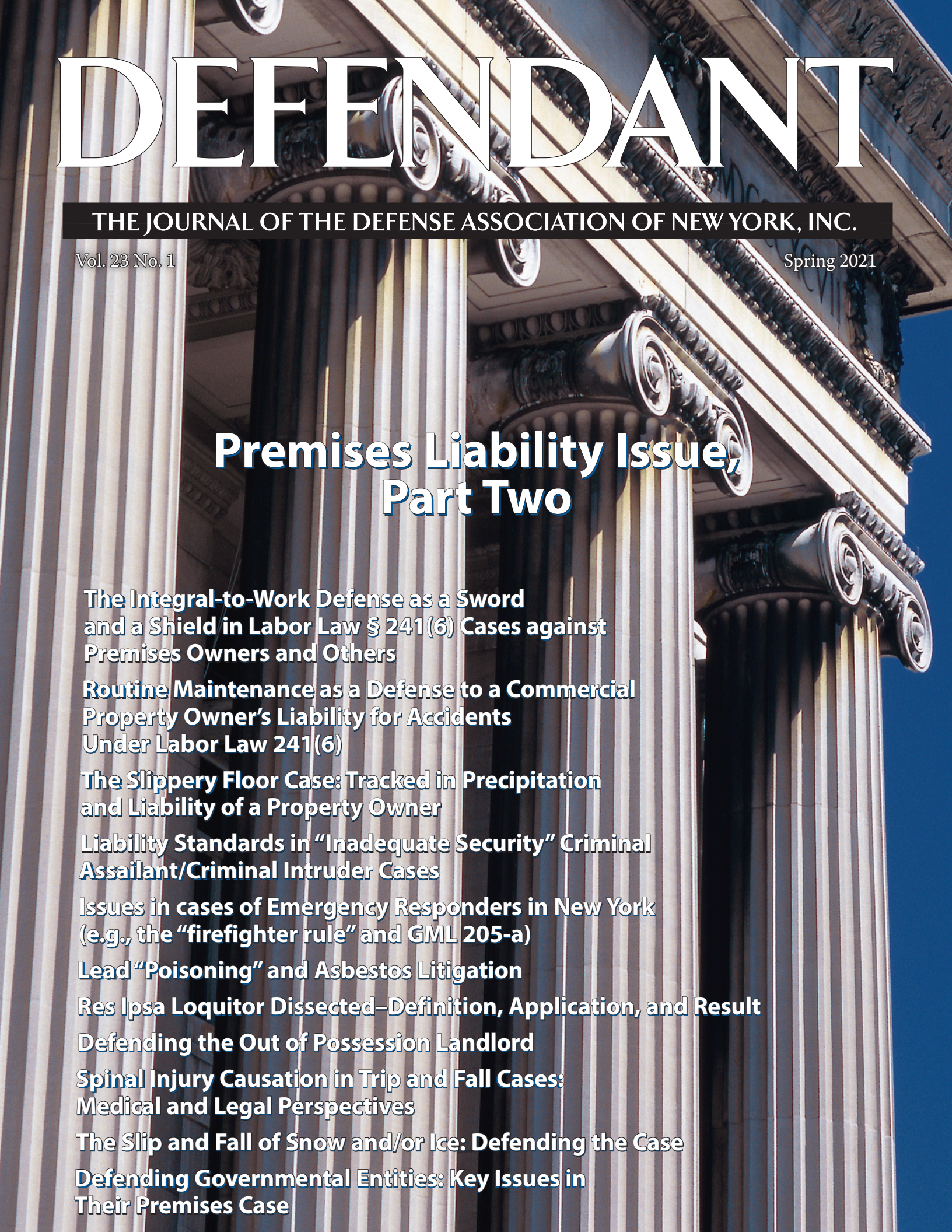

DEFENDANT

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

Vol. 23 No. 1 Spring 2021

Premises Liability Issue, Part Two

The Integral-to-Work Defense as a Sword and a Shield in Labor Law § 241(6) Cases against Premises Owners and Others

Routine Maintenance as a Defense to a Commercial Property Owner's Liability for Accidents Under Labor Law 241(6)

The Slippery Floor Case: Tracked in Precipitation and Liability of a Property Owner

Liability Standards in "Inadequate Security" Criminal Assailant/Criminal Intruder Cases

Issues in cases of Emergency Responders in New York (e.g., the "firefighter rule" and GML 205-a)

Lead "Poisoning" and Asbestos Litigation

Res Ipsa Loquitor Dissected–Definition, Application, and Result

Defending the Out of Possession Landlord

Spinal Injury Causation in Trip and Fall Cases: Medical and Legal Perspectives

The Slip and Fall of Snow and/or Ice: Defending the Case

Defending Governmental Entities: Key Issues in Their Premises Case

Court Reporters | Legal Video | Transcript Repository | Deposition Centers
Interpreters | Courtroom Presentations | Video Conferencing & Streaming

Diamond

Reporting & Legal Video

When You Need Us - Where You Need Us

With Deposition Centers in

Brooklyn, Manhattan Downtown, Midtown East Grand Central, Midtown West Penn Station, Bronx, Queens, Staten Island, Mineola, Melville, White Plains , Albany, Buffalo and New Jersey

And now Servicing the Hudson Valley!

Orange, Ulster, Sullivan, Dutchess, Putnam & Rockland

Certified WBE Woman's Business Enterprise

877.624.3287 ◆ www.diamondreporting.com

New York Law Journal Reader Rankings

Winner Best Court Reporting & Deposition Services Diamond Reporting 2015

President's Column:

TERESA A. KLAUM*

Dear Members,

Will we ever forget 2020 and 2021 with all the difficulties, sorrows, and professional and personal challenges brought on by COVID 19? I doubt it.

With great humility and appreciation, I serve as your president this term. It has been a virtual, Zoom, experience with You, the members, but no less meaningful! I think that the connection, professional camaraderie, and kindness of DANY has still permeated the CLE activities, publications, and activity which we have organized.

We have endeavored to ease the burden of our members during this most difficult time by offering our CLE's all free of charge. I am very appreciative and grateful for all our outstanding CLE presenters and our sponsors and everyone at DANY who worked so hard to make these events happen.

We are truly blessed to have such great scholarship and legal acumen in our ranks. Our Amicus Committee deserves great commendation for their continued efforts to make the voice of DANY heard by the Courts, through thick and thin. Their efforts have made me proud, always, and now again, during my term.

The Defendant is a truly great publication. Many thanks to all of our member authors and the DANY committee and executive members who worked selflessly to publish this magazine twice during this pandemic. It is a great resource to our members.

We have a strong young lawyers' committee and they and our sponsorship committee organized our first ever virtual 5K! I am so happy to report that we had a great sign up for the event and that the sign up membership fees generated money for cool tee

Continued on page 5

** Teresa A. Klaum is a Lead Attorney for the Law Office of Weiser & McCarthy, Staff Counsel to the Hanover Insurance Group, in New York, New York. She is DANY's President for the term of July 1, 2020 through June 30, 2021, and a longstanding Chair of DANY's CLE Committee.*

Editor's Note:

VINCENT P. POZZUTO

As the COVID-19 pandemic, at least in the United States, appears to be winding down and we are seeing light at the end of the tunnel, we here at DANY sincerely hope that remains the case. We continue to extend our thoughts and prayers to those who have suffered and died worldwide. We also continue to extend our appreciation to first responders, medical professionals and the front line workers who bravely carried out their duties during the worst of times, for the benefit of us all.

Looking forward to a brighter future after these difficult times, my hope for the legal profession in New York is that we can once again in the near future see our colleagues live and in-person at the Courthouse, depositions, bar functions and CLE presentations, although I am sure in some slightly modified formats. In my view, the collegiality and human interactions with judges, law secretaries, clerks, adversaries, litigants and jurors is one of the most rewarding aspects of the practice of law.

What civil litigation will look like when the pandemic is fully behind us remains unclear. What is clear, however, is that this pandemic has proven that the DANY Board and all DANY members have the tools and fortitude to overcome whatever obstacles may lie ahead.

With that said, I want to offer a hearty congratulations to Teresa Klaum on her service as DANY President in what was obviously a very challenging year. Terry made sure that DANY did not miss a beat and I can say that Zoom Board meetings were just as lively, educational and entertaining as those conducted in-person.

Continued on page 5

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

DEFENDANT

VOL. 23 NO. 1
Premises Liability Issue, Part Two

Vincent P. Pozzuto
EDITOR IN CHIEF

STAFF
Ellen Cuccio and Antoinette Delio

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

Table of Contents

FEATURES

The Defendant Welcomes Contributors
Send proposed articles to:
Vincent P. Pozzuto
Cozen O'Connor
3 World Trade Center,
175 Greenwich Street, New York, NY 10007
VPozzuto@cozen.com

The Integral-to-Work Defense as a Sword and a Shield in Labor Law § 241(6) Cases against Premises Owners and Others

BY: CATHERINE J. FIORENTINO*

Construction workers have a litany of special statutory protections not available to the typical plaintiff. When an injured construction worker alleges that she tripped or slipped on a job site, she can establish liability through Labor Law § 241(6), which requires that every owner and general contractor provide employees with a safe place to work. However, given the realities of a construction site, are owners and general contractors liable for every single substance or object that may cause a construction worker to slip or trip? For example, could a worker who slips on a substance created by her own work recover under the Labor Law? How about a worker who trips on electrical conduit that is feeding electricity to the entire job site? How could an owner or general contractor realistically run a construction site if every item and substance located on site is deemed a tripping or slipping hazard under the law? Fortunately, these construction site realities are taken into consideration with the "integral-to-work" defense, a crucial tool for defense attorneys to defeat potentially high exposure construction site accident claims.

While comparative negligence is a defense to a Labor Law § 241(6) claim, a plaintiff can now obtain summary judgment on her 241(6) claim without having to prove herself free from comparative negligence.[1] The savvy construction plaintiff will move for summary judgment on her 241(6) claim as soon as possible in the litigation. This can be costly, as 9% interest on any judgment in the case then begins to accrue from the date of the decision granting summary judgment. Vigorously defending the 241(6) cause of action has thus become more important than ever.

To recover under Labor Law § 241(6), a plaintiff must plead and prove a specific violation of the Industrial Code. Tripping and slipping hazards on construction sites are governed by Industrial Code §§ 23-1.7(d) and (e). Section 23-1.7(d) provides that all surfaces including floors, walkways, and passageways must be free of all slippery conditions including ice, snow, water, grease, and any other foreign substance. Section 23-1.7(e)(1) requires that all passageways be kept free from accumulations of dirt and debris, and any other obstructions or conditions that could cause tripping. Section 23-1.7(e)(2) requires that all working areas be kept free from dirt and debris accumulations, scattered tools and materials, and from sharp projections "insofar as may be consistent with the work being performed."[2] Thus, not all items that cause a plaintiff to trip or slip on a job site are actionable under Section 241(6). If the alleged hazard was integral to the ongoing construction work at the site, there can be no liability under these provisions.

The integral-to-work defense applies to "things and conditions" that are an integral part of the construction.[3] It applies to any integral part of the ongoing construction work, not just an integral part of the plaintiff's specific work.[4] The defense applies to Labor Law 241(6) claims predicated upon the aforementioned violations of Industrial Code §§ 23-1.7(d),(e)(1) and (2)[5] involving slip and trip hazards in passageways and working areas at construction sites.[6] The integral-to-work defense has a more complicated history under 1.7(e)(1), dealing with tripping hazards in passageways, than it does under 1.7(e)(2), involving trip hazards in working areas. In 2015, the First Department in *Singh* held that the integral-to-work defense applies only to claims under 1.7(e)(2).[7] However, in the January 2020 *Krzyzanowski* decision, the First Department explicitly held that the Singh decision conflicted directly with well-settled Court of Appeals precedent.[8] Thus, the court held that the integral-to-work defense applies equally to both Sections 1.7(e)(1) and (2).[9]

In defining what is integral to the work, courts have consistently held that purposefully installed items

Continued on next page

* *Catherine J. Fiorentino is a trial attorney in civil litigation in New York City.*

such as pipes[10], conduits[11], rebar[12], floor protection[13], extension cords[14], and wire mesh for a concrete pour[15] were integral to the ongoing construction and thus not tripping hazards as defined by the Section 1.7(e). Courts have also held if plaintiff tripped over an item that he was working with or removing at the time of the accident, including plywood[16], wires[17], bricks[18], rebar[19], and even debris,[20] there is no liability under 241(6) because they are integral to the work. When debris results directly from the work the plaintiff is performing at the time of the accident, that debris constitutes an integral part of the work.[21] Even items that are in the process of being installed by a party other than plaintiff are integral to the work, such as a stack of tiles that were in the process of being installed in the room where the accident occurred,[22] rebar that was being installed at the time of the accident[23], and exposed electrical conduits that were protruding from the floor of a construction site.[24]

While courts have consistently applied the integral-to-work doctrine to tripping hazard claims under 1.7(e), the analysis with regard to slipping hazards as they are defined by Section 1.7(d) is more nuanced. For example, a plaintiff who slipped and fell on mortar that he was working with at the time of the accident "does not compel the conclusion that it [the mortar] is not a 'foreign substance which may have caused slippery footing,'" the definition of a slipping hazard from Section 23-1.7(d).[25] That court declined to grant summary judgment dismissing the 241(6) claim based on Section 1.7(d), but allowed the jury to decide the issue of whether the mortar was integral to the work, precluding the claim. The Second Department has expressly held that liability based on a violation of Section 1.7(d) "is not precluded merely because the foreign substance which caused an accident was part of the work being performed."[26] Even if a slippery substance is inherent in the work a plaintiff is performing, that does not relieve the owner and general contractor's explicit duty under 1.7(d) to remedy the slippery situation by removing the substance, sanding it, or covering it to provide safe footing.[27] Thus, even an affidavit directly from a foreman indicating a plaintiff's cleaning operations inherently involved accumulated water on the floor, did not preclude plaintiff's claim under 1.7(d) because it did not establish that the defendant could not sand or cover the watery area.[28] Accordingly, courts are more hesitant to dismiss a 241(6) claim based upon a violation of Section 1.7(d) even if a slippery substance that causes plaintiff to trip was integral to his work. While the defense is available to defendants under this section, defendants must still prove that they were unable to remedy the slippery condition in order to be successful in defeating a slipping hazard claim under 1.7(d).

Since the Court of Appeals issued the *Rodriguez* decision in 2018 holding that a plaintiff may obtain summary judgment against a defendant without having to prove herself free from negligence, construction plaintiffs have moved for summary judgment on 241(6) prior to depositions. Often, the only evidence proffered on a pre-deposition summary judgment motion is an affidavit directly from the plaintiff. Thus, contacting the insured client as soon as possible upon receipt of a 241(6) claim will aid in shoring up an early integral-to-work defense. Tracking down accident reports, records from on-site investigations, and potential eyewitnesses may provide the written evidence needed to defeat an early summary judgment motion under Labor Law 241(6). Without an affidavit directly from an insured client or an eyewitness challenging plaintiff's assertions, a defendant may be left with an adverse summary judgment decision rapidly accruing interest over the average several-year duration of a construction site personal injury case. Establishing a strong integral-to-work defense early in the case will aid in insulating an owner or general contractor from potentially high exposure Labor Law 241(6) claims.

1 *Rodriguez v City of New York*, 31 NY3d 312, 325 (2018).

2 12 NYCRR 23-1.7

3 *Krzyzanowski v. City of New York*, 179 A.D.3d 479, 481, 118 N.Y.S.3d 10, 13 (1st Dep't 2020).

4 *d. cf. O'Sullivan v. IDI Const. Co.*, 7 N.Y.3d 805, 806, 855 N.E.2d 1159, 1159 (2006).

5 *O'Sullivan*, 7 N.Y. 3d at 805; *Krzyzanowski*, 179 A.D. 3d at 480-481.

6 12 NYCRR 23-1.7

7 *Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 608 (1st Dep't 2015)

8 *Krzyzanowski*, supra

9 *Id.* at 480.

Continued on next page

The Integral-to-Work Defense as a Sword and a Shield in Labor Law 241(6) Cases against Premises Owners and Others

Continued from page 4

[10] *O'Sullivan*, supra.

[11] *Verel v Ferguson Elec. Const. Co., Inc.*, 41 AD3d 1154, 1157 (4th Dep't 2007)

[12] *Venezia v State*, 57 AD3d 522, 523 (2d Dep't 2008); *Tucker v Tishman Const. Corp. of New York*, 36 AD3d 417 (1st Dep't 2007); *Letterese v A & F Commercial Builders, LLC*, 180 AD3d 495, 495 (1st Dep't 2020)

[13] *Krzyzanowski*, supra; *Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592, 593 (1st Dep't 2013); *Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421, 422 (1st Dep't 2013); *Rajkumar v Budd Contr. Corp.*, 77 AD3d 595, 596 (1st Dep't 2010)

[14] *Conlon v Carnegie Hall Socy., Inc.*, 159 AD3d 655, 656 (1st Dep't 2018)

[15] *Adams v. Glass Fab, Inc.*, 212 A.D.2d 972, 973, 624 N.Y.S.2d 705 (4th Dep't 1995)

[16] *Alvia v. Teman Elec. Contracting, Inc.*, 287 A.D.2d 421, 423 (2d Dep't 2001)

[17] *Harvey v. Morse Diesel Int'l, Inc.*, 299 A.D.2d 451, 453 (2d Dep't 2002)

[18] *Lech v Castle Vil. Owners Corp.*, 79 AD3d 819, 821 (2d Dep't 2010)

[19] *Flynn v. 835 6th Avenue Master L.P.*, 107 A.D.3d 614, 614–615 (1st Dep't 2013)

[20] *Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 622 (2d Dep't 2003); *Smith v New York City Hous. Auth.*, 71 AD3d 985, 987 (2d Dep't 2010)

[21] *Solis v 32 Sixth Ave. Co. LLC*, 38 AD3d 389, 390 (1st Dep't 2007); Salinas, supra

[22] *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 (1st Dep't 2007)

[23] *Flynn v 835 6th Ave. Master L.P.*, 107 AD3d 614 (1st Dep't 2013); *Brown v 44th St. Dev., LLC*, 137 AD3d 703 [(1st Dep't 2016)

[24] *Trombley v DLC Elec., LLC*, 134 AD3d 1343, 1344 (3d Dep't 2015)

[25] *Ventura v Lancet Arch, Inc.*, 5 AD3d 1053, 1054 (4th Dep't 2004)

[26] *Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 730, 732 (2d Dep't 2007)

[27] 12 NYCRR 23-1.7(d); *Hammond v Intl. Paper Co.*, 161 AD2d 914, 915 (3d Dep't 1990)

[28] *Id.*

President's Column

Continued from page 1

shirts and donations to our DANY scholarship fund and a NYC food bank! Look forward to the next 5K!

We are cautiously optimistic about future in-person events, including Yankees' and Mets' games and upstate and downstate golf outings. We are a statewide organization and look forward to further expanding our membership base north and east!

