority"). The accident occurred at 8:15 a.m. The claimant testified that there was an ice storm the night before. The storm persisted in the form of an intermittent wintry mix of snow, sleet and rain until 6:50 a.m., when the claimant reported for duty at the barracks. At the time of the accident, the weather had warmed somewhat and the precipitation had changed to rain. The claimant commenced this action alleging that the Thruway Authority was negligent in failing to maintain the sidewalk free from ice. The Thruway Authority moved for summary judgment, arguing that the "storm in progress" defense insulated it from liability. The trial court denied the motion. However, the Appellate Division reversed and dismissed the claim. Thereafter, the Court of Appeals granted the claimant's motion for permission to appeal.

In a 4-3 decision, the Court of Appeals affirmed the dismissal of the claim. The majority held that "[t] he undisputed facts that precipitation was falling at the time of claimant's accident and had done so for a substantial time prior thereto, while temperatures

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remained near freezing, established that the storm was still in progress and that the Authority's duty to abate the icy condition had not yet arisen." The lengthy three-judge dissent stated that "triable issues of material fact exist as to whether the storm in question had ended, and if so whether a reasonable period of time had passed to hold the Authority liable for negligence resulting in claimant's injuries." The dissent added that "[w]e have never held that above-freezing rain alone constitutes a type of storm-in-progress that would relieve a property owner from taking any action to clear or maintain the property. Thus, if an ice storm has changed, due to warming weather, into mere rain, then the storm has ended." While several cases from the Appellate Division have held that a changeover to rain does not signal an end to a "storm in progress," this is the first time that the Court of Appeals has embraced such a position. This can be viewed as a significant victory for landowners since it now appears that they do not have to engage in the seemingly fruitless and wasteful exercise of spreading salt while a cold rain is still falling, only to have the salt be washed away by the ongoing precipitation.

Yaniveth R. v. LTD Realty Co., 27 N.Y.3d 186, 32 N.Y.S.2d 10 (2016)

In 1982, New York City enacted lead abatement legislation which imposes a duty on landlords to "remove or cover" lead-based paint "in any dwelling unit in which a child or children six (6) years of age and under reside" (emphasis added). In this case, the infant plaintiff sustained lead poisoning in a building where her grandmother lived and provided babysitting services for her 50 hours per week. The Court of Appeals held that the child did not "reside" in the building where her grandmother lived, and thus, liability under New York City's Lead Paint Law could not be imposed on the landlord of that building. The infant plaintiff was born in 1997. From 1997 to 2002, she lived with her mother and father in an apartment in the Bronx, in the City of New York. The child's paternal grandmother lived nearby in an apartment owned by the defendant LTD Realty Co. When the infant plaintiff was three months old, her grandmother began watching her during the day while her parents were at work. The child returned to her parents' apartment each evening. According to the child's mother and grandmother, she lived only at her parents' apartment, and not with the grandmother. In January 1998, the infant plaintiff was found to have an elevated blood lead level, which was traced to conditions at the grandmother's apartment. Consequently, the New York City Health Department issued an Order to Abate to the defendant. As a result, this action was commenced under the New York City Lead Paint Law. It was alleged that since the child "spent a significant amount of time" in her grandmother's apartment, the defendant owed her a duty to abate the apartment of hazardous lead conditions.

The defendant moved for summary judgment arguing that the child did not "reside" in the grandmother's apartment for purposes of liability under New York City's Lead Paint Law. The trial court granted the motion and the Appellate Division affirmed. In a 6 – 1 decision, the Court of Appeals affirmed, noting that the City's Lead Paint Law does not define the word "reside." The Court then stated that "[i]n the absence of a statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase." The Court added that "[a]ccording to Webster's Third, 'reside' is the 'preferred term for expressing the idea that a person keeps or returns to a particular dwelling place as his fixed, settled or legal abode,'" and, based on a prior holding, that "a person's 'residence' entails 'something more than a temporary physical presence,' with some 'degree of permanence and an intention to remain.'" Applying those principles, the Court held that the child did not "reside" in the grandmother's apartment within the meaning of the City's law. "Although a person may reside at more than one location, spending 50 hours per week in an apartment with a non-custodial caregiver is insufficient to impose liability on a landlord under [New York City's Lead Paint Law]." The Court added that "[h]ad the City intended to expand the meaning of the word 'reside' to include

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children who do not actually live in an apartment but spend significant amounts of time there, it could have used words to that effect." The Court also declined to impose liability on the defendant under traditional common law principles. The dissent stated that the majority's narrow reading of the word "reside" undermines the intent of the City's Lead Paint Law, which is to protect young children from the hazards of lead paint. The dissent concluded by declaring that the majority's decision "beseeches a legislative response."

Sangaray v. West River Associates, 26 N.Y.3d 793, 28 N.Y.S.3d 652 (2016)

New York City Administrative Code § 7-210 was enacted for the purpose of shifting tort liability for defective sidewalks from the City to certain property owners as a cost-saving measure for the City. Previously, the Appellate Division, New York's intermediate appellate court, had construed § 7-210 as being limited to the owner of the property that immediately abuts the sidewalk which contains the defect over which a plaintiff trips. In this decision, the Court of Appeals, New York's highest court, held that, under certain circumstances, liability can extend to a neighboring property owner as well.

The plaintiff tripped and fell when his toe came into contact with a raised portion of a New York City sidewalk. The sidewalk flag on which plaintiff walked ran from the front of property owned by the defendant West River Associates, LLC (West River) to a neighboring property owned by the defendants Sandy and Rhina Mercado (Mercado). The sidewalk flag was sloped and it descended lower than a level flagstone that was in front of the Mercados' property. The expansion joint on which the plaintiff fell was solely in the area that abutted the Mercados' premises. The slab that was sloped had settled due to subsidence of the underlying soil. There was proof that approximately 92% to 94% of the defective flag was in front of the West River property, while the remaining 6% to 8% of the defective flag abutted the Mercados' property.