I thank my fellow Board members, the officers, our executive director, and You, the members for all your support at DANY, in coming together, and moving forward with DANY, in this most difficult year.

Sending prayers and good wishes to all for continued safety and wellness.

Thank you!

Teresa A. Klaum

Continued from page 1

Editor's Note

It is now my pleasure to present to you the Premises Liability Issue, Volume II, of the Defendant Magazine. Again, this Volume and the issue preceding it were the idea of Board Member Bradley Corsair, and his work on both has been invaluable. My sincerest thanks to Brad, and to all of the authors who have contributed the excellent articles on the pages that follow.

Routine Maintenance as a Defense to a Commercial Property Owner's Liability for Accidents Under Labor Law 241(6)

BY: LEON R. KOWALSKI, ESQ.*

New York is well known for many things, however in the area of the law, it is recognized (and somewhat notorious) as being the only state with "the Labor Law". Now there is no doubt that *Labor Law* 240(1) garners most of the attention out of that set of statutes. *Labor Law* 240(1) hogs the spotlight! However, of equal importance and just as frequently litigated are those claims made pursuant to *Labor Law* 241(6). When evaluating a *Labor Law* 241(6) claim, it is of great importance to understand the scope of its application. One type of client that is very common to members of the defense bar no matter where situated geographically is the commercial property owner. The statute may be applied to more than a traditional construction "site" and will impose liability upon a commercial property owner, however one area in which a viable defense may be developed depends upon whether or not the plaintiff is engaged in routine maintenance at the time of the accident. By its wording, the statute clearly applies when constructing or demolishing buildings or doing any excavation in connection therewith. However, the statute does not apply to routine maintenance as will be shown below. Does it apply to a commercial building? Yes, it does, and it does not necessarily have to be "under construction" at the time. While the introductory language to *Labor Law* 241(6) appears to limit the application of the ensuing subdivisions to building sites, the application of the statute is broader.[1]

Labor Law 241(6)[2] requires contractors, owners and their agents to ensure compliance with the New York Industrial Code. The initial question must be asked as to which entities, if any, are subject to liability under the statute? The statute applies to contractors as well owners and their agents. It is important to note that the term "contractors" typically means general contractors. An exception to the statute applies to owners of one and two-family dwellings who contract for but do not direct or control the work. Those "owners" are not subject to liability. It is important to note that unlike *Labor Law* 240(1) liability is not absolute and comparative negligence is considered under *Labor Law* 241(6). Also, of importance is the fact that liability under the statute can be vicarious in nature and a finding of a violation is not necessarily a finding of "active" negligence.[3]

If a violation of *Labor Law* 241(6) is alleged, there must be a threshold evaluation as to whether a section of Part 23 of the New York Industrial Code[4] was violated because a violation of Part 23 is a predicate to liability under the statute. Without a violation of Part 23, the plaintiff will have no claim under Labor Law 241(6). In order to have a successful claim, the plaintiff must prove a violation of Part 23 of the New York Industrial Code, which is authored by the Department of Labor and contains 11 Subparts covering everything from safety glasses to explosives to scaffolds to hoisting to cranes to ladders. If claimed to have been violated, it must be determined whether the specific section of Part 23 alleged is sufficiently specific to support a cause of action, as some of the code sections have been held by the court to be general in nature and not specific enough. Please note that notice of the condition which violates Rule 23 is not required since vicarious liability is not dependent on the defendant's personal capability to prevent or cure the dangerous condition.[5] It is important to note that breach of a duty imposed by a rule in the Industrial Code is merely some evidence for the jury to consider on the question of a defendant's negligence.[6] There is a distinction between a violation of an administrative regulation promulgated pursuant to a statute (such as *Labor Law* 241(6)) and a violation

Continued on next page

* *Leon R. Kowalski, Esq. is a managing attorney with Kowalski & DeVito in New York, New York.*

Routine Maintenance as a Defense to a Commercial Property Owner's Liability for Accidents Under Labor Law 241(6)

of an explicit provision of a statute proper. While the latter gives rise to absolute liability without regard to whether the failure to observe special statutory precautions was caused by the fault or negligence of any particular individual, the former is simply some evidence of negligence which the jury could take into consideration with all the other evidence bearing on that subject[7].

Most importantly for the purposes of this writing, the plaintiff must be engaged in one of the enumerated activities listed within the statute. The statute applies when construction, excavation or demolition is being done. Specifically the statute provides: "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places"[8]. In addressing whether *Labor Law* 241(6) applies to an accident, the courts have generally held that the statute's scope is governed by 12 NYCRR 23-1.4(b)(13)[9], which defines construction work to include "all work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures"[10]. Additionally, the courts have relied on 12 NYCRR 23-1.4(b)(16)[11], which defines "demolition" as "work incidental to or associated with the total or partial dismantling of or razing of a building or other structure including the removing or dismantling of machinery or other equipment". Now by the wording of 1.4(b)(13), it would appear that "maintenance' is included in the definition of "construction work" and therefore covered by the statute. However, that is not necessarily the case. The courts clearly draw a line of distinction between the types of maintenance a plaintiff may be performing.

In representing a commercial property owner, you must think about what types of work they may hire a contractor or service provider to perform within their building or on their property. Typically, you may see service related to elevators, plumbing, electrical/ lighting, HVAC, and painting. As indicated above, the key question becomes whether these types of tasks can expose the property owner to liability under the statute.

Each of the four Departments of our Appellate Division has determined that routine maintenance is not a protected activity under *Labor Law* 241(6).[12] Despite the use of the word "maintenance" in the definition of "construction" within the Industrial Code[13], the courts in New York have consistently declined to interpret all maintenance activity as being covered by the statute. An integral issue looked at by the courts in determining whether a particular maintenance task is covered under the statute is whether such work constitutes or involves a significant physical change to a building. Therefore, when representing a commercial property owner, it is important to look at whether the task that the plaintiff was performing at the time of the accident involved work that significantly affected the structure of the building.

The Court of Appeals has also decided this issue. In *Nagel v D & R Realty Corp.*[14], the Court held that the definition of "construction work" contained in Section 23-1.4(b)(13) must be construed consistently with the fact that *Labor Law* 241(6) covers industrial accidents that occur in the context of construction, demolition and excavation, and thus does not cover other routine "maintenance" outside that context. The Court distinguished its earlier decision in *Mosher v State*[15], where it held that Labor Law 241(6) was not limited to building sites and applied to a plaintiff's claim for injuries sustained while repaving a highway. The Court noted that, in contrast to its decision in Mosher, the injuries plaintiff sustained in Nagel did not occur in the context of construction, demolition or excavation at any site. In *Nagel*, the plaintiff was standing on top of an elevator, performing a two-year safety inspection, when he slipped on oil and fell, injuring his right shoulder. The plaintiff in Nagel testified at his deposition that he had been performing an inspection to "make sure the safeties worked properly on the elevator" and explained that he was making sure that the "brakes" on the elevator worked. He testified that the entire process took approximately two hours and that he had been working for 1 hours when the accident occurred.[16]

On the appeal to the Court of Appeals, the plaintiff argued that his injury was a construction injury within the meaning of *Labor Law* 241(6). The

Continued on next page

plaintiff specifically argues that section 23-1.4(b)(13) of the Industrial Code defines construction work to include maintenance work, and neither the statute nor the rules distinguish between routine and non-routine maintenance, while the defendants countered that routine maintenance is not a protected activity within the meaning of *Labor Law* 241(6).[17] After examining the history of the statute and the intent of the Board, the Court of Appeals held that the plaintiff's work of performing a two-year elevator test constituted maintenance work that was not connected to construction, demolition or excavation of a building or structure and is therefore not within the statute's coverage.[18] The court specifically determined "that the Legislature sought to protect workers from industrial accidents specifically in connection with construction, demolition or excavation work is, therefore, patent."[19] Interestingly, the court specifically noted that the term "maintenance" is included in the definition of construction work within section 23-1.4(b)(13) of the Industrial Code, however the court held that the definition of "construction work" must be construed consistently with the Court's understanding that 241(6) covers industrial accidents that occur in the context of construction, demolition and excavation and it must be construed consistently with the relevant regulation referring to protections in the construction, demolition and excavation context.[20] As such, the Court's ultimate determination was that if the work that the plaintiff is doing is routine maintenance it will not be covered by the statute.

While the work in *Nagel* involved an inspection of the elevator, the courts have held that elevator work also may not be protected under the statute. In *Molloy v. 750 7th Avenue Assoc.*,[21] the plaintiff sustained personal injuries while changing elevator contacts and cables, putting new chips in computer boards and painting and cleaning the elevator motor room. The First Department held that such work constituted "mere routine maintenance activity". They reasoned that it was not akin to significant structural work such as that seen in *Joblon* and they held that the plaintiff was not protected by the statute.[22] Similarly, in *Peluso v 69 Tiemann Owners Corp.*, the court found that the examination of electrical control panel in conjunction with adjusting an elevator that is not stopping level with he floor is not construction work under the statute.[23] In *Peluso*, the court noted that the plaintiff was examining the electrical control panel in the basement in an attempt to repair an elevator that was not stopping level with the floor, but was otherwise functioning and that the repair work was being performed on the elevator, not on a building or other structure as required by both statute and regulation.[24]

The courts have found a number of different types of activities to be "routine" maintenance and not covered by the statute. In *Wein v Amato Properties, LLC*[25], the injured plaintiff, an oil burner repairman, was dispatched to replace a defective safety valve on a boiler at a building owned by the defendant. The plaintiff was required to use a ladder, which he was alleged to have obtained from the building, to reach the safety valve, which was on the top of the boiler. While the injured plaintiff was on the ladder installing the new safety valve, the ladder collapsed and caused him to fall on his back and shoulder.[26] In *Wein*, the court found that the injured plaintiff was engaged in maintenance work not related to construction, excavation, or demolition.[27] The court found the task not to be covered by the protections of the statute.[28]

In *Simon v Granite Bldg. 2, LLC*[29], the court found specifically that "wallpapering in and of itself is not an enumerated activity under the *Labor Law*."[30] The court reasoned that wallpapering was not an enumerated activity where there was no proof that the activity was part of a larger construction project.[31] Further, the plaintiff could not establish a violation of *Labor Law* 241(6), since the plaintiff and his decedent were not working in a construction area at the time of the accident, and the accident did not occur in connection with construction, demolition, or excavation work being performed by them.[32]

The repair of exterior floodlights has been determined to be an uncovered activity under Labor Law 241(6). In *Caban v Maria Estela Houses I Associates, L.P.*[33], the injured plaintiff was a journeyman electrician who was employed by an electrical contractor retained by the defendant building owners and was engaged in repairing malfunctioning exterior floodlights on one side of defendants' building when he sustained injury as the result of an electric shock that caused him to shake and fall off the

Continued on page 10

SpeakEasy Services
is a Proud Sponsor of the Defense Association of New York

2021

SpeakEasy Services

Interpreting and Translation

Maria Goldberg

SpeakEasy Services

Phone: 914-636-2898

Email: mgoldberg@speakeasyservices.com

Web: www.speakeasyservices.com

ladder he was using to reach one of the lights.[34] The work involved much more than simply changing a lightbulb; it required replacement of a photocell, dismantlement of lamp housings and their ultimate rebuilding, replacement of ballasts and bulbs, and the disconnection and reconnection of termination wiring to power sources.[35] The court held that with respect to the *Labor Law* 241(6) claim, that section is "inapplicable outside the construction, demolition or excavation contexts"[36] The court also found that the Industrial Code definition of construction work, which includes maintenance and repair, must be construed consistently with the court's understanding that *Labor Law* 241(6) covers industrial accidents that occur in the context of construction, demolition and excavation. The court ultimately found that since the plaintiff's work was not performed in any such context, the *Labor Law* 241(6) claim was dismissed[37]. It is interesting to note that in *Caban*, the defendants argued that the activity was routine maintenance for the purposes of getting out from liability under *Labor Law* 240(1). The court rejected that argument found that the activity "involved much more than simply changing a lightbulb" and was the type covered by *Labor Law* 240(1), but was not an activity covered by *Labor Law* 241(6).[38]

The replacement of worn out bearings in an air-handling unit is another activity that has been determined not to be covered by the statute. In *Anderson v Olympia & York Tower B Co.*[39], the plaintiff was an air-conditioning technician was injured when he hit his hip against an air-handling unit as he attempted to climb on top of it in order to replace worn-out bearings.[40] Specifically, the court found that the *Labor Law* 241(6) cause of action was properly dismissed since the accident did not occur in connection with construction, demolition, or excavation work.[41]

Another area of work that is common in commercial properties is exterior signage. In *Anderson v. Schwartz*, was injured when he fell from ladder while removing aluminum auction sign that had been attached to the exterior of a one-story commercial building owned by the defendant.[42] The sign, which was six feet wide by three to four feet high, had been bolted to the side of the structure at a height of some eight feet from the ground. Of critical significance is that the sign, which stated the name and telephone number of the auctioneer and the date and time of the auction, was a temporary one that had been affixed to the wall for the purpose of advertising the impending sale of the premises. It was not connected to any power source and was attached to the building with four one-half inch bolts.[43] The court found that the plaintiff's activities may have changed the outward appearance of the building, but did not change the building's structure, and thus were more akin to cosmetic maintenance or decorative modification than to "altering" for purposes of his *Labor Law* 240(1) and further held that the plaintiff's *Labor Law* 241(6) claim similarly requires proof that the work performed entailed "alteration" of a building or other structure.[44] The court dismissed the causes of action under both statutes using that same rationale that the work was routine in nature and not an "alteration".[45]

In *Garcia-Rosales v. Bais Rochel Resort*[46], the court determined that the task of draining water from pipes pursuant to the terms of an annual contract to winterize the premises is routine maintenance that is not protected by *Labor Law* 241(6).[47] The court held that *Labor Law* 241(6) does not apply because draining water from pipes is not a construction, demolition or excavation activity and instead was part of routine maintenance at the time of his accident. In *Garcia*, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging violations of *Labor Law* 241(6) by establishing that the work being performed by the plaintiff at the time of the accident was not connected to construction, excavation, or demolition work, as defined in the Industrial Code within 12 NYCRR 23–1.4(b)(13), (16), (19). The court specifically stated that "routine maintenance is not within the ambit of *Labor Law* 241(6)".[48]

The type of work done by the plaintiff in *Nagel* as well as in these other cases cited herein above can be contrasted with the type of work done in *Piccione v 1165 Park Ave., Inc.*[49]. In *Piccione*, the plaintiff fell and sustained an injury when the ladder upon which he was standing to repair a fluorescent light fixture collapsed. The repair work consisted of replacing the ballast and sockets, disconnecting

Continued on next page

the wires, stripping them and then reconnecting them. The court found that such repairs entailed much more than merely changing a lightbulb and constated a "repair" within the meaning of 23-1.4(b)(13) and are protected under *Labor Law* 241(6).[50] It is interesting to note the difference between the First Department's decision in *Caban* in 2009 and the Second Department's decision in *Piccione* in 2012. As you can see the subtle differences in the task being performed by the plaintiff can make all the difference between the plaintiff having a viable cause of action under the statute or having none.

While wallpapering has been held to be excluded from the protections of the statute specifically, it is important to note that painting has been found specifically to be a protected activity. In *Dixson v. Waterways at Bay Pointe Home Owners Ass'n, Inc.*,[51] the court found that the defendants failed to show their entitlement to summary judgment since they did not demonstrate that the plaintiff, who was injured while power washing buildings in preparation for painting them, was not engaged in a specifically enumerated activity under 12 NYCRR 23–1.4(b)(13)[52]. The court held that painting is an activity enumerated under that provision and the power washing performed here was in preparation for, and a contractual part of, the painting work[53]. The court specified that the power washing did not constitute "routine maintenance" that is excluded from the ambit of *Labor Law* 241(6), but rather, constituted surface preparation, an integral part of the painting process contemplated by the parties.[54] In *Pittman v. S.P. Lenox Realty, LLC*[55], the plaintiff/decedent died after being severely burned when a halogen lamp ignited liquid that he was using to refinish the floors in a building. The court stated that "we have previously determined that the application of a protective coating to the roof of a building is the "functional equivalent" of painting, which is a specifically enumerated activity under 12 NYCRR 23–1.4(b)(13)."[56] The court held that the application of polyurethane to a wooden floor likewise was the functional equivalent of "painting" under the Industrial Code and is protected under the statute.[57]

While the term "maintenance" is specifically included in New York's Industrial Code[58] and can be part of construction work pursuant thereto, "maintenance" can consist of many tasks. The work that the plaintiff is performing requires full analysis and investigation. A work activity that is maintenance, but not related to construction is not covered by the statute. As such, it is clear that within the eyes of the law under 241(6) there is a distinction between maintenance related to construction and routine maintenance. Therefore, as a defendant in this type of case, the goal should be to gather as much evidence as possible to prove that the plaintiff was engaged in routine maintenance at the time of the accident.

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

1 *Joblon v. Solow*, 91 NY2d 457, 672 NYS2d 286, 695 NE2d 237 (1998) (the statute is not limited to accidents on a construction site); *Celestine v. New York*, 59 NY2d 938, 466 NYS2d 319, 453 NE2d 548 (1983) (the statutory duty is not limited to "building" sites but extends to any construction site).

2 *Labor Law* 241(6) provides: "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

3 *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998)

4 Part 23 of the New York Industrial Code is entitled "Protection in Construction, Demolition and Excavation Operations" and can be found at https://labor.ny.gov/workerprotection/safetyhealth/sh23.shtm

5 *Wrighten v. ZHN Contracting Corp.*, 32 AD3d 1019, 822 NYS2d 115 (2d Dept. 2006)

6 *Misicki v. Caradonna*, 12 N.Y.3d 511, 909 N.E.2d 1213, 882 N.Y.S.2d 375 (2009)

7 *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d at 349.

8 *Labor Law* 241(6) 9 23-1.4(b)(13) Construction work - All work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure and includes, by way of illustration but not

Continued on next page

by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose.

[10] See, *Saint v. Syracuse Supply Co.*, 25 NY3d 117, 8 NYS3d 229, 30 NE3d 872 (2015); *Emery v. Steinway, Inc.*, 178 AD3d 613, 116 NYS3d 227 (1st Dept. 2019); *Pittman v. S.P. Lenox Realty, LLC*, 91 AD3d 738, 937 NYS2d 101 (2d Dept. 2012); *Enos v. Werlatone, Inc.*, 68 AD3d 713, 890 NYS2d 109 (2d Dept. 2009).

[11] 23-1.4(b)(16) Demolition work - The work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment.

[12] See, *Dilena v. The Irving Reisman Irrevocable Trust,* 263 AD2d 375 (1st Dept. 1999); *Gavin v. Long Island Lighting Co.*, 255 AD2d 551 (2d Dept 1998); *Coates v. Kraft Foods Inc.*, 263 AD2d 734 (3d Dept. 1999); *Scott v. Scott's landing, Inc.*, 277 AD2d 918 (4th Dept. 2000).

[13] 12 NYCRR 23-1.4(b)(13)

[14] *Nagel v. D & R Realty Corp.,* 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 (2002)

[15] *Mosher v. State*, 80 NY2d 286, 590 NYS2d 53, 604 NE2d 115 (1992)

[16] *Nagel v. D & R Realty Corp.*, 99 NY2d at 99.

[17] *Nagel v. D & R Realty Corp.*, 99 NY2d at 99-100.

[18] *Nagel v. D & R Realty Corp.*, 99 NY2d at 102.

[19] *Nagel v. D & R Realty Corp.*, 99 NY2d at 102.

[20] *Nagel v. D & R Realty Corp.*, 99 NY2d at 103.

[21] *Molloy v. 750 7th Ave. Associates*, 256 AD2d 61, 681 NYS2d 253 (1st Dept. 1998)

[22] *Molloy v. 750 7th Ave. Associates*, 256 AD2d at 62.

[23] *Peluso v. 69 Tiemann Owners Corp.*, 301 AD2d 360, 755 NYS2d 17 (1st Dept. 2003)

[24] *Peluso v. 69 Tiemann Owners Corp.*, 301 AD2d at 361.

[25] *Wein v. Amato Properties, LLC*, 30 AD3d 506, 816 NYS2d 370 (2d Dept. 2006)

[26] *Wein v. Amato Properties, LLC*, 30 AD3d at 506-507.

[27] *Wein v. Amato Properties, LLC*, 30 AD3d at 507.

[28] *Wein v. Amato Properties, LLC,* 30 AD3d at 507.

[29] *Simon v. Granite Bldg. 2, LLC*, 114 AD3d 749, 980 NYS2d 489 (2d Dept. 2014)

[30] *Simon v. Granite Bldg. 2, LLC*, 114 AD3d at 753.

[31] *Simon v. Granite Bldg. 2, LLC,* 114 AD3d at 753.

[32] *Simon v. Granite Bldg. 2, LLC*, 114 AD3d at 753.

[33] *Caban v. Maria Estela Houses I Associates, L.P.*, 63 AD3d 639, 882 NYS2d 97 (1st Dept. 2009)

[34] *Caban v. Maria Estela Houses I Associates, L.P.*, 63 AD3d at 640.

[35] *Caban v. Maria Estela Houses I Associates, L.P.*, 63 AD3d at 640.

[36] *Caban v. Maria Estela Houses I Associates, L.P.*, 63 AD3d at 640.

[37] *Caban v. Maria Estela Houses I Associates, L.P.*, 63 AD3d at 640.

[38] *Caban v. Maria Estela Houses I Associates, L.P.*, 63 AD3d at 640.

[39] *Anderson v. Olympia & York Tower B Co.*, 14 AD3d 520, 789 NYS2d 190 (2d Dept. 2005)

[40] *Anderson v. Olympia & York Tower B Co.*, 14 AD3d at 521.

[41] Id.

[42] *Anderson v. Schwartz*, 24 A.D.3d 234, 808 N.Y.S.2d 26 (1st Dept. 2005)

[43] *Id.*

[4] *Id.*

[45] *Id.*

[46] *Garcia-Rosales v. Bais Rochel Resort*, 100 A.D.3d 687, 954 N.Y.S.2d 148 (2d Dept. 2012)

[47] *Garcia-Rosales v. Bais Rochel Resort*, 100 A.D.3d at 688.

[48] *Id.*

[49] *Piccione v. 1165 Park Ave., Inc.*, 258 AD2d 357, 685 NYS2d 242 (1st Dept. 1999)

[50] *Piccione v. 1165 Park Ave., Inc.*, 258 AD2d at 358.

[51] *Dixson v. Waterways at Bay Pointe Home Owners Ass'n, Inc.*, 112 A.D.3d 884, 978 N.Y.S.2d 85, (2d Dept. 2013)

[52] *Dixson v. Waterways at Bay Pointe Home Owners Ass'n, Inc.*, 112 A.D.3d at 884-885.

[53] *Dixson v. Waterways at Bay Pointe Home Owners Ass'n, Inc.*, 112 A.D.3d at 885.

[54] *Dixson v. Waterways at Bay Pointe Home Owners Ass'n, Inc.*, 112 A.D.3d at 885.

[55] *Pittman v. S.P. Lenox Realty, LLC*, 91 A.D.3d 738, 937 N.Y.S.2d 101 (2d Dept. 2012)

[56] *Id.*

[57] *Id.*

[58] 12 NYCRR 23-1.4(b)(13)

The Slippery Floor Case: Tracked in Precipitation and Liability of a Property Owner

BY: NICHOLAS M. CARDASCIA*

Mary works in a high-rise, commercial office building in Midtown Manhattan. She is on her way to work on a rainy Tuesday morning. After she walks through the revolving door and into the lobby, she steps onto a rain mat that was put down by the building janitorial staff. Mary then walks towards the elevators that would bring her up to her office. She steps off the mat onto the lobby floor (probably made of granite or some type of stone material), takes a step or two, and then slips and falls due to water that had been tracked in by others before her. This is a common premises liability scenario. What is the property owner's liability in this case?

Property owner's general standard of care

In general, a landowner has a duty to maintain his property in a reasonably safe condition under the prevailing circumstances.[1] To establish a prima facie case against an owner or possessor of land, plaintiff must show that defendant either (1) created the condition that caused the accident, or (2) had actual or constructive notice of the condition.[2]

If an action is based on an unsafe condition that was not created by defendants, then notice, either actual or constructive, of the condition which caused plaintiff's fall, and a reasonable time to correct it, are essential for plaintiff to establish liability.[3]

Actual notice may be found when the defendant created the condition or was aware of its existence.[4] Plaintiff must demonstrate the "identity of the persons to whom notice of the condition was allegedly given and when and how it was given."[5] In most cases, plaintiff will be unable to establish that defendant had actual notice of the wet condition on the lobby floor and will also be unable to establish that defendant created the condition.

"To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it."[6] A plaintiff relying on constructive notice is required to demonstrate the length of time the condition complained of existed before the accident.[7]

Property owners have no obligation to provide a constant, ongoing remedy for slippery conditions caused by tracked-in precipitation

It is well-settled that "a property owner is not obligated to provide a constant remedy to the problem of water being tracked into a building during inclement weather" and "has no obligation to cover all of its floors with mats or to continuously mop up all moisture resulting from tracked-in precipitation."[8]

In *Dubensky v. 2900 Westchester Co.*, LLC, the plaintiff allegedly was injured when, after she stepped off a carpet runner, she slipped and fell on accumulated water in the lobby of the building in which she worked. It was raining at the time of her accident. She alleged that the defendants were negligent in permitting the lobby floor to become and remain unsafe and in failing to place adequate mats. The defendants moved for summary judgment, inter alia, based on the "storm-in-progress" doctrine. In affirming the order that granted defendants summary judgment, the Second Department noted that "defendants were not required to cover all of their floors with mats, nor to continuously mop up all moisture resulting from tracked-in precipitation."[9]

Likewise, in *Kovelsky v. City Univ. of N.Y.*, the First Department granted defendants' motions to dismiss the complaint because plaintiff failed to establish that defendants could have prevented the wet and slippery conditions on the floor through reasonable care. The Court held that the defendant was not required to cover all its floors with mats or to continuously mop up all moisture resulting from tracked and melting snow.[10]

Continued on next page

[i] *Nicholas M. Cardascia is a Partner at Cullen and Dykman LLP*

The Slippery Floor Case: Tracked in Precipitation and Liability of a Property Owner

In *Negron v. St. Patrick's Nursing Home*, the Second Department reversed the trial court's denial of the defendant's motion for summary judgment where plaintiff was injured when he slipped and fell on tracked rain water present on the floor of a nursing home. The Second Department again applied the storm-in-progress doctrine, stating that "defendant was not required to cover all the floors with mats, nor to continuously mop up all moisture resulting from tracked-in rain."[11]

In *Grib v. New York City Housing Auth.*, the Second Department upheld the grant of summary judgment to a defendant where the plaintiff slipped and fell on a hallway floor in the apartment where she resided. At the time, it was raining, and water was tracked into the hallway as a result. Once more, the appellate division held that summary judgment and dismissal of plaintiff's complaint were warranted, stating the same principles as in the *Dubensky*, *Kovelsky*, and *Negron* cases.[12]

Improper placement of mats will not create a triable issue of fact

If plaintiff argues that she fell because of the improper placement of the mats on the surface of the lobby floor, this argument has no merit and will be insufficient to create a triable issue of fact.[13] In *Toner v. National Railroad Passenger Corp.*, the First Department awarded summary judgment to the defendant where "[t]he only disputed factual issue concerned the placement of the mats."[14] Specifically, the plaintiff claimed that the subject mats were placed three feet from the bottom of a staircase, whereas the defendant claimed that the mats were flush against the bottom of the staircase. Given these facts, the First Department found as follows:

> This dispute over the precise position of the mats, however, is insufficient to establish a triable issue of fact to defeat defendants' prima facie showing. "The reasonable care standard does not require a defendant to cover all of its floors with mats to prevent a person from falling on tracked-in-moisture; nor does it require a defendant to place a particular number of mats in particular places".[15]

Absent proof that the wet spot was sufficiently visible and had been there long enough to discover and remedy, constructive notice cannot be imputed to the property owner

A property owner's general awareness that an area becomes wet because of inclement weather does not constitute constructive notice of the specific condition that gave rise to an accident.[16]

In *Rouse v. Lex Real Assoc*, plaintiff was injured because of a wet spot on the lobby floor. In affirming the order that granted defendants summary judgment, the First Department held that "absent proof that the wet spot was sufficiently visible and had been there long enough to permit discovery and remedy before the accident, it cannot be inferred that they had constructive notice."[17]

The Second Department held the same in *Pinto v. Metropolitan Opera.*[18] In Pinto, the plaintiff allegedly was injured when she slipped and fell on an accumulation of water at the foot of a staircase in the Metropolitan Opera. In opposition to the defendants' motion for summary judgment, the plaintiff argued that the defendants had notice of a recurring condition of water being tracked-in from outside by patrons during inclement weather, permitting an inference of constructive notice, and that the defendants failed to take reasonable measures to abate the alleged accumulation of water. Affirming the order that granted defendants summary judgment, the Second Department held that constructive notice could not be imputed to the defendants where water was tracked inside by other patrons.[19]

Conclusion

If you represent a property owner or tenant in possession in a slip-and-fall case arising out of moisture on an interior surface that had been tracked inside during inclement weather, you have defenses available. To establish those defenses, obtain a certified weather report that establishes ongoing precipitation at the time of the accident. Consider retaining a forensic weather consultant to provide an opinion within a reasonable degree of meteorological certainty that precipitation was falling in the location of plaintiff's accident at the time of the accident and

Continued on page 16

PROUDLY SUPPORTING OUR FRIENDS

DEFENSE ASSOCIATION OF NEW YORK

YOUR LOCAL COURT REPORTING SERVICE AVAILABLE NATIONALLY

Mark Hoorwitz, President

When it comes to

COURT REPORTING

nobody beats

LEXITAS™

formerly DEITZ

NATIONWIDE COURT REPORTING

800-678-0166

www.deitzreporting.com

- Online Access
- Conference Rooms
- Video Conferencing
- Videography
- VideoSync
- Litigation Support

Mark Hoorwitz, President

for some time before.

In addition, try to obtain and preserve building surveillance footage of the incident, and for some time before the incident, to show that mats were placed on the floor, that warning signs were out, and that other people walking in that area had no trouble entering the building before plaintiff. The video may also show other visitors entering and closing or shaking their umbrellas.

The foregoing evidence will help establish that the property owner satisfied its obligation to maintain the premises in a reasonably safe condition if plaintiff was injured due to a slip and fall on water that was tracked in during an ongoing storm.

[1] *Basso v. Miller*, 40 N.Y.2d 233 (1976).

[2] *Peralta v. Henriquez*, 100 N.Y.2d 139 (2003); *Eddy v. Tops Friendly Markets*, 91 A.D.2d 1203 (4th Dep't 1983), affd, 59 N.Y.2d 692 (1983); *Hanley v. Affrotiu*, 278 A.D.2d 868 (4th Dep't 2000); *Brown v. Big V Supermarkets, Inc.*, 188 A.D.2d 798 (3d Dep't 1992).

[3] *Simmons v. Metropolitan Life Ins. Co.*, 84 N.Y.2d 972 (1994); *Fitzgerald v. Adirondack Transit Lines, Inc.*, 23 A.D.3d 907 (3d Dep't 2005); *Arcuri v. Vitolo*, 196 A.D.2d 519 (2d Dep't 1993); *Mennes v. Syfeld Management, Inc.*, 75 A.D.2d 936 (3d Dep't 1980); *Moorhead v. Hummel*, 36 A.D.2d 682 (4th Dep't 1971); *Caligurie v. Schreck's Iron & Metal Corp.*, 8 A.D.2d 991 (4th Dep't 1959).

[4] *Pianforini v. Kelties Bum Steer*, 258 A.D.2d 634 (2d Dep't 1999).

[5] *Carlos v. New Rochelle Mun. Hous. Auth.*, 262 A.D.2d 515 (2d Dep't 1999).

[6] *Gordon v. America Museum of Natural History*, 67 N.Y.2d 836 (1986).

[7] *Yearwood v. Cushman & Wakefield, Inc.*, 294 A.D.2d 568, 568-569 (2d Dep't 2002).

[8] *Paduano v. 686 Forest Avenue, LLC*, 119 A.D.3d 845, 845 (2d Dep't 2014): see also, *Miller v. Gimbel Bros.*, 262 N.Y. 107 (1933); *Beceren v. Joan Realty, LLC*, 124 A.D.3d 572 (2d Dep't 2015); *Aguila v. Fox Hills Partners, LLC*, 123 A.D.3d 952 (2d Dep't 2014); *Yearwood v. Cushman & Wakefield, Inc.*, supra; *Murray v. Banco Popular*, 132 A.D.3d 743 (2d Dep't 2015); *Orlon v. BFP 245 Park, Co.*, LLC, 84 A.D.3d 764 (2d Dep't 2011); *Zerilli v. Western Beef Retail, Inc.*, 72 A.D.3d 681 (2d Dep't 2010); *Dubensky v. 2900 Westchester Co., LLC*, 27 A.D.3d 514 (2d Dep't 2006); *Negron v. St. Partick's Nursing Home*, 248 A.D.2d 687 (2d Dep't 1998).

[9] 27 A.D.3d 514 (2d Dep't 2006).

[10] 221 A.D.2d 234 (1st Dep't 1995).

[11] 248 A.D.2d 687 (2d Dep't 1998).

[12] 132 A.D.3d 725 (2d Dep't 2015).

[13] See, *Toner v. National Railroad Passenger Corp.*, 71 A.D.3d 454 (1st Dep't 2010); *Pomohac v. TrizecHahn 1065 Ave. of Ams., LLC*, 65 A.D.3d 462, 464 (1st Dep't 2009); *Kovelsky v. City Univ. of N.Y.*, supra; see also, *Rogers v. Rockefeller Group Int'l, Inc.*, 38 A.D.3d 747 (2d Dep't 007); *Dubensky v. 2900 Westchester Co., LLP.*, supra; *Ford v. Citibank, N.A.*, 11 A.D.3d 508 (2d Dep't 2004); *Yearwood v. Cushman & Wakefield, Inc.*, supra; *Negron v. St. Patrick's Nursing Home*, supra.

[14] *Toner*, 71 A.D.3d at 456.

[15] *Id.* at 456, quoting *Pomahac v. TrizecHahn 1065 Ave. of the Ams., LLC*, 65 A.D.3d 462, 465 (1st Dep't 2009).

[16] *Solazzo v. New York City Tr. Auth.*, 6 N.Y.3d 734 (2005); *Musante v. Dep't of Educ. of City of N.Y.*, 97 A.D.3d 731 (2d Dep't 2012); *Asante v. JP Morgan Chase & Co.*, 93 A.D.3d 429 (1st Dep't 2012); *Rouse v. Lex Real Assoc.*, 16 A.D.3d 273 (1st Dep't 2005).

[17] 16 A.D.3d 273 (1st Dep't 2005).

[18] 61 A.D.3d 949 (2d Dep't 2009).

[19] *Id.*, see also, *Perlongo v. Park City 3 & 4 Apartments, Inc.*, 31 A.D.3d 409 (2d Dep't 2006).

Liability Standards in "Inadequate Security" Criminal Assailant/ Criminal Intruder Cases

BY: MICHAEL H. RESNIKOFF*

Is a real property owner liable for an injury resulting from a criminal act that occurs to an individual while on the owner's premises?

A landlord's liability for criminal acts by third parties against other persons on their premises is determined via a two-part inquiry: (i) the landlord must have a duty to that individual and (ii) the harm to that individual must have been foreseeable under the circumstances. It is not enough that a harm occurs on the premises; a relationship conferring a duty must first exist between the landlord and the affected parties. New York courts have held that this "relationship" exists with tenants and visitors but not members of the general public. Once a relationship imposing a duty has been established, then courts turn to the question of whether criminal acts by a third party might be considered foreseeable.

Critical to the foreseeability analysis are three factors: (i) whether a landlord had notice of criminal activity in and around the premises; (ii) whether the landlord took reasonable security measures to minimize the risk of criminal acts to those using the premises; and (iii) whether the location of the crime is sufficiently proximate to the premises. The foregoing is a fact-specific inquiry that determines whether liability attaches to the landlord or whether harm that occurs to those to whom the landlord owes a duty is outside the scope of that duty (i.e. not foreseeable).

New York courts have long held that liability in negligence for criminal acts perpetrated by third parties upon individuals on the premises is directly contingent on the existence of a duty. See Pulka v. Edelman, 40 N.Y.2d 781 (1976); Palsgraf v. Long Is. R.R. Co., 248 N.Y. 339 (1928); Basso v. Miller, 40 N.Y.2d 233 (1976); Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507 (1980); Miller v. State of New York, 62 N.Y.2d 506 (1984); Burgos v. Aqueduct Realty Corp., 92 N.Y.2d 544 (1998); Jacqueline S. v. City of New York, 81 N.Y.2d 288 (1993); Gentile v. Town & Vil. of Harrison, N.Y., 137 A.D.3d 971 (2d Dept 2016); Scurry v. New York City Hous. Auth., No. 2018-07386, 2021 WL 262206 (N.Y. App. Div. Jan. 27, 2021).

While earlier caselaw endeavored to impose a general duty of care upon all parties regardless of their status, over time, the New York Court of Appeals distilled the duty inquiry into one based on a special relationship between the landlord and the person in question. In Waters v. New York City Housing Authority, 69 N.Y.2d 225 (1987), the Court of Appeals examined the question of whether the plaintiff, a young woman who was forced from a public street into a building by her assailant through a door with a broken lock, was within the orbit of duty imposed on the property owner. In the absence of a relationship between the landlord and either the victim or the assailant and no association between the victim and the premises, outside of the crime itself, the Court of Appeals refused to extend the landlord's duty to "members of the public at large who might be victimized by street predators." Waters v. New York City Housing Authority, supra; see also, Brown v. New York City Hous. Auth., 39 A.D.3d 744 (2d Dept 2007); Parker v. D/U Third Realty Co., 141 A.D.2d 301 (1st Dept 1988) ("Although a landlord is certainly required to take reasonable security measures to avoid the likelihood of injury to tenants, business guests or invitees and may also be liable to other persons whose presence on the property is reasonably foreseeable, such as business patrons, delivery people and legitimate visitors, a property owner has no responsibility to extend that protection to "the millions of individuals who use the sidewalks of New York City each day and are thereby exposed to the dangers of street

Continued on next page

* *Michael H. Resnikoff is a partner with Bronster LLP in New York, New York.*

crime") (internal citations omitted).