West River moved for summary judgment on the ground that the defect did not about its property, and it could not be held liable for failing to maintain the sidewalk. The trial court granted the motion and the Appellate Division affirmed.

The Court of Appeals unanimously reversed and reinstated the claims against West River. In its decision, the Court stated that the Appellate Division has "seemingly engrafted onto § 7-210 a 'location requirement,' such that if the defect upon which a person trips abuts a particular property, then the owner of that property is deemed liable, without conducting any inquiry as to whether a neighboring owner's failure to comply with its statutory duties may have also been a proximate cause of the accident."

The Court of Appeals rejected that approach. In so doing, the Court stated the following:

> To be sure, the location of the alleged defect and whether it abuts a particular property is significant concerning that particular property owner's duty to maintain the sidewalk in a reasonably safe condition. That does not, however, foreclose the possibility that a neighboring property owner may also be subject to liability for failing to maintain its own abutting sidewalk in a reasonably safe condition where it appears that such failure constituted a proximate cause of the injury sustained.(emphasis in original)

The Court concluded that West River's failure to maintain the sidewalk flag abutting its premises rendered it potentially liable under the New York City Sidewalk Law.

Now, in cases of this nature, a property owner moving for summary judgment should consider doing more than pointing to the fact that the defect over which plaintiff tripped did not abut its property. Instead, the moving defendant may want to also demonstrate that a defect in front of its premises was not a contributing factor to the condition on the adjoining property which caused the accident.

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The Year in Review: Significant Decisions from the New York Court of Appeals

Cruz v. Bronx Lebanon Hosp. Ctr., 27 N.Y.3d 925, 28 N.Y.3d 679 (2016)

In a short memorandum decision, the Court of Appeals affirmed the Appellate Division determination that legally sufficient evidence supported the jury's finding that defendant had constructive notice of the alleged defect. Plaintiff was attending a cookout on the grounds of the defendant's hospital with four of her grandchildren. The picnic was held in a courtyard with a gated playground area. The floor of the playground was connected by a series of rubber mats. Plaintiff's foot got caught in a hole in the rubber mat and she fell forward striking her right elbow. Plaintiff described the hole as being caused by "worn out" rubber. Plaintiff suffered an avulsion fracture and dislocation of the right elbow. The hospital's vice-president of support services testified that the maintenance staff inspects and cleans the accident area at least once a day and testified that his records did not contain a work order for the claimed defect in the rubber mat. At trial, the jury awarded the plaintiff $300,000 for past pain and suffering and $270,000 for future pain and suffering. After defendant's motion, the amounts were reduced to $140,000 and $60,000 respectively.

Defendant sought to set aside the verdict, arguing that the evidence so preponderated in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence. The Appellate Division found that the liability verdict was based on legally sufficient evidence, noting that the fact that plaintiff's testimony was the lone evidence of the claimed defect is not a basis to conclude that there was insufficient evidence of a hazardous defect to impose liability. Plaintiff's testimony that the mat was worn out means that it occurred over the passage of time and that as such a reasonable jury could conclude that the defect should have been discovered. The Court also found that the pain and suffering awards did not deviate materially from what would be reasonable compensation.

Justices Friedman and Saxe dissented. The dissent argued that the defect did not exist for a sufficient length of time and was not in a condition that would allow for defendant to discover and fix the problem. The dissent noted that there was no testimony that anyone observed the defect prior to the accident. Nor did the plaintiff provide photos of the defect or expert testimony establishing that the defect had existed for a sufficient length of time. Plaintiff failed to establish constructive notice because she did not provide the dimensions of the defect and that she never saw the defect before or after the accident. Her testimony stating that the matting was "worn" was merely conclusory and insufficient to prove constructive notice.

Taveras v. 1149 Webster Realty Corp., 28 N.Y.3d 958, 38 N.Y.S.3d 516 (2016)

The Court of Appeals affirmed the Appellate Division's determination that defendants failed to meet their burden to establish judgment as a matter of law. Plaintiff fell on a ramp leading from a public sidewalk to the entrance of the defendants' store. At his first deposition, the plaintiff testified upon leaving the store he "stepped like on a hole" and that he "stepped on something" which caused his ankle to twist and fall." The thing that plaintiff fell on was not solid. Plaintiff could not identify the location of his fall at the first deposition, but the photos shown to him at that deposition did not have any identifying characteristics. At the second deposition, additional photos were shown that depicted the full entrance way in front of the store and he was able to mark the area where he fell on the ramp which was not level. The Appellate Division's dissent noted that plaintiff never saw what caused him to fall, that he never noticed the potentially defective condition previously, and that his testimony changed from falling on something not solid to falling on a hole.

Pink v. Rome Youth Hockey Ass'n, Inc., 28 N.Y.3d 994, 41 N.Y.S.3d 204 (2016)

Defendants are nonprofit youth hockey associations. This case involves a hockey fight between spectators at a tournament hosted by defendants. The game included several on-ice fights and ejections. Following the game, two female spectators got into a fight and a melee

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ensued. The plaintiff attempted to break up the fight, but the brother of one of the female spectators (who started the fight) struck and injured plaintiff. The brother subsequently pled guilty to criminal assault and the female spectators pleaded guilty to disorderly conduct. The plaintiff sued the youth hockey associations, the City of Rome and alleged that defendants owed a duty to protect the plaintiff from criminal assault. Plaintiff's verified bill of particulars stated that defendants failed to enforce USA Hockey's "Zero Tolerance" policy requiring on-ice officials to seek to remove spectators from the game for vulgar language, threatening people or for using physical violence.

Defendants moved for summary judgment alleging that they have no duty to protect plaintiff from a random assault. The Supreme Court denied the motion claiming that the fan's unruly behavior put defendants on notice. The Appellate Division modified the order, granting summary judgment in favor of one of the youth hockey associations that did not lease the arena. The Court of Appeals then dismissed all claims against the defendants. The Court found that although defendants owed a duty to protect fans from foreseeable criminal conduct, here the criminal assault on the plaintiff was not a reasonably foreseeable result of any failure to take preventative measures. The Court reiterated that a failure to adhere to an entity's internal rules or regulations is not itself negligence.

Products

Matter of New York City Asbestos Litigation [Dummitt], 27 N.Y.3d 765, 37 N.Y.S.3d 723 (2016)

In this case, the Court of Appeals ruled that a manufacturer has a duty to warn of the danger of component parts used in its equipment – even where that manufacturer did not manufacture or sell the components. Plaintiffs in these consolidated cases died of mesothelioma, allegedly caused by years of exposure to asbestos. Mr. Dummitt, a boiler technician in the Navy, maintained steam valves on Navy ships. Mr. Suttner, a pipefitter at a manufacturing plant owned by General Motors, maintained the steam system at that plant, including the valves. The defendant in both cases, Crane Company ("Crane"), was a manufacturer of steam valves. When Crane produced the valves, each valve was surrounded with a gasket - an asbestos disc sealed by rubber. Due to the high temperatures and strong pressure utilized in the steam pipe systems, Crane knew that the gaskets and rubber packing would eventually wear out and need replacement. The purchasers of the valves (the Navy and General Motors) bought replacement asbestos gaskets and packing. Those replacement components were not manufactured by Crane.

To replace the older component, the deteriorated gasket was scraped off the valve. The rubber packing was then blasted with compressed air. The task of removing the older gaskets generated dust laden with asbestos. It was not the initial use of the valves and components that caused the release of asbestos, as the plaintiffs were servicing much older equipment which no longer had the original components. The plaintiffs admitted that they were never exposed to asbestos from products that were either supplied or sold by Crane. Rather, the asbestos exposure came from the replacement parts. While Crane did not manufacture or sell the replacement parts, it influenced the purchaser's choice of replacement components. Crane assisted in drafting user manuals which specifically mandated asbestos for the replacement parts. In addition, Crane provided the purchasers with detailed drawings specifying the components to be used with each valve. Moreover, Crane took the replacement components which had been manufactured by third parties, rebranded them, and sold them as Crane products.

Both cases were tried to verdict, and both resulted in victories for plaintiffs, with damages awards of $3 million for Suttner and $8 million for Dummitt. The juries found that Crane had rendered its valves defective by failing to warn of the dangers of the joint use of the valves and the other manufacturers' products. The intermediate level appeals courts affirmed. Before the Court of Appeals, Crane argued that it had no duty to warn because it did not manufacture the replacement gaskets, it did not place them into the stream of commerce, nor did it have any control over the production of the parts. Crane further

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claimed that it did not derive any benefit from the sale of the replacement parts. In a unanimous decision, the Court of Appeals affirmed, finding that Crane did have a duty to warn against the danger arising from the foreseeable use of its valves "in combination with a third-party product." The Court adopted the following standard in determining liability in this type of failure to warn case: "The manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended." In reaching this rule, the Court emphasized that while many products are mutually compatible and used in combination, "very few products must be used together" to function as intended. The necessity element of the standard thus plays an important role in analyzing these cases. The Court concluded that it found no unfairness in requiring a manufacturer to issue warnings where that manufacturer substantially participates in the integration of the two products. The Court has expanded the scope of the duty to warn doctrine in products liability cases. Notwithstanding that the defendant neither manufactured nor sold the defective product, a products liability defendant who plays an active role in recommending and promoting the use of a defective product may not escape liability under a theory of failure to warn

Finerty v. Abex Corporation and Ford Motor Co., 27 N.Y.3d 236, 32 N.Y.S.3d 44 (2016)

During the 1970s and 80s, plaintiff was exposed to asbestos while replacing various engine parts on Ford tractors and passenger vehicles in Ireland. He then moved to New York and was eventually diagnosed with peritoneal mesothelioma. He brought suit against, inter alia, Ford Motor Company ("Ford USA") and Ford Motor Co. Ltd. ("Ford UK"). Ford UK was a wholly owned subsidiary of Ford USA. Discovery revealed that Ford USA did not manufacture or distribute the asbestos-containing parts, and that those parts had been manufactured and sold by Ford UK. Ford USA moved to dismiss plaintiff's complaint on the grounds that it did not place the offending items in the stream commerce and that the corporate veil should not be pierced so as to hold Ford USA liable for the acts of Ford UK. Plaintiff argued that Ford USA was actively involved in the design and production of Ford products throughout the world. The trial court denied Ford USA's motion holding that there was sufficient evidence that Ford USA "exercised significant control over Ford UK . . . and had a direct role in placing the asbestos-containing products to which plaintiff was exposed into the stream of commerce." The lower court did find that there was no basis to pierce the corporate veil as against Ford USA. The Appellate Division affirmed, agreeing both that there was no basis for piercing the corporate veil and that questions of fact remained as to whether Ford USA could be held directly liable for its role in the distribution of the auto parts "on the ground that it was in the best position to exert pressure for the improved safety of products or to warn end-users of these auto parts of the hazards they presented." The Appellate Division granted Ford USA leave to appeal and certified the question of whether its order was properly made.