Once it is established that the affected party is one to whom the landlord owes a duty, the inquiry of whether the crime could be considered "foreseeable," thus imposing liability, can proceed. Relevant to the foreseeability analysis are the types of security measures taken by the landlord and the landlord's notice of similar crime in and around the premises. "A landlord may have a duty to maintain minimal security measures to protect tenants and visitors from the likelihood of criminal intrusions and may be held liable to an individual whose injuries were proximately caused by the absence of adequate security " *Curry v. Baisley Park Assocs.*, 162 Misc. 2d 436 (Sup. Ct. 1994); see also, *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149 (2d Dept 1999).

A landlord is obligated to take reasonable precautionary measures to minimize the risk of criminal acts and make the premises safe for visitors when the landlord is aware, or should be aware, that there is a likelihood of conduct on the part of third parties that would endanger visitors; without proof of prior criminal activity, however, a landlord's duty to reasonably protect those using the premises from such activity never arises. *Gentile v. Town & Vil. of Harrison, N.Y.*, 137 A.D.3d 971 (2d Dept 2016) ("To establish that criminal acts were foreseeable, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location"); see also, *Jacqueline S. by Ludovina S. v. City of New York*, 81 N.Y.2d 288 (1993) ("Whether knowledge of criminal activities occurring at various points within a unified public housing complex, such as Wagner Houses, can be sufficient to make injury to a person in one of the buildings foreseeable, must depend on the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question") (internal citations omitted).

The proximity of the subject location is also relevant to this inquiry; even if a landlord had notice of criminal activity in the area and failed to take requisite security measures, the location of the crime must be sufficiently proximate to the premises for liability to attach to the landlord. In *Allen v. New York City Housing Authority*, 203 A.D.2d 313, 609 N.Y.S.2d 678 (2d Dept, 1994), the plaintiff, a tenant in a public housing project owned by the defendant, suffered multiple gunshot wounds as she left the building and was walking towards the building's parking lot. The Appellate Division, Second Department held that even though plaintiff was a tenant and defendant had a duty to her based on that status, that duty did not extend to providing protection to prevent such an act. The court summarily stated that the crime was completely unforeseeable, as the "casual connection between a criminal act in an essentially open-air, public area, and any negligence on the part of the defendant is too attenuated, as a matter of law." *Id.* at 314; see also, *Daly v. City of New York*, 227 A.D.2d 432 (2d Dept 1996) (holding that the landlord had no duty to protect the victim "because the tragic shooting incident occurred in the outdoor common area of the housing project").

For liability of criminal acts of third parties to attach to a landlord, the landlord must have a special relationship with the affected party that gives rise to a duty; in effect, the affected party must be more than a member of the public at large. If the landlord owes the affected party a duty, then the question of liability proceeds to the determination of whether the harm in question was also foreseeable. Foreseeability depends on whether the landlord had notice of similar criminal activity or risk of criminal activity in and around the premises and failed to take reasonable precautions to protect those using the premises from that risk. Even if the landlord had notice and failed to take such measures, however, liability can only attach if the location of the crime was sufficiently proximate to the premises. If an affected party can meet this three-prong test for foreseeability, a court will likely hold that a landlord is liable for harm that occurred to that party on the premises.

Issues in cases of Emergency Responders in New York (e.g., the "firefighter rule" and GML 205-a)

BY: KAREN L. CAMPBELL & JASEN ABRAHAMSEN*

We routinely rely on our first responders in our time of need. We continually see images of their heroic bravery when running into a blazing inferno, diving into a rough or icy body of water and even crawling down the most minuscule of depths to rescue a stranger. They respond and react to inherently dangerous situations every day knowing the extreme risks associated with their occupation; however, when injured in the line of duty, what recourse do they have, if any?

Before 1935, first responders such as police officers and firefighters in New York injured in the line of duty, initially were barred from pursuing a cause of action for injuries sustained while in the line of duty under the *"Firefighter Rule"*; however, since then, legislation has amended the General Municipal Law (GML) multiple times. Presently, firefighters and police officers in New York can pursue two potential causes of action: (1) common law negligence; or (2) a statutory cause of action under General Municipal Law, Section 205-a, for firefighters or General Municipal Law, Section 205-e, for police officers.

Although there is legislative intent to refer to, these statutes are confusing, which could be treacherous for an injured uniformed claimant to navigate through, and for a landowner to properly defend against. In this article, we will briefly dissect the General Municipal Law 205-a (Firefighters) and 205-e (Police Officers) and its components, which allow and disallow an injured uniformed NYC first responder to pursue a claim. We will further discuss what specific items are necessary for an injured first responder to pursue such a claim and inversely, what specific items are necessary for a landowner to sufficiently defend against such a claim. Further, we will briefly provide a recent trend in the law in New York State regarding GML 205-a and 205-e.

General Municipal Law (GML) 205-a "creates a cause of action for firefighters who suffer line of duty injuries directly or indirectly caused by a defendant's violation of relevant statutes and regulations" (*Giuffrida v Citibank Corp.*, 100 NY 2d 72 [2003]). For an injured firefighter to make out a valid GML 205-a claim, the injured claimant *must* "[1] identify the specific statute or ordinance with which the defendant failed to comply with, [2] describe the manner in which the firefighter was injured and [3] set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the firefighter" (*Zanghi v Niagara Frontier Transp. Commn.*, 85 NY 2d 423, 441 [1995]). The plaintiff "is not required to show the same degree of proximate cause as is required in a common law negligence action" *Giuffrida, supra*. Rather, "a plaintiff need only establish a practical or reasonable connection between the statutory or regulatory violation and the claimed injury" (*Zanghi, supra*)[1].

Likewise, under New York General Municipal Law 205-e, police officers who suffer line of duty injuries may file a civil lawsuit in certain circumstances. If the injury — or death — was a result of a failure to comply with the law, the responsible person can be held liable for the officer's injuries (same as 205-a). Common law barred a police officer from recovering in tort for injuries suffered in the line of duty (see, *Santangelo v State of New York*, 71 NY2d 393, 397 [1988]). In Law (L 1989, ch. 346); and in 1996, the Legislature "largely abolishe[d]" the common law by enacting section 11-106 of the General Obligations Law (see, *Giuffrida v Citibank Corp.*, 100 NY2d 72, 78 [2003]). The latter provision allows police officers to bring tort

Continued on next page

* *Karen L Campbell is a partner and Jasen Abrahamsen is an IT Paralegal and Trial Consultant of and with Lewis Brisbois. Karen.Campbell@LewisBrisbois.com; Jasen.Abrahamsen@LewisBrisbois.com.*

claims for most work injuries that occur in the line of duty. Importantly, however, section 11-106 maintains the common-law bar on tort claims against "the police officer's ... employer or co-employee" (General Obligations Law 11-106 [1]). While a police officer can assert a common-law tort claim against the general public, liability against a fellow officer or employer can only be based on the statutory right of action in General Municipal Law 205-e .[2]

Because Labor Law 27-a (3) (a) (1) does not set forth objective standards of conduct, but rather requires the employer to provide "reasonable and adequate protection" from "recognized hazards that are causing or are likely to cause death or serious physical harm to its employees," it can be argued the statute itself does not impose clear duties. However, courts have held that other statutes, which appear on their face to set forth general duties, are valid predicates for liability under General Municipal Law 205-e. (*Gonzalez v Iocovello*, 93 NY2d 539 [1999], affg. *Cosgriff v City of New York*, 241 AD2d 382 [1st Dept 1997] [New York City Charter 2903 (b) a valid predicate]; *Hayes v City of New York*, 264 AD2d 610 [1st Dept 1999] [Multiple Dwelling Law 78 is a valid

predicate, citing *Gonzalez*, supra]. Some cases of the Appellate Division, Second Department have held that a cause of action under General Municipal Law 205-e may be premised upon an alleged violation of Labor Law 27-a (3) (a) (1). (See, *Koenig v Action Target, Inc.*, 76 AD3d 997 [2d Dept 2010]; *Norman v City of New York*, 60 AD3d 830 [2d Dept 2009]; *Campbell v City of New York*, 31 AD3d 594 [2d Dept 2006]; *Balsamo v City of New York*, 287 AD2d 22 [2d Dept 2001].) In *Balsamo*, the Appellate Division, Second Department, held "inasmuch as Labor Law 27-a imposes a clear legal duty on public employers to provide a safe workplace for their employees, and an expansive interpretation is consistent with the over-all goal of [General Municipal Law 205-e], the Court found a violation of Labor Law 27-a may constitute a sufficient predicate for a claim pursuant to General Municipal Law 205-e which is based on an allegation of a workplace safety violation."

(Balsamo, 287 AD2d at 28.)[3]

In situations where the officer dies, the surviving family members can file a wrongful death lawsuit under section 205-e (same as 205-a). These specific civil actions can be filed against any party who caused an injury or death, including the police officer's employer or coworker; however, if a lawsuit is filed against a municipality or other government entity, special rules and deadlines apply.

New York police officers may also sue individuals, businesses, and other entities (same as 205-a). Some examples for consideration:

(a) A situation where a police officer responds to a routine call involving a local business being robbed, and hazardous conditions present on or at that property cause an injury to a police officer. If those unsafe conditions at the property violated specific state and/or local building codes or safety ordinances, then then police officer can sue the business for his or her injuries.

(b) A vehicle failed to yield the right of way to a police cruiser with its flashing lights and siren on, causing a vehicular accident, the injured police officer can sue the driver of the offending vehicle.

(c) A suspect assaults a police officer. The officer could file a claim against the suspect for any injuries he or she suffered because of that assault.

To satisfy the causation element, the injured responder "need only establish a 'practical or reasonable connection' between the statutory or regulatory violation and the claimed injury" (*Giuffrida v Citibank Corp.*, 100 NY 2d 72 [2003] citing *Zanghi v Niagara Frontier Transp. Commn.*, 85 NY 2d 423, 441 [1995]), which is similar to any other negligence cause of action.

To proceed with such a cause of action, counsel for the injured firefighter and/or police officer must identify specific codes and/or statutes alleged to have been violated by the landowner. Violations under these specific code and/or statute violations are required to predicate such a claim under GML 205 on behalf of an injured firefighter or police officer. Provisions from the New York City Administrative Code (*including the Fire Code, the Housing Maintenance Code and the Building Code*), the New York State Multiple Dwelling Law, the New York State Vehicle and Traffic Law, and OSHA/

Continued on next page

Issues in cases of Emergency Responders in New York (e.g., the "firefighter rule" and GML 205-a)

PESHA standards are frequently and routinely relied upon by an injured first responder to predicate a GML 205-a case. Violations of Section 27-a of the New York State Labor Law have also been successfully asserted. To prevail, the injured first responder ***must*** *assert and prove that the defendant violated a specific statute and failed to remedy such defect promptly before the injury alleged occurrence*.

In 1996, the Legislature enacted General Obligations Law (GOL) 11-106 as another potential route to pursue for first responder firefighters. This provision gives firefighters a cause of action in negligence (as opposed to the statutory cause of action afforded under GML 205-a) for line of duty injuries; however, *the GOL provides an exception as against municipal employers and fellow workers*. Therefore, an injured firefighter now has two potential avenues for recovery from negligent parties. First, if violating a statute, rule or City ordinance caused an injury to a firefighter, the injured claimant may sue under GML 205-a. Second, if someone else's negligence caused the injuries, whether or not there was a violation of a specific statute, the firefighter may bring a cause of action in negligence, *except against his or her employer*.

Workers' Compensation Benefits and GML

Workers' Compensation *is not a bar* to an action against the employer for an *intentional and deliberate tort* committed by or at the direction of the employer.[4] Where an intentional tort has been committed by the employer, the injured *employee has the option* to pursue either a civil damage remedy or workers' compensation, ***but not both***, and voluntary acceptance of compensation benefits constitutes a bar to maintain a civil damage action.[5] A finding by the Workers' Compensation Board that the injury was accidentally incurred is conclusive in any civil action under principles of collateral estoppel.[6] Further, Plaintiff's acceptance of workers' compensation benefits precludes an action against his or her employer under General Municipal Law 205-a.[7] The practical effects of *Weiner* may be narrow, at least in New York City, since City firefighters and police officers are not covered by the Workers' Compensation Law; rather, they are covered by the more generous and non-exclusive provisions of the Administrative Code of the City of New York.

Bringing the Suit

General Municipal Law 205-a and 205-e create a cause of action "in addition to any other right of action or recovery" for the "injury or death or a disease that results in death" of "any officer, member, agent or employee of any fire department/police department injured, or whose life is lost while in the discharge or performance of any duty" when the injury or loss of life "occurs directly or indirectly because of any neglect, omission, willful or culpable negligence of any person or persons in violating the requirements of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city government or any of their departments, divisions and bureaus." Recovery is permitted under the statute ***only if*** the local law and/or regulation either imposes clear legal duties upon the landowner or constitutes part of a well-developed body of law and regulation with positive commands that mandate the performance or nonperformance of specific acts.[8] ***New York City Administrative Code 27-127 and 27-128*** (now codified together in 28-301.1), which imposes on landowners the responsibility to keep all buildings maintained in a safe condition and to keep all service equipment, means of egress, devices and safeguards required by law in good working order, ***are sufficient predicates for liability under General Municipal Law 205-a and 205-e***.[9] However, for a common law negligence action against a property owner, New York City Administrative Code 27-127 and 27-128 are *nonspecific and reflect only general duty to maintain premises in safe condition*.[10] The Court of Appeals has yet to decide whether 27-127 or 27-128 (now codified together in 28-301.1) is a sufficient independent predicate to support a General Municipal Law claim under either 205-a or 205-e claims.[11] There is presently a split between the appellate departments and a decision from the Court of Appeals may be necessary to rectify the discrepancy.

In actions based on General Municipal Law 205-a and 205-e, *the pleadings* ***must*** *specify the*

Continued on next page

specific statutes, ordinances, codes, rules, and/or regulations that defendant has allegedly violated, describe how the plaintiff's injuries occurred *and* set forth facts from which it may be inferred that the defendant landowner's negligence directly or indirectly caused the harm to the plaintiff.[12] In *Williams*, the Appellate Division concluded "[m]erely an 'alleged violation' of [other] provisions of the Penal Law, which are as yet unproven in a criminal proceeding, cannot serve as a predicate for a civil claim under General Municipal Law 205-e , as a matter of law." Unlike the New York State Labor Law, an ***OSHA regulation*** is part of a well-developed body of law and imposes a clear legal duty ***can serve as a predicate*** to a claim under GML 205-a or 205-e.[13] In Gammons, the Second Department considered, among other things, whether the decision of the Court of Appeals in *Williams v City of New York* (2 NY3d 352 [2004]) warranted a departure from its holding in *Balsamo v City of New York* (287 AD2d 22 [2001]). They primarily addressed the issue of whether Labor Law 27-a (3) (a) (1) constitutes a sufficient statutory predicate for a police officer's cause of action to recover damages pursuant to General Municipal Law 205-e even though Labor Law 27-a does not provide for a private right of action. They concluded Labor Law 27-a (3) (a) (1) can constitute a sufficient statutory predicate for a police officer's cause of action to recover damages pursuant to General Municipal Law 205-e (See *Gammons, supra*).

State agencies are subject to local laws and regulations when acting in a proprietary (as an owner of a property), as opposed to governmental capacity and, their alleged failure to properly maintain a premises under the New York City Administrative Code and Fire Department rules was proprietary, *Dempsey v Manhattan and Bronx Surface Transit Operating Authority*, 214 AD 2d 334, 625 NYS2 d 133 (1st Dept 1995). Therefore, such agencies can be held responsible under the statute as a landowner for failure to maintain their property in a safe condition. Although Public Authorities Law 1266(8) exempts the New York City Transit Authority's (NYCTA) facilities and operations from local jurisdiction and from application of the local laws that conflict with the Public Authorities Law, the statute ***does not preclude*** a General Municipal Law 205-a action based on violating those laws, at least where no conflict exists.[14] Thus, a firefighter could seek recovery from the Transit Authority under General Municipal Law 205-a for a violation of New York City Administrative Code 27-127 and 27-128, since those provisions require owners to maintain the premises and facilities in a safe condition and defendant owner cited no provision of the Public Authorities Law or related regulations inconsistent with that duty.

Digging deeper, the Firefighter's Rule ***does not apply*** to products liability actions sounding in negligence, breach of warranty and products liability brought by a volunteer firefighter against a manufacturer of firefighters' safety equipment that failed to provide adequate protection against hazards foreseeably encountered by firefighters during rescue activities.[15] Further, as provided in *Gonzalez v Iocovello*, 93 NY 2d 539, 693 NYS 2d 486, 715 NE 2d 489 (1999), a cause of action under General Municipal Law 205-e ***may be based on a fellow officer's violation of Vehicle & Traffic Law 1104(e)***.

Elements Needed to Successfully Defend Against GML 205 Claims

Once a lawsuit has been commenced by an injured firefighter or police officer under the GML and the specific required items, including the identification of the specific causes of action(s) alleged, the specific rules, statutes and/or ordinances alleged to have been present and violated by the defendant landowner, have been included in the initial pleadings, then the pendulum turns to the landowner first respond to the allegations and to rebut and/or eliminate the specific allegations. To establish entitlement to judgment or dismissal as a matter of law on a either GML 205-a or 205-e claim, a defendant landowner ***must show either*** (1) that it violated no relevant government provision or (2) that, if it did, the violation did not directly or indirectly cause plaintiff's injuries.[16] If the defendant can meet this initial burden, then plaintiff must raise a question of fact that the alleged violations were a direct or indirect cause of the injury or death.[17] In a 205-e case predicated on violating a Penal Law

Continued on next page

Issues in cases of Emergency Responders in New York (e.g., the "firefighter rule" and GML 205-a)

Continued from page 22

provision, however, the defendant is entitled to summary judgment ***if*** (a) no criminal charges were brought against the defendant, (b) a reasonable view of the evidence supports the conclusion that either no prohibited conduct occurred or that the conduct was justified and (c) the plaintiff does not offer compelling evidence demonstrating a material question of fact as to whether the conduct was criminal and not justified.[18] Where a violation is claimed because of a defective condition, the ***plaintiff must prove actual or constructive notice***, although it is unnecessary for the plaintiff to prove such notice as required for recovery under a common law theory of negligence.[19] However, under *Alcalde v Riley*, 73 AD 3d 1101, 902 NYS 2d 149 (2d Dept 2010), the Court recognized that notice of an unsafe condition was not required for recovery under General Municipal Law 205-a, but holding that such notice is required for firefighter's common law cause of action brought under General Obligations Law 11-106. Rather, plaintiff must establish only that the circumstances surrounding the violation indicate that it resulted from neglect, omission or willful or culpable negligence on the defendant's part, *Mulham v New York*, *supra*. Notice of a defective condition on a staircase in an apartment building can be inferred from evidence in the record of the landlord's continuous battle with tenants who leave garbage in the common areas of the building.[20] Similarly, a question of fact existed as to a building's owner's actual or constructive notice of a blocked interior staircase where there was evidence that the owner resided in the building at around the time of the fire, *Alcade v Riley*, *supra*. Where a GML 205-e claim is based on an alleged roadway defect, however, local laws requiring prior written notice of the defect are still applicable.[21]

To assist with GML 205 claims, both parties should consider retaining a strong expert witness to assist with navigating the extensive (and more often than not, confusing) Building Code section applicability, specific statute, rule and/or other ordinance applicable to and specific violation of those items to predicate a claim and weigh upon a specific theory as to whether violating same is evidence and whether it could be proven to be inapplicable or in compliance with the law. Further, quick and early investigation of building records and procurement of relative documents is an essential key for success on both sides. Now with technological advances and handheld devices, etc., there is many opportunity available to either party to procure as much information as necessary to support either side of a claim. One must perform due diligence and secure as much supporting evidence early on as possible. Next, a party should consider retaining an engineering expert to assist with alleged defective conditions and the application, if any, to the applicable and specific code sections to predicate a claim/defend against a claim.