The Court of Appeals unanimously reversed, holding that it was Ford UK rather than Ford USA that manufactured and distributed the tractor and vehicle parts. Further, the Court noted that Ford USA was not an entity within the distribution chain and had not actually placed any of the parts into the stream of commerce. The fact that Ford USA may have exercised some control over its trademark was irrelevant given that Ford USA's control of that trademark did not involve any direction as to what warnings were to be placed on product packaging. Finally, the Court agreed that the corporate veil should not be pierced and that Ford USA could not be held liable for the actions of its subsidiary since Ford USA did not involve itself directly in Ford UK's affairs. The Court further held that Ford USA's ability to exert pressure on Ford UK was insufficient to subject it to strict liability. The Court noted that it had never "applied that concept to a parent company's presumed authority over a wholly-owned subsidiary."

This decision reiterates two relatively well settled points of law. One, that strict liability for a

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defective product will be imposed, except in limited circumstances, only upon those manufacturing or distributing the product, or the entity responsible for placing that product in the stream of commerce. Two, the Court refused to deviate from its long-standing jurisprudence holding that corporate forms will not be lightly disregarded.

Labor Law

Nazario v. 222 Broadway, LLC, 28 N.Y.3d 1054, *43 N.Y.S.3d 251* (2016)

Plaintiff was performing electrical work as part of a renovation, and was reaching up while standing on the 3rd or 4th prong of a 6-foot A-frame wood ladder when he received an electric shock from an exposed wire. He was able to maintain his hold on the ladder which stayed in an open, locked position as both he and the ladder fell to the ground. The ladder was not secured to anything stable prior to the accident. The trial court denied plaintiff's motion for summary judgment on his §240(1) claim but, upon a search of the record, dismissed those claims.

The Appellate Division, First Department reversed and reinstated plaintiff's Labor Law §240(1) claim and granted plaintiff summary judgment on that claim. That court held that plaintiff's evidence was sufficient to establish, prima facie, that the ladder he used did not provide adequate protection. The court rejected defendants' arguments that plaintiff's actions were the sole proximate cause of his injuries since he failed to use protective gloves before the power supply was turned off, reiterating that comparative negligence is not a defense to a §240(1) claim.

In a brief memorandum decision, the Court of Appeals modified the Appellate Division decision to deny plaintiff's motion for partial summary judgment on his Labor Law §240(1) claim. The Court held that questions of fact "exist as to whether the ladder failed to provide proper protection, and whether plaintiff should have been provided with additional safety devices.

Bennett v. Hucke, *28 N.Y.3d 964, 38 N.Y.S.3d 834* (2016)

The Court of Appeals affirmed a decision of the Appellate Division, Second Department without substantive decision. The case is significant for the simple reason that the Court affirmed the Appellate Division determination, where that court had reiterated certain well-settled principles of law. Specifically, the Appellate Division held that Labor Law §240(1) does not apply to prime contractors, construction managers, or agents of the owner or general contractor without authority to supervise and control the plaintiff's work. Further, the Appellate Division discussed Labor Law §200, and the differences between injuries arising from the manner in which work is performed and injuries arising from a dangerous condition on the premises.

Batista v. Manhattanville College, *28 N.Y.3d 1093, 45 N.Y.S.3d 357* (2016)

The Court of Appeals issued a short memorandum decision, modifying a decision of the Appellate Division, First Department, and granting plaintiff partial summary judgment on his Labor Law §240(1) claim. The Appellate Division had denied that motion, holding that questions of fact remained as to whether plaintiff disregarded instructions to use only pine planks for flooring on the scaffolding he was constructing, otherwise knew that pine planks were the only type of flooring to be used, and/or whether additional planks were available to him at the site or at his employer's yard. The court held that questions remained as to whether plaintiff should have checked the planks for knots and whether he used one with a knot in it, which he should not have done. In modifying that order, the Court of Appeals did not address the specific holding of the Appellate Division or discuss the questions the lower appellate court had deemed outstanding.

Notice of Claim

Newcomb v. Middle Country Central School Dist., *28 N.Y.3d 455, 45 N.Y.S.3d 895* (2016)

The infant plaintiff in this action was 16-years-old when he sustained "devastating injuries" in a hit and run automobile accident. His father reported details of the accident to his son's high school (located in the defendant's school district) and then requested copies of the accident file from the applicable police department. That request was

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denied since the investigation into the hit-and-run accident was ongoing, so plaintiff hired his own investigator to photograph the accident site. He then served timely notices of claim on the State, town and county. Plaintiff finally received the police department accident file six months after the date of loss and found photographs revealing a large sign at the accident location advertising a play at another high school located within the school district. That sign had been removed before plaintiff's investigator had taken his photographs. Plaintiff served a notice of claim on the School District and, at the same time, moved for leave to serve a late notice of claim.

The court noted the 4 factors to be considered in determining whether to permit a late notice of claim:

1) a nexus between petitioner's sons infancy and the delay in service,
2) a reasonable excuse for the delay,
3) actual knowledge on the part of the School District of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter, and
4) potential prejudice to the School District due to the delay.

The Supreme Court found that the delay was justified due to the severity of the infant plaintiff's injuries and his inability to obtain photographs of the scene, but held that there was no nexus between the plaintiff's infancy and delay. Further, the court held that the School District did not acquire actual knowledge of the essential facts within the statutory time period. Finally, the court placed the burden on plaintiff to demonstrate that the school district was not substantially prejudiced by the delay in service and concluded that plaintiff failed to carry that burden.

The Appellate Division affirmed but the Court of Appeals reversed, holding that the trial court, despite its discretionary function in determining a motion to serve a late notice of claim, erred in its conclusion regarding substantial prejudice. First, the Court held that "a finding that a public corporation is substantially prejudiced by a late notice of claim cannot be based solely on speculation and inference" but, rather, must be based on evidence in the record. Additionally, the Court concluded that "the mere passage of time normally will not constitute substantial prejudice in the absence of some showing of actual injury."

The court also resolved a split in Appellate Division authority regarding the burden of proof, holding that the initial burden is on the petitioner to demonstrate that late notice will not substantially prejudice the public corporation. Once carried, that burden shifts to the public corporation to respond with a particularized evidentiary showing that the corporation will be substantially prejudiced if late notice is allowed.

Wally G. v. New York City Health and Hospitals Corporation, 27 N.Y.3d 672, 37 N.Y.S.3d 30 (2016)

Plaintiff brought suit against the New York City Health and Hospitals Corp. ("HHC") alleging negligence and malpractice in HHC's failure to properly treat and manage his mother's prenatal care. Plaintiff brought suit against HHC but did not move for permission to serve a late notice of claim until five years later. In support of that motion, plaintiff submitted voluminous medical records and affidavits from medical experts, who concluded that HHC was responsible for plaintiff's injuries. The Supreme Court denied plaintiffs' motion to serve a late notice of claim and granted HHC's cross-motion to dismiss that claim, and a divided Appellate Division affirmed. The majority found plaintiff's counsel's excuse, that he waited to make the motion to file a notice of claim until he received additional medical records, unreasonable. The Appellate Division also held that plaintiff failed to establish that HHC received notice of the essential facts constituting the plaintiff's claim within 90 days of accrual or a reasonable time thereafter.

The Court of Appeals affirmed, reiterating that the actual knowledge requirement of GML 50-e contemplates actual knowledge of the essential facts constituting the claim not knowledge of a specific legal theory. The Court noted that:

> a medical provider's mere possession or creation of medical records does not ipso facto establish that it had actual knowledge of a potential injury where the records do not evince that the

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> medical staff, by its acts or omissions, inflicted any injury on plaintiff during the birth process.

The Court concluded that determinations as to "actual knowledge" and whether medical records "evince" as opposed to simply "suggest" that a medical provider inflicted injury rests in the sound discretion of the court and would not be reversed absent an abuse of that discretion.

Automobile

Castiglione v. Kruse, 27 N.Y.3d 1018, 32 N.Y.S.3d 579 (2016)

The Court of Appeals reversed the Appellate Division's grant of summary judgment because triable issues of fact existed. The Court of Appeals decision does not mention any specific facts so the dissent's rationale from the Appellate Division decision is described below. This case involved a pedestrian knockdown in which defendant moved for summary judgment based on liability. The majority the Appellate Division stated that the plaintiff and a nonparty witness established that plaintiff waited for the traffic light to turn red, then looked both ways, before her attempt to cross Montauk Highway. She claimed that she was hit when she had almost completely crossed the street. Defendant testified that she did not see the plaintiff prior to impact. The dissent noted that the design of the intersection and the deposition testimony made it conceivable for a jury to determine that the plaintiff was truly oblivious to her surroundings and should bear some comparative negligence. The majority also ignored the deposition testimony of the plaintiff where she said that she failed to look to her sides and instead only looked ahead as she was crossing lanes of travel. She only looked to her sides before entering the intersection and the plaintiff has a duty under the VTL that does not end when she leaves the curb. The dissent argued that plaintiff not seeing the defendant prior to the accident means she failed to see what there was to be seen. Finally, plaintiff's testimony makes it reasonable for a juror to infer that the plaintiff walked into the side of defendant's vehicle after it had entered the intersection.

Oates v. New York City Transit Auth., 28 N.Y.3d 1046, 43 N.Y.S.3d 245 (2016)

The Court of Appeals affirmed the Appellate Division's determination that there was legally sufficient evidence to support the jury's findings of negligence and entitlement to damages for decedent's conscious pain and suffering. Here, the decedent was found dead under a Transit Authority bus. The bus driver did not know how the body came to be underneath the bus, but plaintiff's DNA samples were recovered from the bus. The jury found the bus driver negligent. A jury could reasonably infer the driver's negligence based on the evidence presented. The plaintiffs showed that the decedent's body was crushed by the bus at such an angle that the bus driver, while pulling out of the bus stop should have seen the decedent. The Appellate Division also found plaintiffs' uncontroverted expert testimony that she was conscious and in pain for 2 to 5 seconds supported the jury's findings.

Experts

Sean R. V. BMW of North America, LLC, 26 N.Y.3d 801, 28 N.Y.S.3d 656 (2016)

In this decision, the Court of Appeals, New York's highest court, affirmed lower court orders precluding plaintiff's expert witnesses from testifying at trial, concluding that neither of the experts provided sufficient evidence that the methodology they employed was generally accepted in the scientific community.