Other Items to Consider with GML 205 Claims

An injured police officer's spouse may assert a derivative cause of action under GML 205-e.[22] However, in a prior case, it was held the spouse of an injured fire fighter may not assert a loss of consortium claim under GML 205-a.[23] There continues to be some discrepancy regarding the derivative cause of action of a spouse and further litigation may be warranted to properly sort it out.

Turning to New York City's "Strongest", the common law "Firefighter's Rule" ***does not*** extend to New York City sanitation workers, who are not expected or trained to assume the hazards routinely encountered by police officers and firefighters.[24] In a case involving a responding Emergency Medical Technician (EMT), the Court of Appeals in held that an EMT injured while responding to an injured person could not pursue a GML 205 cause of action.[25] In responding to the injured person, the EMT fell and was injured on a boardwalk owned by the City of New York (Parks & Recreation). The Court held the EMTs injuries arose from and were connected with his employment with the City. Therefore, his action was barred by his receipt of Workers' Compensation benefits. Further, his common law negligence and 205-a claims were dismissed as he could not sue his employer.

GML 205 remains a logical pathway to pursue causes of action for injuries sustained in the line of duty for first responders in certain instances

Continued on next page

Issues in cases of Emergency Responders in New York (e.g., the "firefighter rule" and GML 205-a)

Continued from page 23

since 1935. Since then, there have been multiple amendments to the law allowing these complicated claims and expanding the reach of these claims allowing a larger net to be cast over the potential actions to be filed. To pursue such a claim, an eligible injured party must plead and provide sufficient proof of a defective condition, which existed in violation of a specific statute, rule and/or local ordinance and the violation of the code, statute and/or ordinance caused the plaintiff's injuries. The statutes may be far reaching as case law suggests that more provisions have been allowed through the years to predicate such claims. As a defendant landowner, it is incumbent to obtain as much information early and document as much information as possible to build a strong defense to either show the statute, rule and/or ordinance is not applicable or there was no violation of the statute, rule and/or ordinance. The key component will be to disprove that a violation existed and that the owner had no notice of an alleged defective condition, if it existed. In order to achieve this result, retention of qualified investigators, code experts and engineers will be necessary to navigate the vast body of codes, rules, statutes and literature.

The Defendant Welcomes Contributors

Send proposed articles to:

Vincent P. Pozzuto
Cozen O'Connor

3 World Trade Center,
175 Greenwich Street, New York, NY 10007

VPozzuto@cozen.com

Lead "Poisoning" and Asbestos Litigation

BY: JOSH H. KARDISCH, ESQ.[1]

Lead Poisoning Litigation

The lead "poisoning" lawsuit borrows concepts from premises liability and toxic torts and, therefore, creates discovery and trial issues that do not exist in other types of personal injury litigation. Unlike other substances (such as asbestos and prescription drugs), lead does not produce a "signature" injury, i.e., a harm which is characteristic of or which can only be caused by that element. Plaintiffs in these cases generally claim brain damage which yields learning and attentional deficits, hyperactivity, and behavioral problems. An amalgam of other factors, however, such as improper nutrition, poor parenting and/or education, exposure to other environmental irritants, genetics, and social and familial dynamics can produce precisely the same deleterious effects, and defense counsel must explore each such possible causative element to maximize success whether through dispositive motion, settlement, or trial.

If blood levels are high enough, lead can be stored in the bones and seen as "lead lines" in x-rays of the gums and femur. The element can cross the blood-brain and fetal barriers and have an adverse effect *in utero*. Lead interferes with hemoglobin synthesis and, accordingly, the transport of oxygen throughout the body. In so doing, it allows a protein called "protoporphyrin" to build up in the red blood cells, and that accumulation can be measured just like lead levels. While the blood lead level (measured in micrograms (ug) per deciliter (dL)) represents a snapshot in time, the "free erythrocytic protoporphyrin" ("FEP") reading reveals the length of time during which there has been an elevated blood lead level. From a defense perspective, the FEP is a potential indicator of exposure in other residences and the extent of the actual harmful effect, if any.

Based on an ongoing National Health and Nutritional Examination Survey ("NHANES"), the Centers for Disease Control periodically lowers the standard for "acceptable" blood lead levels in children. In 1975 - when the average child in New York City had 15 ug/dL of lead in his/her blood - the CDC set the "threshold limit" at 35 ug/dL. In 1985, the agency lowered that benchmark to 25 and in 1991, it identified a "level of concern" of 10 ug/dL, with levels below classified as "not lead poisoned" and those above divided into ranges based upon the severity of the exposure. Scientific evidence indicating that blood lead levels below 10 ug/dL can cause harm prompted the CDC in 2012 to abandon the phrase "level of concern" in favor of a "reference value" of 5 ug/dL. Six years later, the New York State Legislature amended Public Health Law 1370 and related regulations (NYCRR, Title 10, Part 67), to follow the federal directive and lowered the definition of an "elevated blood lead level" in children to 5 µg/dL.

Lead can be most detrimental to children between birth and age three when central and peripheral nervous systems are developing and infants and toddlers routinely engage in hand-to-mouth activities. Starting in 1993, New York State mandated that medical providers screen all children for lead poisoning at one and two years of age and assess overall risk at least annually to determine the need for blood lead screening between ages six months and six years. Regulatory amendments require primary health care providers to perform risk reduction and nutritional counseling and to engage the appropriate local health department in overall environmental management. In addition to medical assessment, the law requires health care professionals to conduct complete diagnostic evaluations, including detailed lead exposure assessments and anticipatory guidance for all families about lead poisoning prevention.

Continued on next page

* *Josh H. Kardisch is Of Counsel to Russo & Gould LLP, and has been defending toxic tort, construction accident and general personal injury litigation for the past 35 years.*

Pediatricians and health specialists counseling parents are required to actively look for and eliminate lead hazards in the home.

As the CDC progressively lowered the acceptable blood values and the State became more proactive in identifying the risks and results of exposure, more and more children were characterized as lead "poisoned". And, of course, the definitional metamorphosis increased the number of potential plaintiffs and the amount of litigation against residential landlords.

Local Law 1 of 1982

New York City banned the use of lead-based paint inside residential structures in 1960, and the federal government implemented the same prohibition in 1978. Nevertheless, it has been estimated that as much as 45% of the city's housing stock contains lead-based paint.

In 1982, the New York City Council adopted NYC Code 27-2013 (commonly known as "Local Law 1"), as the liability standard for multiple dwellings within the five boroughs. As the Court of Appeals interpreted that law in *Juarez v. Wavecrest Management Team, Ltd.*, 88 N.Y. 2d 628, 649, N.Y.S. 2d 115 (1996), and subsequent cases, Local Law 1:

1. created a rebuttable presumption that paint in multiple dwellings (i.e., buildings able to house three or more families living independently), erected before January 1, 1960, where children under age seven reside, is "lead-based paint" (meaning that it has .7 mg of lead per square centimeter of surface), and constitutes a Class "C" ("immediately hazardous") condition if it is peeling or is on a deteriorated subsurface;

2. required plaintiffs to demonstrate that the "building owner had actual or constructive notice that a child six years of age or younger was living in one of its residential units..."; and

3. charged a landlord who has knowledge of a child's presence with notice of any hazardous lead condition in that unit. Significantly, the law did not impose an express or implied duty upon landlords to affirmatively enter dwellings to ascertain the inhabitant's ages or the condition of the paint.

The New York City Department of Housing Preservation and Development ("HPD") and the Department of Health and Mental Hygiene ("DOH") adopted certain regulations requiring property owners to: 1) encapsulate lead paint hazards with pre-approved products; and 2) temporarily relocate inhabitants during abatement, if necessary, to insure their safety. The regulations, however, allow landlords to negate the lead hazard presumption on a per-dwelling or building-wide level by submitting a certified lead-based paint inspector's or risk assessor's statement that each tested surface and component is either free of lead-based paint or has been properly contained. Finally, the regulations provide that the tenants' failure to relocate (if necessary, to ensure their safety) is tantamount to a "refusal of access" under the Housing Maintenance Code and the Rent Stabilization Code.

Childhood Lead Poisoning Prevention Act of 2003

On January 21, 2004, the New York City Council passed the Childhood Lead Poisoning Prevention Act of 2003. The law's stated purpose was to direct "resources to primary prevention (of lead poisoning), including identifying children who are most at risk"....for what was determined to be a "preventable childhood disease and public health crisis." The statute superseded all previous promulgations, but maintained the aforementioned rebuttable presumption, and placed the onus on multiple dwelling owners to: 1) investigate whether children under age seven reside in their premises; 2) inspect apartments for lead-based paint hazards (newly defined as "peeling, chewable, deteriorated, friction and impact surfaces and sub-surfaces"), on a case-by-case basis as the conditions may warrant and "at least once a year or more, if necessary, such as when, in the exercise of reasonable care, he has actual or constructive knowledge of a condition reasonably foreseeable to cause a hazard, if a tenant complains about an apartment's condition, or if the DOH issues an Order, and; 3) take such actions as are necessary to prevent children from becoming lead poisoned.

The 2003 law applies to multiple dwellings built either before 1960 (or between 1960 and 1978 where the owner knows there is lead-based paint), and to all common areas, and requires the landlord to include a conspicuous notice in English and Spanish (at a minimum) in every lease, which advises tenants of each party's obligations and a questionnaire as to

Continued on page 28

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

NEW YORK CHAPTER

www.NYMEDIATORS.ORG

The following attorneys are recognized in 2021 for

Excellence in the field of Alternative Dispute Resolution

NAME	BASED IN	PHONE	CALENDAR
David J. Abeshouse	Uniondale	(516) 229-2360	☑
Jeffrey K. Anderson	Latham	(518) 785-4900	☑
Joanne Barak	Palisades	(845) 365-0136	☑
Robert E. Bartkus	New York	(212) 308-0070	☐
Simeon H. Baum	New York	(212) 355-6527	☑
Leona Beane	New York	(212) 608-0919	☑
David M. Brodsky	New York	(917) 463-0086	☑
Mark J. Bunim	New York	(212) 683-0083	☑
Steven Certilman	New York	(212) 956-3425	☐
Theo Cheng	New York	(917) 459-3669	☑
Douglas S. Coppola	Buffalo	(716) 852-4100	☑
Jacquelin F. Drucker	New York	(212) 688-3819	☐
Howard S. Eilen	New York	(516) 222-0888	☐
Neil M. Eiseman	New York	(917) 603-3725	☑
Eugene I. Farber	White Plains	(914) 761-9400	☐
Alfred Feliu	New York	(212) 763-6801	☑
Ronnie Bernon Gallina	New York	(212) 607-2754	☐
Lynn D. Gates	Buffalo	(716) 852-1544	☑
David Geronemus	New York	(212) 607-2787	☐
Stephen P. Gilbert	Larchmont	(917) 273-4910	☐
Marc J. Goldstein	New York	(212) 799-8605	☑
Krista Gottlieb	Buffalo	(716) 218-2188	☑
George L. Graff	Briarcliff Man.	(914)502-2552	☐
James E. Hacker	Troy	(518) 274-5820	☑
Thomas Halket	Mamaroneck	(914) 833-2681	☐

NAME	BASED IN	PHONE	CALENDAR
Noah Hanft	New York	(347) 686-8450	☑
A. Rene Hollyer	New York	(973) 590-8304	☑
Reginald A. Holmes	New York	(212) 967-6799	☑
Jean Kalicki	New York	(646) 371-9156	☐
Harold A. Kurland	Rochester	(585) 454-0717	☑
Lela Porter Love	New York	(212) 790-0365	☐
Richard Lutringer	New York	(917) 830-7966	☑
Robert E. Margulies	New York	(201) 207-6256	☐
Richard L. Mattiaccio	New York	(212) 616-7085	☐
Michael Menard	Buffalo	(716) 842-6700	☑
Charles J. Moxley Jr	New York	(212) 329-8553	☐
Terrence O'Connor	Albany	(518) 641-6225	☐
Philip O'Neill	New York	(212) 308-4411	☑
Ruth D. Raisfeld	New York	(914) 722-6006	☑
Richard H. Silberberg	New York	(212) 415-9231	☑
David C. Singer	New York	(646) 220-1749	☐
Steven Skulnik	New York	(646) 223-9776	☑
Mark R. Sonders	Troy	(518) 213-0131	☑
Hon. Joseph P. Spinola	New York	(212) 967-6799	☐
Stephen S. Strick	New York	(212) 227-2844	☐
Edna Sussman	New York	(212) 213-2173	☐
Rosemary Townley	Larchmont	(914) 834-6272	☐
Peter H. Woodin	New York	(212) 607-2761	☐
Michael D. Young	New York	(212) 607-2789	☐
Richard Ziegler	New York	(347) 686-8385	☐

Check Bios or Available Dates Calendars Online for New York's Top-Rated Neutrals.

dri™
The Voice of the Defense Bar

NADN is proud creator of the DRI Neutrals Database
www.DRI.org/neutrals

For more info, watch video at www.NADN.org/about

Lead "Poisoning" and Asbestos Litigation

Continued from page 26

the presence of children under the specified age. At the beginning of each lease year, the owner must give the tenant a form on which to identify minor inhabitants. If the tenant does not identify child(ren) and the landlord does not otherwise have actual notice, the lead presumption does not apply in any subsequent personal injury action; if the tenant does not return the questionnaire by mid-February and the landlord does not have actual notice of a child, the owner must inspect the premises at a reasonable time and on reasonable notice, and if he cannot gain access, he must inform the Department of Health and Mental Hygiene. The law requires tenants to be truthful regarding the presence of children at all times during the lease period, and cooperative with regard to access, and prohibits owners from asking tenants to waive the benefits or protections of the new law.

The 2003 law expanded the definition of lead-based paint to include "lead contaminated dust," and "chewable" (i.e., protruding and readily accessible), "deteriorated," "peeling," "friction" and "impact" surfaces as potential "lead-based-paint hazards," and addresses defects which lie under painted surfaces (such as structural or plumbing failure). It places the onus squarely on the owner to inspect for children (now, age seven or younger), and it details a timetable for compliance, including submission of the results of a "lead contaminated dust clearance test". Finally, the 2003 law requires landlords to maintain records of all lead-abatement work performed for no less than 10 years.

Prior to 2003, defense attorneys routinely challenged findings of lead-based paint by questioning the integrity of the testing procedure, the accuracy of the device used, and the presence of lead materials beneath the painted surface (such as inaccessible pipes). Under the "new" law, however, if the owner does not contest the findings when the DOH generates them, his/her attorney may not challenge the presence of lead at trial.

The 2003 law is still in effect and it is much less friendly to multiple dwelling owners than older legislation. Given the tolling of the statute of limitations for infancy, it is critical for defense counsel to determine the precise period(s) of alleged exposure and, therefore, whether the 1982 or 2003 law applies to the individual case.

The "Chapman" Scenario

Neither formulation of Local Law 1 applies to owners of: 1) non-multiple dwellings within the City of New York, or; 2) any type of dwelling outside the City of New York. Prior to 2001, plaintiffs in premises liability cases in which Local Law 1 does not apply, had to establish liability through common law negligence, i.e., that:

1) at the relevant time, the subject premises was not reasonably safe;

2) defendant had actual knowledge of a defective, lead based paint condition, or that the condition was visible and apparent and had existed for a sufficient period of time prior to the alleged exposure;

3) defendant was negligent in not maintaining the premises in reasonably safe condition; and

4) defendant's negligence was a substantial factor in causing plaintiff's harm.

In the 2001 case, *Chapman v. Silber*, 97 NY2d 9 (2001), the Court of Appeals set the standard of liability for owners of non-multiple dwellings within the City and all types of dwelling outside the City. New York's High Court stated:

> If the landlord is aware of the age of the building, the presence of chipped and peeling paint, the dangers of lead paint to children and the presence of young children in the apartment, he may have an obligation to take precautions to provide a reasonably safe environment for plaintiffs. Even if the plaintiff cannot demonstrate that the landlord actually knew that there was lead in chipped or peeling paint, summary judgment is inappropriate when plaintiff raises an issue as to the landlord's high degree of risk that there was a lead paint danger in the apartment sufficient to trigger a duty to address the condition. Plaintiff must still prove a negligent breach of the duty and a legally sufficient causal nexus between the breach and the claimed injuries.

So, a plaintiff in this scenario creates a triable issue of fact when he shows that a landlord:

1) retained a right of re-entry to a leased premises and assumed a duty to make repairs;

Continued on next page

2) knew that the apartment was constructed at a time before lead-based paint was banned;

3) was aware that paint was peeling in the apartment;

4) knew of the hazards to young children of lead-based paint; and

5) knew that a young child lives in the apartment.

In the author's opinion, the *Chapman* decision was ambiguous and flawed for the following reasons:

1) Real Property Law Section 235-b prohibits a landlord from unlawfully entering an

apartment and violating the tenant's reasonable expectation of privacy and fundamental right to exclusive possession.' But at the same time, Administrative Code Section 27-2008, provides that: No tenant shall refuse to permit the owner ... to enter [the demised premises] to make repairs or improvements required by this code or other law or to inspect [the demised premises] to determine compliance with this code or any provision of law, if the right of entry is exercised at a reasonable time and in a reasonable manner.