Three years before plaintiff was born, his parents purchased a new 1989 BMW 525i, and plaintiff's mother used that vehicle while she was pregnant. Within two years of owning the vehicle, plaintiff's mother began noticing the smell of gasoline in the vehicle and claimed that, at times, she would suffer from headaches, dizziness and throat irritation as a result of that strong odor. On their first trip to service the vehicle, the dealership found no problem and made no repair. While plaintiff's mother was pregnant, her husband returned to the dealership a second time, complaining of the gasoline odor, and a fuel leak caused by a split fuel hose was discovered. Plaintiff was born soon thereafter with severe mental and physical disabilities. Approximately two years

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later, BMW recalled the vehicle due to defects in the fuel hoses, which had, according to reports from customers, led to a "conspicuous fuel odor." Plaintiff eventually commenced an action against BMW and others, alleging in utero exposure to toxic gasoline vapor resulting from defendant's failure to timely discover and fix the defective fuel hose, caused his injuries. In support of that claim, he submitted affidavits from two experts, who opined, first, that plaintiff's mother must have inhaled 1,000 ppm of gasoline vapor. That expert cited controlled studies which found that such a concentration of vapor was required to cause the symptoms plaintiff's mother complained of while driving the vehicle. The second expert stated her opinion, using a "weight of the evidence" analysis, that gasoline vapor was a substantial factor in causing plaintiff's birth defects. Defendants eventually moved to preclude plaintiff's experts from testifying at trial, arguing that those experts reached "novel conclusions" which were not based upon "generally accepted principles and methodologies." The Supreme Court granted that motion and precluded the experts, holding that they had not relied on generally accepted methodologies, and the Appellate Division affirmed, certifying the question to the Court of Appeals of whether the orders were properly made.

The Court of Appeals unanimously affirmed, noting first the standard for admissible expert opinions on causation in toxic tort cases; namely, evidence (1) [of] a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation)." The Court began by reiterating the Frye test requirements that experts utilize "methods found to be generally accepted as reliable in the scientific community." The Court held that plaintiff's expert's opinions, based on testimony from plaintiff's family that the gasoline odor caused their symptoms were inadmissible as they did not identify "any text, scholarly article or scientific study, however, that approves of or applies this type of methodology, let alone a consensus as to its reliability." The Court then reviewed the specific studies and methodology used by both experts, and concluded:

> Although it is sometimes difficult, if not impossible, to quantify a plaintiff's past exposure to a substance, we have not dispensed with the requirement that a causation expert in a toxic tort case show, through generally accepted methodologies, that a plaintiff was exposed to a sufficient amount of a toxin to have caused his injuries.

The Court concluded that plaintiff failed to meet this burden in the instant action and affirmed the preclusion of his expert witnesses.

This decision highlights once again the need for expert witnesses to properly document their methodology in reaching their conclusions and for plaintiffs seeking to rely on those experts to establish that such methodology was generally accepted within the appropriate scientific community. Further, this decision underscores the Court's intention, reiterated in Cornell v. 360 W. 52st Realty, LLC, 22 N.Y.3d 762 (2014) to bring a form of "strict scrutiny" to these types of cases.

Sadek v. Wesley, 27 N.Y.3d 982, 32 N.Y.S.3d 42 (2016)

The Court of Appeals affirmed the Appellate Division's refusal to preclude plaintiff's neurological expert from testifying at trial. This action arose out a motor vehicle accident where plaintiff asserts that his head slammed against the side window. After the accident, plaintiff was diagnosed with an embolic stroke. He was also diagnosed with a large blood clot and plaque in his arteries. Plaintiff brought suit and alleged that the defendant's negligence in causing the accident caused or aggravated the stroke which was asymptomatic prior to the accident. Plaintiff's expert, Dr. Nabil Yazgi, initially stated there was a "probable causal relationship" between the accident and stroke but later admitted that a medical report issued soon after the accident noted that the thrombus and atheroma were no longer evident which is "physiologically unlikely, [and] which suggests the first report was possibly artifact."

At trial, the court precluded Dr. Yazgi because his supplemental report negated his first report. The

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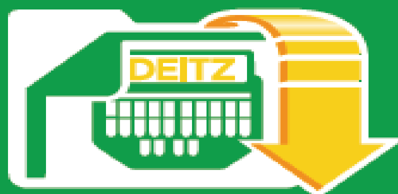

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court allowed plaintiff to locate another neurologist as long as the new expert did not rely on a new theory. Plaintiff retained a second neurological expert, Dr. Sang Jin Oh, who was prepared to testify that the cause of plaintiff's stroke was the motor vehicle accident and that he adopted Dr. Yazgi's opinion. Defense counsel sought to preclude Dr. Oh based on the same grounds as the original challenge to Dr. Yazgi,and on the grounds that an embolic stroke cannot be caused by trauma.

The Court of Appeals determined that the trial court improperly precluded plaintiff's neurological experts from testifying. Dr. Yazgi's supplemental report provided grounds for impeachment, but did not absolutely invalidate his proposed testimony. Further, defendant's argument that Dr. Yazgi's CPLR 3101 (d) statement failed to sufficiently set forth the mechanism by which stroke occurred was rejected because the narrative report was served more than a year prior to the trial. Defendants had the option of moving for amplification or to require the witness to provide a more complete explication of his theory of causation.

The Court also improperly precluded Dr. Oh from testifying. Dr. Oh did not provide a new theory because plaintiff's theory was that the accident caused an embolus to dislodge and travel to the brain. The Court of Appeals also found that a Frye hearing was not necessary. The defendants' expert "conducted a search of the relevant medical literature" and found no support for plaintiff's theory. However, the Court noted that "defendants' experts did not even point to literature or studies disproving such a link." This assertion was clearly negated by plaintiff's literature supporting her case.

Even if a Frye hearing was necessary, the evidence presented sufficiently established reliability. General Acceptance does not mean that a majority of scientists subscribe to the conclusion. Instead, it means that those espousing the theory followed generally accepted scientific principles and methodology in reaching their conclusions. Thus, the Court only needs to determine whether the expert properly relates existing data, studies, or literature to the plaintiff's situation. Plaintiff's theory was supported by a "reasonable quantum of legitimate support." Defendant's causation argument that the stroke caused the accident is a causation issue that is properly decided by a jury. Further, the Court found it highly improper for the defendants to wait until the jury was empanelled to file seven motions in limine to preclude all of the plaintiff's experts. The Court likened this to an ambush.