While it reiterated the landlord's "right of re-entry," the High Court did not consider the practical difficulties that landlords often face in exercising that right. In many situations, tenants share their rental units with individuals (including children), whom they do not identify in the lease, window guard notices or by other means, and make unauthorized alterations to the dwelling unit. Notwithstanding laws that require residents to permit access, tenants who do this generally do not report adverse conditions and do not allow owners and managers into their apartments for fear of reprisal. If liability depends upon the landlord's ability to control and freely (or at least reasonably), access the unit and the owner cannot exercise his "right" to enter (particularly if the tenant prevents him from doing so), then I would say he has not acted unreasonably and his faultless "inaction" cannot be viewed as the proximate cause of the alleged harm, much less a basis for liability;

2) the *Chapman* Court relied on a case which held that "damp walls [are] plain notice of something to be remedied". A "damp wall" is an open and obvious symptom of an underlying and purportedly hazardous condition, but 'peeling paint" does not evince the existence of lead, much less identify a location or an amount which might be injurious. Clearly, a landlord who sees or should see a wet wall has reason to believe that a condition beneath the surface is causing the moisture; lead, however, does not cause a wall to crack or chip, and, accordingly, a property owner who has knowledge of peeling does not have notice, actual or constructive, of lead because the metal is, in fact, "invisible." And the court did not discuss the feasibility of testing for lead, an issue which is supremely relevant in determining the landlord's reasonableness;

3) The Court was non-specific in identifying the "hazards of lead to young children," a landlord's knowledge of which may trigger a "duty to act". The Court stated that plaintiff must prove that the landlord actually "knew" of lead's potentially harmful effect on children, an element which never before existed, and which is, by definition, vague. It is difficult to fathom how a plaintiff would prove that a landlord had such knowledge (if he denies same), unless, of course, the parties had had some discourse about the relevant science and the infant's particular situation.

Plaintiff's attorneys much prefer the presumption of Local Law 1 to the elements of *Chapman*, and for that reason, there are far fewer lead poisoning lawsuits outside the City of New York than within. What we have certainly seen over the years is a growing unwillingness owners to rent apartments to families with young children, effectively increasing the burden on an already limited housing stock.

Lead poisoning cases can be won or lost on the jury's perception of the landlord and, specifically, his reasonableness prior to receiving notification of a lead violation. Verdict and settlement values are not determined solely on the amount of lead in the child's blood or his IQ/cognitive state, but on whether the jury decides that the landlord did what was required or was negligent in such a manner or to such a degree that he deserves to be punished. Although a daunting task, defense counsel must try to convince the jury that the landlord is an attentive and caring property owner who acted at all relevant times within the parameters of what the law recognizes as reasonable and that his conduct or failure to act did not cause this particular child to

Continued on next page

suffer harm.

In defending these cases, counsel must understand and argue that a blood lead level itself – however high - is not what determines whether or not and to what degree an infant has been harmed by exposure. A detectable lead level at some point in a child's life does not dictate that he will have brain damage or any other long-term adverse effect. It is simply not true that any amount of lead will cause harm to a person of any age. And, of course, just because the child has cognitive deficits or behavioral issues does not mean that his exposure to lead is the cause. The most critical determinant of ability is how the child is performing and interacting at the present time. That is why it is important when representing owners in to get complete academic records and interview teachers and guidance counselors, social workers, and anyone with a keen understanding of the child's level of functioning. Counsel must not be dissuaded by the restrictions that the Department of Education typically places on the ability to speak with teachers; there is no reason that an attorney cannot contact the child's teachers by any reasonable means and at any reasonable time when they are not in school. It is critical that defense counsel do so as teachers who interact with the child far more than do the plaintiff's experts often make the best defense witnesses at trial.

As a practical matter, the scales of justice are tipped against the property owner when the plaintiff is a young child. No juror can really put sympathy and prejudice aside sufficient to fairly judge the facts of the particular case when a cognitively deficient or behaviorally "abnormal" child presents at trial, the alleged victim of adverse conditions inside the home. Juries will often let sympathy draw the causal connection between an apartment's condition and a child's condition, even when the science does not support that conclusion. The defense practitioner, therefore, must leave no stone unturned in demonstrating that no child can be viewed in a vacuum and that his or her development is a function of a multitude of factors having nothing to do with exposure to lead-based paint in the defendant's property.

Asbestos Litigation

Asbestos is a naturally-occurring substance which because it is particularly resistant to heat and an excellent electrical insulator, was widely used (until the 1970's), in the construction, power, automotive, clothing-manufacturing, and naval industries. The silicate mineral's crystals are composed of microscopic fibers which abrasion or disturbance can easily render airborne and available for human ingestion and inhalation.

There are many diseases associated with exposure to asbestos, the most common of which are asbestosis (a scarring and inflammation of the lungs which hampers oxygen flow and breathing), mesothelioma (a fatal cancer which mostly appears in the membranes surrounding the lungs, abdominal cavity, and heart), and lung cancer. The most frequent exposures occur to manual laborers at construction sites, power plants, and other industrial locales, but there have been a fair number of tenants in older residential buildings who have come into harm-producing contact with the substance. No amount of exposure to asbestos can be considered non-hazardous - in fact, one fiber in the "right" place and at the "right" time can cause debilitating and life-threatening illness. Generally speaking, the more extensive the exposure, the greater the chance of developing one of the aforementioned or other awful diseases, and smoking can exacerbate the deleterious effects of the exposure. Because latency periods (i.e., the amount of time between exposure and recognition of symptoms) for asbestos- related diseases are so protracted, plaintiffs often sue 25-30 years post exposure. Of course, that characteristic makes defending on product identification and causation that much more difficult.

For a variety of reasons, asbestos litigation in New York is handled in a very different manner than other personal injury claims, including lead "poisoning" cases. First, the sheer volume of plaintiffs and defendants makes judicial management in the conventional sense a Herculean task. Second, the severity of plaintiffs' condition(s) makes expeditious resolution particularly important. Therefore, mesothelioma and lung cancer claims are placed on the accelerated "In Extremis" Docket, while wrongful death and less dire matters are placed on the "FIFO" (for first in/first out) Docket. Third, asbestos cases usually involve the same defending

Continued on next page

entities (manufacturers, property owners, etc.), the same jobsites, the same law firms, and the same medical/scientific professionals. For these reasons, these cases are consolidated under the heading, New York City Asbestos Litigation ("NYCAL"), and a Case Management Order ("CMO") (as opposed to a Preliminary Conference and multiple Compliance Conference orders), fixes the timing and other guidelines for moving the cases along towards fruition. NYCAL maintains its own calendaring, document repository, information-sharing, notification and docketing systems. Designated law firms act as liaison counsel for each side and a Special Master oversees the discovery process.

Plaintiffs generally proceed on one or more of the following theories of liability: common-law negligence, strict products liability (failure to warn), and products liability (negligence). In order to prove a case of damaging asbestos exposure, a plaintiff must show that he or she was exposed to the defendant's product(s) and that the exposure is more likely than not a substantial factor in developing the alleged condition. This requires providing evidence that the defendant's product was present at the time of the plaintiff's exposure, that the defendant's product was capable of causing particular illnesses (general causation), and that the plaintiff was exposed to sufficient levels of the dangerous substance to develop the illness (specific causation). When plaintiff proceeds on all three, the jury must determine 8

whether plaintiff was exposed to asbestos from defendant's product; 2) whether defendant failed to exercise reasonable care by not providing an adequate warning; and (3) was defendant's failure to warn a substantial contributing factor in causing the injury. And since there are many defendants in the typical case, the jury must also determine whether liability should be apportioned among the other parties and to what degree.

Causation in asbestos lawsuits is defined in a more exacting and precise manner than in many other types of cases. The Court of Appeals laid out the quality and quantity of expert proof necessary to prove general and specific causation in two seminal opinions which a number of the lower courts have applied to asbestos cases. By now, it is "a well-established requirement that an expert opinion on causation set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation), and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)". *In re New York City Asbestos Litig.*, 48 Misc. 3d 460, 473, 11 N.Y.S.3d 416, 426 (N.Y. Sup. Ct. 2015); *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.* (No. II), 387 F. Supp. 3d 323, 337-339, 2019 U.S. Dist. LEXIS 97904, *102-103, 2019 WL 2433552e.

In *Parker v Mobil Oil Corp.*, 7 NY3d 434, 857 NE2d 1114, 824 NYS2d 584 (2006), the Court of Appeals identified the pertinent causation inquiry as "whether there is a proper foundation to determine whether the accepted methods were appropriately employed in a particular case." 7 NY3d at 447. The Court held that what is relevant is whether the methods which plaintiff's experts employed led to a reliable result, "specifically, whether they provided a reliable causation opinion without using a dose-response relationship and without quantifying [the plaintiff's] exposure." (Id.) In so doing, the Court concluded that:

> plaintiff's experts had failed to demonstrate that the plaintiff's exposure caused his AML, and that the general, subjective, and conclusory opinions that plaintiff had "far more exposure" to benzene than did the refinery workers reported in the studies was "plainly insufficient" and unsupported by epidemiological evidence to establish causation, given the absence of either a quantification of the other workers' exposure or evidence as to how the plaintiff's exposure exceeded it.

7 NY3d at 449. As neither one of plaintiff's experts was able to identify an epidemiological study finding an increased risk of AML as a result of exposure to the product (benzene), the Court held, there was no evidence of a causal connection between benzene and AML, and standards promulgated by regulatory agencies as protective measures are inadequate to establish legal causation. 7 NY3d at 449-450.

In *Cornell v 360 W. 51st St. Realty*, LLC, 22 NY3d 762, 986 NYS2d 389 (2014), the High Court clarified its holding in *Parker*. Therein, the trial court dismissed the complaint, concluding that plaintiff had failed to prove either general or specific

Continued on page 33

imedview, inc

Big city results, small town connections

Imedview, Inc. is an IME company focused on providing clients with fast, personalized, thorough assistance with all of their record retrieval and IME needs. We are fully equipped to offer an expansive array of services, which include, but are not limited to:

- Independent Medical Examinations
- Record Retrievals - all types
- Record / Peer Reviews & Radiology Reviews
- Expert Witness Services

For your convenience, all services can be requested via: phone, email, fax or submitted through our web-based operating system.

Imedview, Inc.
172 Burt Street
New York, NY 10168
Phone: 888-747-1090
Fax: 866-791-7030

For additional information, please contact our offices at the above number or visit us at: www.imedview.com.

Thank You.

causation. The Appellate Division, First Department, reversed, finding sufficient the plaintiff's expert's opinion relating her illnesses to her exposure to mold based on the opinion finding "some support in existing data, studies [and] literature." *Id*. at 779. The Court also suggested that "because '[i]t is undisputed that exposure to toxic mold is capable of causing the types of ailments from which [the plaintiff] suffers,' Parker teaches that threshold and actual exposure levels are not required to perform [a] differential diagnosis." *Id*.

The Court of Appeals reversed the Appellate Division, focusing on the data and evidence underlying the plaintiff's expert's opinion. After rejecting standards promulgated by regulatory agencies as irrelevant, the Court found that the expert's testimony did not establish general causation, as the reports and studies on which he relied were expressed in terms of "risk," "linkage," and "association," not causation, and that in equating association with causation, he had departed from the generally accepted methodology for evaluating epidemiological evidence when determining whether exposure to a toxin or agent causes a harmful effect or illness. *Id*. at 783. Differentiating between "association" and cause-effect relationship, the *Cornell* Court concluded that because "studies that show an *association* between a damp and moldy indoor environment and the medical conditions [alleged by the plaintiff] do not establish that the relevant scientific community generally accepts that molds cause these adverse health effects," the Appellate Division was wrong in finding that the expert's opinion was sufficient to prove general causation based on "some support" in the record, and that the plaintiff had failed to raise a triable issue as to general causation. *Id*. (*Compare with, In the Matter of New York Asbestos Litig.*, 28 AD3d 255, 812 NYS2d 514 (1st Dept. 2006) (in which the First Department upheld a jury verdict against a defendant, finding that "[t]he evidence demonstrated that both plaintiffs were 'regularly' exposed to dust from working with defendant's gaskets and packing, which were made of asbestos." 28 AD3d at 256; and *Penn v Amchem Prods.*, 85 AD3d 475, 925 NYS2d 28 (1st Dept. 2011) (in which the appellate court found plaintiff's testimony that visible dust emanated from dental liners on which he worked and his expert's testimony the dust "must have contained enough asbestos to cause his mesothelioma was sufficient to sustain the jury verdict. 85 AD3d at 476).

The *Cornell* Court pointed out that "Parker by no means…dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect," and that it is "not enough for a plaintiff to show that a certain . . . agent sometimes causes the kind of harm that he or she is complaining of." Rather, the Court continued, "[a]t a minimum, . . . there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered." 22 NY3d at 784. Accordingly, the Court held that plaintiff had failed to meet her burden as, among other issues, her expert made no effort to quantify her level of exposure and his differential diagnosis was inadequate and plaintiff failed to raise a triable issue as to specific causation. 22 NY3d at 783-785.

In *Matter of New York City Asbestos Litigation.*, 130 A.D.3d 489, 13 N.Y.S.3d 398 (1st Dept. 2015), plaintiff argued that as a signature disease, his mesothelioma must have been caused by exposure to asbestos-containing automotive components and, therefore, that he should be relieved of having to establish a quantifiable level of exposure. Like Parker, he argued, evidence that there is no safe level of exposure to the toxin and that he was exposed through inhalation and dermal contact is sufficient. Defendants challenged the methodology and overall sufficiency of plaintiff's expert evidence.

The First Department noted that *Parker and Cornell* are the controlling precedents in deciding whether the opinions of plaintiffs' experts are sufficient to prove causation as a matter of law in all toxic tort matters including asbestos cases. The court stated:

> the "signature" nature of mesothelioma is "does not dispose of the issue of whether a defendant's product caused the mesothelioma, as it is not the association between mesothelioma and asbestos that is in issue when determining causation but whether a defendant may be held liable for having caused a plaintiff's mesothelioma, which depends on the

Continued on next page

sufficiency of the exposure, if any, to asbestos in the defendant's product and whether that exposure is capable of causing mesothelioma. And, where an expert concedes that asbestos contained within friction products becomes degraded in the manufacturing process, and the plaintiff is alleged to have been exposed to numerous asbestos-containing products over many years, this issue may not be overlooked or ignored.

On the issue of "general" causation, the court noted that: a) general knowledge that asbestos causes mesothelioma is insufficient to prove that asbestos within friction products causes mesothelioma; and b) studies showing an "increased risk," an "association" or a "link" between the asbestos content in factory air are not sufficient to prove a causal connection between alleged exposure in a vehicle repair garage and any defendant's product. On the "specific" causation element, the court stated that an expert must testify as to a "scientific expression of plaintiff's exposure, i.e., evidence on the amount, duration, or frequency of exposure from which a dose-response relationship can be established. Breaking this down further the court noted that plaintiff must demonstrate that the dust to which he was exposed contained any asbestos and enough to cause mesothelioma and whether the fibers were biologically active and had the potential of causing mesothelioma by mathematical modeling by taking into account his work history, and to the extent she mentioned or relied on studies, she did not and could not compare the exposures reported in the studies with the type of exposure that plaintiff claimed. The court concluded that plaintiff's expert failed to provide a scientific expression of his exposure to asbestos from brakes, clutches, or gaskets sold or distributed by defendant and an insufficient foundation for the admission of the expert evidence, and reversed the jury determination in plaintiff's favor.

It should be noted that plaintiff in the above case also posited that evidence of regular and cumulative exposure over many years renders unnecessary a quantification of his individual exposures to prove the causal connection to defendants' products. The court rejected the argument stating that it is "irreconcilable with the well-recognized scientific requirement that the amount, duration, and frequency of exposure be considered in assessing the sufficiency of an exposure in increasing the risk of developing a disease. Accepting the experts' theory that a cumulative and unquantified exposure proves causation, the Court stated, means that if plaintiff was exposed to asbestos dust when working on one product at one time in his decades-long career, that exposure would be considered just as likely to cause mesothelioma as his greater and more frequent exposures to asbestos dust from other products. Again, such a notion is contrary to accepted science that it is the nature and degree of the exposure that affects the risk of developing a disease. The court cited *Matter of New York City Asbestos Litig. [Dummitt]*, 36 Misc 3d 1234[A], * 8, 960 NYS2d 51 (Sup Ct, New York County 2012), in which a trial court upheld a verdict for plaintiff determining that his experts had established a "scientific expression" for the basis of their opinions and, therefore, specific causation. The court noted that one of the experts in that case had actually measured the asbestos fibers released into the air from products identical to those produced by the defendant, and considered the plaintiff's experts' testimony in the context of evidence that the plaintiff's workplace contained hundreds of the defendant's products.

New York has yielded and continued to yield some of the largest verdicts in asbestos cases in the country. It is therefore essential for defense counsel to challenge plaintiff's proof on product identification and both general and specific causation.

Res Ipsa Loquitor Dissected– Definition, Application, and Result

BY: MARGARET MAZLIN

Definition and Impact

Res ipsa loquitor is "nothing more than a brand of circumstantial evidence." Morejon v. Rais Construction Co., 7 NY3d 203 (2006). It is an ancient doctrine "which derives from the understanding that some events ordinarily do not occur in the absence of negligence. *See*, States v. Lourdes Hospital, 100 NY2d 208 (2003); *citing to*, Byrne v. Boadle, 2 H&C 722, 159 Eng Rep 299 (1863); Dermatossian v. New York City Transit Authority, 67 NY2d 219, 226 (1986). This evidentiary doctrine which "allow[s] the factfinder to infer negligence from the mere happening of an event." *Id* at 211. Res ipsa loquitor is a "common-sense application of the probative value of circumstantial evidence." Abbott v. Page Airways, Inc., 23 NY2d 502 (1969). When invoked, the doctrine triggers application of the ordinary rules pertaining to circumstantial evidence in negligence cases stemming from certain types of occurrences. Dermatossian v. New York City Transit Authority, *supra*. The underlying theory is that "certain occurrences contain within themselves a sufficient basis for an inference of negligence." George Foltis, Inc. v. New York, 287 NY 108 (1941). Res ipsa loquitor simply creates a permissive inference of negligence. Dermatossian v. New York City Transit Authority, *supra*.

Since res ipsa loquitor is not a separate cause of action, plaintiff's failure to plead it does not bar its use given supporting facts. Smith v. Consolidated Edison Co. of New York, Inc., 104 AD3d 428 (1st Dep't, 2013); Weeden v. Armor Elevator Co., Inc., 97 AD2d 197 (2nd Dep't, 1983). However, the doctrine may only be invoked when the unexplained circumstances of the injury-producing event justify the inference of negligence. Breese v. Hertz Corp., 25 AD2d 621 (1st Dep't, 1986). For example, in Monroe v. New York, 67 AD2d 89 (2nd Dep't, 1979), the appellate court concluded that plaintiff's specific and overwhelming proof established the accident, and, therefore, the inference created by res ipsa loquitor was unnecessary. Plaintiff, Monroe, a demolition worker, was injured during the fall or collapse of the steel fire escape upon which he worked. He conclusively proved that: (a) the fire escape fell because the portions of the support brackets embedded in the building wall were weakened by corrosion; and (b) this condition was the sole cause of the collapse because no part of the fire escape which plaintiff had previously removed supported any part of the weight of the section which fell and, at that time, his employer's demolition operations had not yet reached the rear brick wall in which the subject support brackets were anchored or embedded. Although plaintiff conceded that defendant did not have actual notice that the portions of these brackets embedded in the wall were rusted through, he maintained that defendant should have been charged with constructive notice of that condition. On those facts, the appellate court found that the res ipsa loquitor inference was not needed because plaintiff had "establish[ed] all the facts surrounding the cause of the accident." *Id* at 98.