Insurance Coverage

Selective Insurance Co. of America v. County of Rensselaer, 26 N.Y.3d 649, 27 N.Y.S.3d 92 (2016)

In this case, the New York Court of Appeals addressed the question of when an insurer may charge multiple deductibles for one claim involving many people. Typical of insurance coverage disputes, the outcome turned on interpretation of key phrases contained in the policy of insurance, with analysis of the term "occurrence" being pivotal to the Court's ruling. Between 1999 and 2002, the County of Rensselaer instituted a program where every individual admitted into the county jail was subject to a strip search – regardless of the type of offense charged. More than 800 individuals who had been subject to the strip search commenced a class action lawsuit, claiming that the strip search policy was unconstitutional and a violation of their civil rights. The County had purchased liability insurance policies from Selective Insurance ("Selective") for the years 1999 through 2002, covering personal injury arising out of the conduct of its law enforcement personnel. "Personal injury" was defined in the policy as "humiliation, mental anguish or a violation of civil rights . . .." The policies provided that Selective, as the insurer, was obligated to pay damages in excess of a $10,000 deductible (per claim). The deductibles applied to all covered damages "sustained by one person or organization as the result of any one occurrence." Selective designated defense counsel who advised its insured (the County) that there were no viable defenses. The case was settled, with each of the 800 class member receiving a $1,000 payment. Attorneys' fees for counsel representing the class members (the arrestees) was set at a little more than $440,000.

Selective abided by the terms of the settlement.

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Selective then argued that the County was required to reimburse it for each of the $1,000 payments made to each of the 800 class members. The County refused to pay Selective anything more than a single $10,000 deductible payment. In support of its position, the County argued that all of the claims arose out of one "occurrence" – the strip search policy. Selective commenced a declaratory judgment action, asserting that each class member was subject to a separate deductible. The County moved to dismiss, claiming that it only owed one deductible. The County further argued that even if a new deductible applied to each class member, the legal fees generated should be allocated to one policy period. The trial court agreed with Selective in part, finding that a separate deductible payment applied to each class member. However, the court also agreed with the County, finding that all legal fees should be allocated to one policy. The lower court also dismissed the County's claim that Selective acted in bad faith. The Appellate Division unanimously affirmed and the Court of Appeals granted leave to appeal.

The Court of Appeals affirmed, finding that each individual strip search constituted a separate occurrence. The searches, conducted over a period of four years, could not be aggregated as a single occurrence. The policy set forth specific examples of large scale events such as riot or civil disturbance where diverse injuries would be treated as a single occurrence. However, the strip searches would not qualify as a large scale event, and thus were deemed separate occurrences. With respect to attorneys' fees, the Court agreed with the County that, as there was one defense team assigned to the case, the fee was attributed to only one plaintiff. The insurer's argument was rejected because the policy did not explicitly address how attorneys' fees are allocated in class action lawsuits. Selective was thus responsible for paying the $440,000 counsel fee to the arrestee's attorney.

Finally, the Court rejected the County's contention that Selective had acted in bad faith. The County claimed that Selective failed to challenge the class certification. In addition, given the County's responsibility to pay $800,000 in deductible payments, the County alleged that Selective's handling of the defense and subsequent negotiation was in bad faith. Bad faith, ruled the Court, is established when an insurer's conduct is in "gross disregard" of the insured's interests. Here, the Court found that there was no basis to the County's claim of bad faith. The County had selected competent counsel in defense of the action and the County had participated in settlement negotiations. The takeaway from this decision is that, based on the language of the policy here, multiple deductibles could be charged for one claim involving many claimants. When ruling on coverage issues, the courts will carefully examine the policy language. In connection with the attorneys' fees, the Court allocated the deductible here to one policy and one claimant. Thus, while the insurer was able to recoup the $800,000 paid in settlement, the insurer was responsible for paying $440,000 in attorneys' fees. The Court also emphasized that in order to demonstrate an insurer acted in bad faith, the insured has the burden of establishing that the insurer's conduct was in "gross disregard" of the insured's interests.

Spoleta Construction, LLC v. Aspen Insurance UK Ltd., 27 N.Y.3d 933, 30 N.Y.S.3d 598 (2016)

In this declaratory judgment action, the plaintiff argued for a defense and indemnification from the defendant based on a letter the plaintiff sent to its subcontractor which was forwarded to the defendant, discussing the claim and requesting that the subcontractor place its carrier on notice. When the subcontractor's employee commenced an action three months later, the carrier denied coverage claiming that the aforementioned letter merely "framed" the plaintiff as a claimant against the subcontractor but not as an additional insured of the carrier.

The Supreme Court granted the defendant's motion to dismiss, but the Appellate Division reversed and reinstated the complaint. The Court of Appeals affirmed, holding that the plaintiff's initial letter was sufficient as the notice provision of the defendant's policy required notification "as soon as practicable" of "(1) how, when and where the occurrence or offense took place; (2) the names and addresses of any injured persons and witnesses; and (3) the nature and location

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of any injury or damage arising out of the occurrence or offense."

Miscellaneous Cases

Killon v. Parrotta, 28 N.Y.3d 101, 42 N.Y.S.3d 70 (2016)

The issue is whether the correct test was applied by the Appellate Division in setting aside a jury verdict and determining that the defendant was an initial aggressor and thereby not able to use a justification defense in the retrial. The Court of Appeals found that the lower court did not apply the "utterly irrational" test and that it was not utterly irrational for the jury to find that defendant was not the initial aggressor. A verdict is utterly irrational if there is no way that a reasonable person could reach that conclusion based on the evidence presented.