The doctrine is typically invoked when the specific cause of an accident is unknown and, in the appropriate circumstances, res ipsa loquitor enables the jury to infer negligence solely from the event coupled with defendant's relation to it. Kambat v. St. Francis Hospital, 89 NY2d 489 (1997); Pavon v. Rudin, 254 AD2d 143 (1st Dep't, 1998). It may be triggered even when some of the circumstances are known but the actual or specific accident cause remains unknown. Bonura v. KWK Associates, Inc., 2 AD3d 207 (1st Dep't, 2003).

The doctrine has been invoked in medical malpractice actions arising out of injuries to those parts of anesthetized patients' bodies which were remote

Continued on next page

* *Margaret Mazlin is a Partner in the New York City office of Russo & Gould LLP*

from the operative site. *See*, States v. Lourdes Hospital, *supra* [a tube inserted into plaintiff's right hand for anesthesia was said to have caused the subsequent diagnosis of right thoracic outlet syndrome and reflex sympathetic dystrophy]; Frank v. Smith, 127 AD3d 1301 (3rd Dep't, 2015) [plaintiff had numbness and was unable to flex his fingers following shoulder surgery]; DiGiacomo v. Cabrini Medical Center, 21 AD3d 1052 (2nd Dep't, 2005) [amputation of plaintiff's right leg resulting from a blood blister on the bottom of his right foot which his wife saw as he was placed under anesthesia for surgery on his left foot – this blister probably resulted from pressure to the right foot]; Mack v. Lydia E. Hall Hospital, 121 AD2d 431 (2nd Dep't, 1986) [plaintiff, while under anesthesia, suffered third degree burns on the side of her left thigh in the course of surgery to treat rectal cancer – during the surgery, an electrocoagulator was used to coagulate blood vessels and stop bleeding – a component part of this device known as a grounding pad, was placed on plaintiff's left thigh throughout the surgery, with the surgeon controlling the flow of electricity through that pad – when the pad was removed at the end of the operation, a burn was discovered directly underneath the area where the pad had been placed]. Res ipsa loquitor has also been invoked in cases where a foreign body was unintentionally left at the operative site. *See*, James v. Wormuth, 21 NY3d 540 (2013) [defendant doctor was unable to find a localization guide wire after taking a biopsy of plaintiff's lung and exercised his professional judgment that it was better to leave it rather than continue the search procedure – plaintiff returned complaining of significant pain, so defendant doctor performed a second operation to locate and remove this guide wire – plaintiff sued defendant doctor for malpractice based on res ipsa loquitor – the doctrine could not properly be invoked because defendant doctor was not in exclusive control of the guide wire since others participated in the procedure]; Kambat v. St. Francis Hospital, *supra* [during a hysterectomy, defendant surgeon left a laparotomy pad in the decedent's abdomen, which caused a fatal infection].

When and How Invoked – The Elements

Although the inference is available where it is logical to deduce that negligence caused the event, it cannot be based on speculation or conjecture. Manley v. New York Telephone Company, 303 NY 18 (1951). It is not fair or reasonable to infer that a defendant's negligence caused an accident which may naturally have resulted from other causes. Cole v. Swagler, 308 NY 325 (1955); Ianotta v. Tishman Speyer Properties, Inc., 46 AD3d 297 (1st Dep't, 2007). Plaintiff cannot invoke res ipsa loquitor without establishing that the accident could not have happened in the absence of negligence. Mochen v. State, 57 AD2d 719; Pipers v. Rosenow, 39 AD2d 240 (2nd Dep't, 1972). However, plaintiff does not need to conclusively eliminate the possibility of all other explanations or inferences for the injury. *See*, Kambat v. St. Francis Hospital, *supra*. What plaintiff must offer is evidence from which the jury can reasonably infer that on the whole it is "more likely than not" that there was negligence associated with the cause of the event. Kambat v. St. Francis Hospital, *supra*; Ezzard v. One East River Place Realty Co., LLC, 129 AD3d 159 (1st Dep't, 2015).

Plaintiff must establish each of three elements to trigger application of res ipsa loquitor. First, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence. Second, it must be caused by an agency or instrumentality within defendant's exclusive control. Third, plaintiff must not have contributed towards the happening of the event. James v. Wormuth, *supra*; States v. Lourdes Hospital, *supra*; Kambat v. St. Francis Hospital, *supra*. Plaintiff must establish all three elements for the doctrine to apply. States v. Lourdes Hospital, *supra*; Bernard v. Bernstein, 126 AD23d 833 (2nd Dep't, 2015).

It Makes Sense that This Does Not Happen Absent Negligence

In the typical res ipsa loquitor case, the jury can reasonably use past experience common to the community for the conclusion that the adverse event generally would not occur absent negligent conduct. Kambat v. St. Francis Hospital, *supra*; *see also*, Diovisalvo v. Woodlawn Cemetery, Inc., 241 AD2d 348 (1st Dep't, 1997) [expert testimony unnecessary for the jury to conclude that a crypt cover would not have suddenly dislodged without someone's negligence]. Of course, in certain res ipsa cases, like medical malpractice actions, common knowledge and every day experience of lay jurors may be insufficient to

Continued on next page

support the inference. Kambat v. St. Francis Hospital, *supra*; James v. Wormuth, *supra*; States v. Lourdes Hospital, *supra*. The Court of Appeals has held that an expert may be used to bridge the gap between the common knowledge of jurors and physicians. States v. Lourdes Hospital, *supra*. However, there is a narrow category of factually simple medical malpractice cases which requires no expert opinion to enable jurors to reasonably infer that the accident would not happen without negligence. *See*, Kambat v. St. Francis Hospital, *supra* [a surgeon unintentionally leaves a foreign object inside plaintiff's body].

Exclusive Control is Not That Exclusive

The exclusive control requirement is meant to ensure that the evidence provides a rational basis to conclude that the cause of the injury-producing event was probably such that defendant was responsible for any negligence in connection therewith. Dermatossian v. New York City Transit Authority, *supra*. The intended purpose is to reasonably eliminate all explanations for the cause of the injury other than the defendant's negligence. *Id*.

The element of control is not absolutely rigid or literal. Rather, it is enough to present evidence of possession and control to such a degree that the probability of someone other than defendant having caused the accident is so remote that it is fair to infer defendant was the negligent party. Durso v. Wal-Mart Stores, Inc., 270 AD2d 877 (4th Dep't, 2000); Finocchio v. Crest Hollow Club at Woodbury, Inc., 184 AD2d 491 (2nd Dep't, 1992). Hence, plaintiff does not have to rule out all other possible causes or culpable defendants, just to show that those other causes or culpable parties are less likely. Elsawi v. Saratoga Springs City School District, 179 AD3d 1186 (3rd Dep't, 2020); Crawford v. New York, 53 AD3d 462 (1st Dep't, 2008). It is not necessary that control be limited to a single person. For instance, res ipsa loquitor may be triggered in elevator accident cases where both the building owner and elevator maintenance company have "exclusive control" over the part of the elevator in question. DiPilato v. H. Park Central Hotel, LLC, 17 AD3d 191 (1st Dep't, 2005). The doctrine even applies when only one of the two persons in joint control is sued. Corcoran v. Banner Super Market, Inc., 19 NY2d 425 (1967).

Evidence that third parties had access to the object in question destroys the premise supporting the inference of negligence on the part of the one who is normally in control of that object, unless there is other evidence that the third parties did nothing to cause the injury. De Witt Properties, Inc. v. New York, 44 NY2d 417 (1978); Camillo v. Geer, 185 AD2d 192 (1st Dep't, 1992). When it comes to instrumentalities controlled by a given defendant but handled by the public, the operative question is whether the public used or handled the instrumentality itself, not whether the public used the larger object to which the instrumentality was attached. Pavon v. Rudin, 254 AD2d 143 (1st Dep't, 1998) [plaintiff was struck by a heavy door at defendant's business operator's premises due to a defective component part – evidence that defendant was in exclusive control of the entire door was sufficient to trigger the doctrine]; Singh v. United Cerebral Palsy of New York City, Inc., 72 AD3d 272 (1st Dep't, 2010) [res ipsa loquitor applied against the owner where motion sensor located on top of the automatic swinging door malfunctioned – it is unlikely that the public would have had contact with the top of the door].

Hence, res ipsa loquitor does not apply when the allegedly defective instrumentality was designed to come into contact with the public and was subject to potentially damaging misuse or vandalism. De Sanctis v. Montgomery Elevator Co., Inc., 304 AD2d 936 (3rd Dep't, 2003). Supermarket merchandise that customers handle is not in the exclusive control of the storekeeper and, therefore, res ipsa loquitor is not applied in cases against supermarkets arising out of incidents involving falling objects or foreign substances on the floor. Ruggiero v. Waldbaums Supermarkets, Inc., 242 AD2d 268 (2nd Dep't, 1967). A burst gasoline hose at a self-service gas station was not in the exclusive control of the owner because it was continuously available to customers. Troisi v. Merit Oil Co., 208 AD2d 615 (2nd Dep't, 1994). Similarly, persons injured in accidents involving bus passenger grab handles or the defective steps on a subway station escalator may not invoke res ipsa loquitor. Dermatossian v. New York City Transit Authority, *supra*; Ebanks v. New York City Transit Authority, 70 NY2d 621 (1987). Res ipsa loquitor does not apply to owners of property sued for the collapse

Continued on next page

of a defectively designed and constructed residential porch, Crosby v. Stone, 137 AD2d 785 (2nd Dep't, 1988), or a glass window that fell from an apartment building while the tenant was out of the country, Veltri v. Stahl, 155 AD2d 287 (1st Dep't, 1989).

By contrast, res ipsa loquitor is charged against supermarkets with respect to exploding bottles, when it may fairly be inferred that the storekeeper controlled the bottles. Corcoran v. Banner Super Market, Inc., 19 NY2d 425 (1967). It will also apply to when a landlord left a stool in the basement for the tenants' use. Nosowitz v. 75-76 Polk Ave. Corp., 34 AD2d 648 (2nd Dep't, 1970). The same is true for glass shelves affixed to the walls of the stockroom at defendant's store Silberman v. Lazarowitz, 130 AD2d 736 (2nd Dep't, 1987), to a self-service elevator that defendant was responsible to maintain, Buell v. SPS Properties, 166 AD2d 925 (4th Dep't, 1990), and to a department store display item located five feet above the floor. Ciciarelli v. Ames Dept. Stores, Inc., 162 AD2d 996 (4th Dep't, 1990).

Once plaintiff establishes the requisite degree of control, defendant's notice of the alleged defect may be inferred under res ipsa loquitor, so plaintiff does not need to present evidence of actual or constructive notice. Lococo v. Mater Cristi Catholic High School, 142 AD3d 590 (2nd Dep't, 2016); Ezzard v. One East River Place Realty Co., LLC, *supra*; Levinstim v. Parker, 27 AD3d 698 (2nd Dep't, 2006); Parsons v. State, 31 AD2d 596 (3rd Dep't, 1968).

Plaintiff's Conduct May Block the Inference of Defendant's Negligence

The third element of res ipsa loquitor, having to do with plaintiff's actions, still exists although the enactment of CPLR 1411 substituted the concept of comparative negligence being a reduction on plaintiff's recovery for the prior rule that plaintiff's contributory negligence barred recovery. In Dermatossian v. New York City Transit Authority, *supra*, the Court of Appeals declined to rule on the question of whether the advent of comparative fault, pursuant to CPLR 1411, eliminates this third element of res ipsa loquitor. Since then, the high court and each department of the Appellate Division have often repeated this third element. Morejon v. Rais Construction Co., *supra*; Kambat v. St. Francis Hospital, *supra*; Ebanks v. New York City Transit Authority, *supra*; Romero v. Xcellent Car Wash & Express Lube, 171 AD3d 584 (1st Dep't, 2010); Dengler v. Posnick, 83 AD3d 1385 (4th Dep't, 2011); Ever Win, Inc. v. 1-10 Industry Associates, LLC, 74 AD3d 735 (2nd Dep't, 2010); Rondeau v. Georgia Pacific Corp., 29 AD3d 1066 (3rd Dep't, 2006).

It has been held that this element will render res ipsa loquitor inapplicable when the evidence of plaintiff's fault completely negates the inference of defendant's negligence or when the inference of defendant's negligence is "no more likely a causative agent [of the injury-producing event] than plaintiff's own conduct." De Simone v. Inserra Supermarkets Inc., 207 AD2d 615 (3rd Dep't, 1994). Thus, since the adoption of comparative fault, res ipsa loquitor has been invoked even when plaintiff has been found comparatively negligent. Beadleston v. American Tissue Corp., 41 AD3d 1074 (3rd Dep't, 2007); see also, Burgess v. Otis Elevator Co., 114 AD2d 784 (1st Dep't, 1985) [res ipsa loquitor was properly charged where plaintiff had no control over the misleveling of the elevator even though she, having been injured when she stumbled while existing the elevator, was held partially at fault]. The key distinction appears to be whether or not plaintiff's conduct actually affected the injury-producing instrumentality. *See*, Beadleston v. American Tissue Corp., *supra* [fact that plaintiff, who was struck by a 1,000-pound bale that fell from defendant's loading truck, walked into an area that he knew was dangerous did not prevent him from invoking res ipsa loquitor because there was no evidence that plaintiff actually moved, touched or otherwise caused that bale to fall on him]; and Miller v. Schindler Elevator Corp., 308 AD2d 312 (1st Dep't, 2003) [plaintiff was entitled to rely on res ipsa loquitor even though she may have activated the emergency stop switch in response to a sudden drop of the elevator].

Concluding Concepts – Inference vs. Presumption – Summary Judgment

Application of the res ipsa loquitor doctrine does not create a presumption of negligence. George Foltis, Inc. v. New York, *supra*. When the doctrine is properly invoked, that simply means plaintiff has made a *prima facie* case of negligence entitling the case to go to the

Continued on next page

Res Ipsa Loquitor Dissected– Definition, Application, and Result

jury. States v. Lourdes Hospital, *supra*; Horowitz v. Kevah Konner, Inc., 67 AD2d 38 (1st Dep't, 1979). Res ipsa loquitor merely creates a permissive inference of negligence from the circumstances of the injury producing event. Morejon v. Rais Construction Co., *supra*; Kambat v. St. Francis Hospital, *supra*.

Defendant does not bear the burden of rebuttal. Davis v. Goldsmith, 19 AD2d 514 (1st Dep't, 1963). Thus, even where defendant does not present a rebuttal, the jury is not bound to infer negligence and may reject the inference. Kambat v. St. Francis Hospital, *supra*; Braun v. Consolidated Edison Co. of New York, 31 AD2d 165 (1st Dep't, 1968); *aff'd*, 26 NY2d 825 (1970). However, defendant is free to offer evidence to rebut the inference raised by the doctrine. States v. Lourdes Hospital, *supra*; Ezzard v. One East River Place Realty Co., LLC, *supra* [defendant is free to rebut inference by presenting different facts or otherwise arguing that the jury should not infer negligence].

When it comes to summary judgment, application of res ipsa loquitor may serve as the basis for an award of summary judgment to plaintiff only in "the rarest of cases" where "the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable." Morejon v. Rais Construction Co., *supra*; Barney-Yeboah v. Metro-North Commuter R.R., 25 NY3d 945 (2015); *see also*, Farina v. Pan American World Airlines, Inc., 116 AD2d 618 (2nd Dep't, 1986) [plaintiff was granted summary judgment on liability where the airline failed to explain why its airplane went off the runway while attempting to land]. It has been held that in cases where conflicting inferences may be drawn, the choice of inference belongs to the jury. States v. Lourdes Hospital, *supra*; Kambat v. St. Francis Hospital, *supra*. The rule that a plaintiff does not need to prove the absence of comparative fault on a summary judgment motion, Rodriguez v. New York, 31 NY2d 312 (2018), does not apply when a plaintiff is moving for summary judgment based on res ipsa loquitor. Specifically, plaintiff will not succeed on that theory without establishing as a matter of law that defendant's negligence, rather than plaintiff's own negligence, caused the injury-producing event. Romero v. Xcellent Car Wash & Express Lube, *supra* [plaintiff, whose foot fell into an uncovered drain on defendant's property, was not entitled to summary judgment based on res ipsa loquitor because he failed to establish that he did not cause or contribute to his own accident].

At the end of the day, circumstantial evidence may be enough to convince a jury to infer that defendant was negligent but plaintiff's comparative fault is a defense and that will likely preclude plaintiff from having his negligence claim summarily determined.

Defending the Out of Possession Landlord

BY: MICHAEL S. FABIANI*

According to Property Shark, there is roughly 90 million square feet of commercial real estate available for rent as of the end of 2020. Add to that figure the hundreds of millions of square feet already under lease, and New York City is – obviously – home to one of the most robust commercial real estate markets in the world. While the industry has already been hit hard by the work-from-home dictates of the pandemic – and may continue its downward trend deep into 2021 – there will always be demand for commercial office space.

One factor in understanding the costs of developing and renting commercial space, be it office or retail, is the potential liability exposure stemming from injuries sustained in the tenant spaces. In our experience, the vast majority of commercial leases consider the landlord "out-of-possession," (OOP) in that they typically do not retain any active presence in the tenant space. The landlord hands over the property and then stays out. We all know the landlord retains certain responsibilities at an office building, including providing HVAC; building safety and cleanliness in common areas; plumbing; electric; trash removal, etc. But the property owners and managers do not ordinarily station a porter inside a specific office space to provide maintenance and monitoring.

This article offers guidance in how to approach a premises liability action involving a tenant-space incident, such as a trip- or slip-and-fall. As a starting point, it is crucial to understand the legal framework, which has not changed in recent years and was recently re-affirmed by the Court of Appeals.[1] The general rule in New York City is that a landlord who transfers possession and control of their space to a tenant is not liable for injuries sustained on the property. There are exceptions, and there is a bit of a conflict between the 1st and 2nd Departments as to precisely how these exceptions are framed. While the conflict does exist, in our view it is one of form over substance, and the same fact pattern would likely yield the same result in either jurisdiction.