The plaintiff was a longtime friend of defendant's wife. Plaintiff made a drunken threatening phone call to defendant about his treatment of his wife in the middle of the night. In response, defendant drove 20 miles to plaintiff's residence with the intent to end the dispute face-to-face. When defendant arrived, he shined his truck lights on the plaintiff's home. Here, the two versions of what happened diverge. Defendant claims that plaintiff left his home with a maul hammer handle in hand, so defendant went back to his truck to get a baseball bat. Plaintiff then swung the maul handle at him grazing the back of his head. Because of his bad knees, he could not retreat, so he swung his bat and broke the plaintiff's jaw.

Conversely, plaintiff claims that he repeatedly told the defendant to leave and that he threw the maul handle to the ground when he stepped off the porch. Defendant then swung his bat at plaintiff. Further, a witness testified that defendant came out of his truck with a bat.

The elements for self-defense are that a defendant reasonably believed that plaintiff was attacking or about to attack him and that the force that defendant used to prevent injury was reasonable under the circumstance. The defendant cannot be the initial aggressor (the person who attacks first or threatens to attack).

Here the jury unanimously found that defendant acted in self-defense. Plaintiff moved to set aside the verdict. The Supreme Court denied the motion, but the Appellate Division reversed and ordered a new trial. During the re-trial, the Supreme Court indicated that it was constrained by the Appellate Division's holding that the defendant was the initial aggressor and denied defendant's request to charge the jury on self-defense. Defendant appealed. The Appellate Division improperly used the weight of the evidence rule. The Court of Appeals determined that the original jury verdict was not utterly irrational because of the conflicting versions of trial testimony. As such, the Appellate Division was reversed and a new trial was ordered.

Chanko v. Am. Broad. Companies Inc., 27 N.Y.3d 46, 29 N.Y.S.3d 879 (2016)

This action involves the defendant's filming a patient's treatment and death in an emergency room without his or his family's consent and then broadcasting a portion of the footage on television. The patient's family filed an action for intentional infliction of emotional distress and for breach of doctor-patient confidentiality. Decedent's widow saw her husband on a stretcher and saw her husband's doctor tell the family about his death on ABC while watching NY Med. Although the decedent was not named, his wife and people who knew him were able to discern his identity. Unless a patient waives doctor-patient privilege, a doctor shall not disclose any information acquired in treating the patient. The elements of a cause of action for breaching the privilege is (1) the existence of a doctor-patient relationship; (2) the doctor's acquisition of information relating to a patient's treatment or diagnosis; (3) the disclosure of such information to a person not connected to the patient's treatment that allows the person to be identified; (4) no consent for the disclosure and (5) damages. Here, plaintiff's cause of action for breach of doctor-patient confidentiality was allowed to proceed. The improper disclosure was to the general public in the broadcast and to all ABC employees who worked on the project because the decedent did not consent to the filming. However, plaintiff's cause of action for intentional infliction of emotional distress

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was dismissed. The elements for IIED are (1) extreme and outrageous conduct; (2) intent to cause or disregard of a substantial probability of causing severe emotional distress; (3) a casual connection between the conduct and injury and (4) severe emotional distress. Here, the Court held that the factual allegations did not rise to the level of being outrageous. The footage that aired did not include the decedent's name, his image was blurred and the episode devoted less than three minutes to his death and his circumstances. The Court deemed the conduct offensive, but not atrocious enough to sustain a cause of action.

Al Rushaid v. Pictet & Cie, 28 N.Y.3d 316, 45 N.Y.S.3d 276 (2016)

In this case, the Court of Appeals discussed the factual predicate for exercise of New York's long-arm jurisdictional statute. The Supreme Court granted the defendant's motion to dismiss for lack of personal jurisdiction, concluding that the defendant's use of correspondent bank accounts was "passive [and] not purposeful so as to justify the exercise of personal jurisdiction over the defendant." The Appellate Division, First Department affirmed, holding that "the defendants merely carried out their client's instructions and did not purposefully avail themselves of the privilege of conducting activities in New York. The Court of Appeals reversed after extended discussion of the "correspondent account" used by the defendants and federal constitutional due process concerns, concluding that

> the defendants' intentional and repeated use of New York correspondent bank accounts to launder their customers' illegally obtained funds constitutes purposeful transaction of business substantially related to plaintiffs' claims, thus conferring personal jurisdiction within the meaning of CPLR 302(a)(1).

Diegelman v. City of Buffalo, 28 N.Y.3d 231, 43 N.Y.S.3d 803 (2016)

In this appeal, the Court addressed the interplay of General Municipal Law ("GML") §205-e and GML §207-c. The first session provides police officers with a cause of action for injuries sustained in the line of duty where such injuries occur as a result of the negligence of anyone failing to comply with statutes, ordinances and rules. §207-c provides for reimbursement of wages and costs of medical treatment to police officers injured in the line of duty. §207-c essentially replaces the Worker's Compensation law. The plaintiff suffered asbestos-related injuries after his career with the Buffalo police department and brought suit against the City. The City of Buffalo elected not to provide worker's compensation benefits to its officers relying, instead, on GML §207-c.

The Supreme court granted the plaintiff's application to serve a late notice of claim but the Appellate Division reversed, holding that plaintiff's claim was barred by GML §207-c. The Court of Appeals reversed that determination and granted plaintiff's motion to serve a late notice of claim against the City of Buffalo. The Court reviewed the statutory language and §205-e's prohibition of police officers suing their employers in tort when they have received Worker's Compensation benefits. The Court rejected the City's argument that Worker's Compensation benefits and GML §207-c benefits are equivalent, holding that Worker's Compensation is "a more lenient and more inclusive standard" than the GML.

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

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