Under 1st Department law, there are two clear exceptions: an OOP landlord may be liable if they (a) retain an ongoing duty to make repairs and maintain the property or (b) have a contractual right to reenter, inspect and make needed repairs **and** liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision. As an example of the latter, the 1st Department has denied summary judgment where there was an issue of fact as to "whether the lack of a handrail in the stairwell was a structural defect that violated a specific statutory provision…"[2]

Alternatively, per 2nd Department jurisprudence, an OOP landlord may still be liable if they retained control over the premises and have a duty either imposed by statute; or assumed by contract or a course of conduct. Again, these rules are similar in practice; they both allow for liability against the landlord if they retained a duty – imposed by common law or statute – to ensure the property was kept in a safe condition.[3]

In the typical scenario involving a commercial landlord, determining whether such they retained that duty is largely dependent on the wording of the lease. Thus, the best way to defend against one of these cases is to render them DOA by ensuring the lease is crystal clear that the landlord retains no duty to re-enter or provide ongoing maintenance and repairs.

Since those reading this are unlikely to be in position to advise your clients to rewrite leases agreed to years ago, we can only clean up the mess left by the real estate attorney. What follows is our guidance for defending these cases on behalf of a commercial OOP landlord once suit has been filed.

Continued on next page

* *Michael S. Fabiani is an associate attorney at Fabiani, Cohen & Hall, LLP. His father and founding partner of the firm, John V. Fabiani, Jr., contributed to the drafting of this article.*

Defending the Out of Possession Landlord

Fact Gathering

The first order of business is to gather as much information from the client as possible about 3 distinct topics: the incident itself; the lease; and the general duties of the property management company vis a vis the tenant space.

1. Visit the Property: Inspection and Interviews of Relevant Employees

Of course, as in any case, it is crucial to understand early on as much detail about the incident as possible. In many cases, particularly those involving a structural or otherwise non-transient defect like snow, a site inspection will prove useful. Even if a defect has been repaired, these visits are helpful to put eyes on the scene, which gives a better understanding of the incident when it comes time to depose the plaintiff.

A site inspection can also improve your ability to gather documents and interview witnesses. In a typical commercial space incident, there will generally be an incident report and several witnesses with information. Many of these cases involve employees of the tenant, so there may be a relevant HR file and a workers compensation claim and file that demands procurement. And remember – employees gossip. In a recent case I defended, the plaintiff, an employee of the commercial tenant, claimed she tripped and fell on a portable tile that had been poorly installed on the ground. Employee emails showed no one believed the incident actually happened, and that several co-workers watched the security footage and did not see any incidents. Had we just spoken with the CEO or general counsel of the company, we never would have known.

2. Consider the Possibility of Surveillance Footage

There are also many sidewalk cases in the City – slips on ice, or defective sidewalks, or cellar/hatch door incidents – which would also fall under the out-of-possession landlord defense. Consider the possibility that these incidents may have been caught on camera, either from the commercial space or from a conveniently-positioned nearby camera.

3. Review the Lease in Detail

Next up, you must obtain the lease and with it, a thorough accounting of the landlord's duties in the space. Commercial landlords may agree to such routine cleaning and maintenance as window-washing; taking out the trash; periodic carpet cleaning, etc. They may provide as-needed assistance with plumbing, HVAC and electric. You must know the contours of these responsibilities, as a creative plaintiff's attorney will try – through these sporadic premises visits – to depict the landlord as having a daily physical presence.

An example of a poorly-worded lease coming back to bite an OOP landlord is Richer v. JQ II Assocs., LLC.[4] There, the plaintiff was injured in her employer's office when part of an electromagnetic door fell on her head. The lease made the landlord responsible for all "latent defects and structural repairs." Presumably, the landlord had contemplated latent defects in existence when the tenant took possession, and Supreme Court agreed, granting the landlord and property manager summary judgment. The 2nd Apartment reversed, finding the lease sufficiently vague as to potentially require the landlord responsible for latent defects that surfaced after the property was demised to the tenant.

It is thus imperative that you know all relevant provisions of a lease and any riders, not only to defend the case but, more importantly, so you can capably inform your client of the risks. No client wants to be told a summary judgment motion is a sure winner only to be blindsided by some seemingly irrelevant provision of the lease.

Lastly, most leases contain indemnification provisions running in the landlord's favor. If your lease has such a provision, and you have not already done so, consider the possibility to tender to the tenant.

Discovery and Depositions

1. Document Production

Once the litigation commences, it is imperative to obtain as many documents as possible that bear on the landlord's presence in the tenant space. Because the plaintiff will try to depict the property manager as having a consistent presence in the tenant's office, a good source of information is emails between the two parties evidencing complaints that might warrant a visit to the property. If you are able to show that the tenant sent emails with complaints every 3 weeks, this could establish that the property manager only comes on site when

Continued on next page

Continued on next page

Defending the Out of Possession Landlord

specifically requested. If the tenant is a party to the action, be sure to demand all documents and emails in their possession evidencing the landlord or property manager's visits to the space.

2. Preparing for Depositions

As noted above, a resourceful plaintiff's attorney will try to establish that the commercial landlord, through its property manager, has a consistent presence in the tenant space. An unprepared tenant witness may even fall into the trap, because this is how the human brain operates. A person's memory will inevitably recall events that do happen rather than those that do not. As a result, an employee asked to think back on how many times the property management company visited their space might overstate the frequency based on recalling the several visits in a given year.

In another one of my OOP landlord cases, a former employee was subpoenaed for a deposition. She was asked how often the building superintendent visited the property, to which she responded, "perhaps once a week." Our current employees begged to differ, offering an estimate closer to once a month. A court might treat once-a-week visits as closer to the "right to re-enter" that would preclude summary judgment.

Conclusion

Success in these cases depends heavily on early fact gathering and a complete understanding of the critical issues before discovery starts. This will allow you both to know what documents to request and how to accurately inform your client of the risks of exposure.

[1] See, Guzman v Haven Plaza Housing Dev., 69 NY2d 559 (1987) (OOP who retains right to re-enter to make repairs maybe liable for injuries caused by significant structural defects); Henry v Hamilton Equities, Inc., 34 NY3d 136 (2019).

[2] Pimentel v. Marx Realty & Imp. Co., 55 A.D.3d 480 (1st Dep't 2008); Uppstrom v Peter Dillons Pub,, 172 AD3d 497 (1st Dep't 2019) (the OOP owner of the Bar not liable for fall on stairway); Wright v (Olympia & York, Inc., 273 AD2d 24 (1st Dep't 2000) (OOP could be liable for fall through drop ceiling); Podel v Glimmer Five, LLC,, 117 AD3d 579 (1st Dep't 2014) (OOP got summary judgment where plaintiff fell on spiral staircase, because the alleged violations were not structurally significant); Lopez v 1372 Shakespeare Avenue, 299 AD 2d 230 (1st Dep't 2002) (OOP deemed to have constructive notice of Building Code violation where plaintiff fell on defective exit ramp.)

[3] Santos v 786 Flatbush Food Corp., 89 AD3d 820 (2nd Dep't 2011) (OOP not liable to plaintiff who slipped and fell in grocery store.); Bouima v Dacomi, Inc., 36 AD3d 739 (2nd Dep't 2007) (question of fact where tenant fell on unsecured ladder which was only access to leased storage space); Cherry v Exotic Realty, Inc., 34 AD2d 412 (2nd Dep't 2006) (summary judgment in favor of OOP granted on appeal, as there was no evidence that OOP committed a specific statutory violation.); Washington v Ind. Home for Blind,, 164 AD3d 543 (2nd Dep't 2018) (OOP failed to demonstrate that it did not create dangerous condition on stairway.)

[4] 166 AD3d 692 (2nd Dep't 2018); see also Monopoli v Food Emporium, Inc., 135 AD3d 716 (2nd Dep't 2016) (where a lease was ambiguous as to the OOP's duty to maintain a sidewalk where plaintiff's decedent fell)

Spinal Injury Causation in Trip and Fall Cases: Medical and Legal Perspectives

BY: JARED F. BRANDOFF, M.D.* LEON R. KOWALSKI**

Defense of a personal injury lawsuit is often a cooperative effort of defense counsel and a medical expert. With that in mind, this article of legal and orthopedic disciplines addresses the issue of spinal injury causation in trip and fall cases.

Orthopedic Spinal Surgeon's Perspective

Falls happen. In fact, according to the World Health Organization, falls happen frequently and represent the second greatest reason for unintentional injury in the Western World, surpassed only by motor vehicle accidents.[1,2] There are many different types of falls, some from standing height and some from high elevation. Some accidental and some intentional. For purposes of this article we will ignore intentional falls, more often referred to as jumps, and focus on unintentional falls, relevant to the legal domain.

Pertinent examples of standing height falls include slips on puddles, snow, ice, spilled food, potholes, curbs, obstacles and debris. Certainly, there are other things to trip on and ways to fall, but these exemplify several common causes of falls which result in litigation. High elevation falls are also relevant in the legal realm, frequently involving construction site falls, falls from ladders, falls during recreational activities (e.g. Amusement park attractions, public parks, certain sporting events, etc.), falls down stairs and falls from buildings (e.g. from an open window or defective railing protecting a porch or patio). In general, accidental falls from standing height occur most often in the elderly population secondary to diminishing coordination, balance, visual acuity and depth perception. However, this population does not represent the majority of falls that result in litigation.

So, what determines what, why and how injury occurs as a result of a fall? If ever the laws of physics apply, falls are the perfect manifestation of this. Skeletal structures, like all building materials, resist loads and remain functional and pliable through a wide range of forces. If an applied force exceeds a material's intrinsic properties to resist such a load, the material deforms (bends, cracks, tears, etc.) and injury results. Therefore, it all comes down to forces and energy and the resistive properties of the materials themselves. Harder materials require higher forces to deform; softer materials deform under lower stresses.

So how does this apply practically in real life? The actual physics equations (which we all learned once upon a time in college) are beyond the scope of what should be included in a legal journal, but the variables are familiar to everyone. Factors such as the rate of deceleration, multiplied by the mass of the object (i.e. how big the person is), determine the energy of the fall. Rate of deceleration is determined by two factors; the speed of the object at the time of impact and the pliability (or firmness) of the material that the object lands on. Finally, the speed at impact is determined by the height of the fall, or more precisely, the length of time that elapses while the object (person) is falling, during which time the force of gravity exerts its effect and the object accelerates toward the ground. So, in common terms, the higher the fall, the longer it lasts, the more energy at impact. The harder the surface one hits (i.e. concrete vs foam or sand), the higher the energy at impact. And finally, the bigger one is, the more energy they fall with (i.e. the harder they fall).

Accordingly, falls from higher heights are more likely to result in injury than falls from lower or standing heights. Falls onto stone, steel or concrete are more likely to result in injury than falls onto grass, dirt, sand or water. Moreover, consideration must also be given to which body part hits first since those tissues will absorb the brunt of the energy of the fall and are most likely to be injured if an injury is to occur. Obviously falls onto one's head will result in a higher

Continued on next page

* *Jared F. Brandoff, M.D. practices orthopedic spine surgery with White Plains Hospital Physician Associates in Westchester County, New York.*
** *Leon R. Kowalski is a managing attorney with Kowalski & DeVito in New York, New York.*

rate of serious injury than a fall onto one's buttocks (where presumably there is more fat and connective tissue and no major organs live). So why is any of this important?

As doctors, we are trained from very early on in our clinical education to assess people in the urgent care setting who have sustained potential injuries from falling. Ingrained in us is the knee-jerk reaction to inquire about the facts of a fall that determine the energy of the trauma and therefore the likelihood of a serious injury (or any injury at all). When someone falls the evaluator must determine the height of the fall, what the subject landed on, and what body part hit first. It's all about the energy of the trauma….Kudos to physics.

Not surprisingly, when we analyze the statistics regarding injuries which have resulted from falls, certain patterns emerge. Several articles have been written on this subject in the medical literature and the observations are rather consistent. In a study from Germany in 1995 from the journal Unfallchirurg, injury patterns sustained from falls from great heights were reported. In this study, the average height of the falls was 7.2 meters (23.62 feet, or more than two-stories). From this height, 83% of subjects sustained a fracture of the thoracic or lumbar spine, and a majority of these fractures occurred at the thoraco-lumbar junction (near T12 or L1). 45% of subjects sustained fractures to the lower extremities. 25% of subjects sustained a fracture in their upper extremity. 30% of subjects suffered from fractures of the thoracic spine and pelvis concurrently. Blunt abdominal injury was rare and head injuries occurred in only 27% of subjects.[3] Notably, cervical spine injuries did not occur with a high enough frequency to mention!

In an article published in Trauma & Acute Care in Sweden in 2017, several injury patterns from both high elevation and low elevation falls were reported. They observed that 40-70% of fallers seeking medical attention in the Emergency Room sustained injuries. Spine injuries were common, ranging from 13% in low elevation falls to 36% in high elevation falls. Among these, lumbar and thoracic injuries completely predominated over cervical injuries. Thoracic injuries are common in high elevation falls, but rib fractures, lung contusions and pneumothorax predominate over thoracic spine fractures incidences.[4] Once again, cervical spine injuries are not specifically mentioned as occurring with any notable frequency.

One commonality among each of the mentioned injury patterns which result from falls, especially when the spine is involved, is that when injuries do occur, they are rarely subtle. When a subject presents to the emergency room after a fall with complaints of pain in a specific area, imaging modalities are obtained. In the emergency setting in the United States, X-rays and CT scans are the most common imaging modalities utilized. The algorithms are very simple: if the mechanism of the accident (fall) suggests that there was enough energy to cause an injury, and if the subject complains of pain in a specific location, imaging studies should be obtained. Furthermore, if a subject falls and complains of pain, but the treating physician does not believe that the mechanism of the accident was bad enough to cause a serious injury, imaging modalities should STILL be obtained.

In an overwhelming majority of the time, if a fracture is present, it will be seen and treated appropriately. With respect to spinal injuries specifically, if a traumatic disc herniation has occurred, or if a ligamentous injury has occurred causing destabilization of the spinal column, the symptoms aren't subtle and both axial (along the neck or back) and radicular (into the limbs) pain will typically result. Sometimes neurological deficits may also occur. Once diagnosed with these spinal injuries, referral is made to a spine specialist for evaluation and treatment. These algorithms are nearly universal among the various urgent care and emergency room facilities in the United States.

When cervical injuries do occur from a fall, they usually are the result of one of two mechanisms. Cervical injuries require either an axial load (meaning one lands on their head and the force of impact is transmitted directly through the cervical vertebral column), or an abrupt whipping of the head resulting in significant flexion, extension or lateral excursion of the spinal column and shear forces across the ligaments and supporting structures of the cervical spine. In the first scenario, axial load injuries from a fall are typically associated with blunt head trauma

Continued on next page

and obvious acute neurological deficits. Non axial-load injuries (rotational, flexion/extension, or lateral bending) are far more common in motor vehicle accidents and rarely occur as the result of a fall.

Thoraco-lumbar fractures occur after falls from height when victims land on their lower extremities. The forces travel up their legs and are focused in the lumbar spine where the forces from each limb coalesce. Disc herniations in either the cervical or lumbar spine are not specifically studied in the research here, possibly because they do not occur with great frequency.

Upon evaluating fall victims in the office, most physicians will order advanced imaging modalities (X-ray most commonly for routine skeletal injuries, MRI for spinal injuries or subtle skeletal injuries) in order to determine both the presence and acuity of any injury, if one is not obvious. Once an injury is diagnosed, either in the urgent care setting or in the subsequent follow up period, treatments are, for the most part standardized, and expectations of reasonable outcomes are for the most part pre-determined. For example, rib fractures and vertebral compression fractures, while initially very painful, almost universally heal without issues. On the other hand, people who suffer from calcaneus fractures almost never go back to "normal". In general terms, the injuries, themselves frequently suggest the outcome. Some injuries are bad and some not too bad because they typically heal well.

Imaging modalities such as CT and Xray are very good at demonstrating skeletal injuries that affect the bones but can be deficient at giving any accurate sense of when the observed injury occurred. This is meaningful in the medicolegal domain. For long bone fractures in a typical setting, these limitations are not too concerning since after a traumatic event a fracture will be apparent and the timing of the injury will be obvious. During the healing phases, bone growth (callus) will be demonstrated, and once healed the bone will appear mended. In this scenario, once the healing is complete, the bones will look normal again. On the other hand, there are times when a fracture can deform a bone, and the bone can adequately heal in its deformed morphology and never regain a "normal" appearance. In cases where the healing is complete but the overall morphology of the bone is altered from the original form, then the bone will ALWAYS look deformed from that point on, but the fracture is healed and the deformity is (usually) clinically irrelevant. There is no way to know if the deforming injury, which is now healed, occurred 3 months, three years or three decades ago. They look more or less the same on Xray and CT imaging, but they look vastly different on MRI.

A perfect example of this is the thoracic or lumbar vertebral compression fracture. The compression deformity remains forever apparent, but the cracks in the bone reliably mend (usually within three months of injury and almost always within six months), pain abates, and function is restored. Just having a CT or Xray which demonstrates a vertebral compression fracture is not adequate evidence to conclude that the fracture occurred at any specific point in time or as the result of any specific fall or traumatic event (although in this scenario an accurate medical history can suggest a lot). Additional imaging modalities which can suggest the timing and acuity of the injury are needed in order to link any observed injury to a specific event.

MRI is a far more capable modality when it comes to assessing timing and acuity of an injury. When an injury occurs, the healing process commences almost immediately in the human body, initiated by the physiologic effects of the trauma, itself. The process of inflammation brings increased blood flow and an increase in interstitial fluids in and around the injured tissue. The increased fluids are referred to in medical terms as edema, and MRI is extremely sensitive at detecting the presence (or absence) of edema in tissues. Accordingly, MRI is both sensitive (i.e. if an injury is present but not visible on Xray or CT, the edema should be visible on MRI and the diagnosis of an injury can be made) and specific (i.e. if edema is not present despite evidence on Xray or CT that an injury may have occurred, then it is extremely unlikely that the suggested injury on CT/Xray occurred recently and is therefore likely old, healed, or degenerative in nature). The combination of imaging modalities increases the clinician's accuracy in determining the timeframe and acuity of an injury. This is true of all injuries and therefore holds true after falls.

Continued on next page

Spinal Injury Causation in Trip and Fall Cases: Medical and Legal Perspectives

So what does any of this have to do with litigation? Well, in my experience, it comes down to this. In situations where injury is apparent and negligence is established, there is very little litigation. These subjects are rarely referred to me for evaluation because there is no question about the causality and severity of their situation. They fell, they got hurt, it was someone's fault… case closed (or no case at all). If there are questions about their permanent condition, I examine them, determine how permanently affected they are by their injuries, and all parties eventually agree to terms.

Not all claimants fall into this group and things are typically not so black and white. Rather, most of the exams that I perform are on claimants who have fallen and may or may not have complained of pain in their neck or back at the time of the accident, but no obvious injury was observed other than possible spasming of the muscles; and sometimes not even this is apparent. Typically, these patients complain of pain but demonstrate intact functions on neurological examination. Frequently, however, their complaints of pain persist despite conservative treatment, and a cascade of advanced medical treatments ensues. As pain persists, the invasiveness of treatments increase.

Eventually advanced imaging modalities are ordered (which in all likelihood were not indicated at the time of the initial accident given the paucity of evidence suggesting acute injury after the fall). Invariably, advanced imaging studies reveal pathology. Pathology in the setting of pain with a history of trauma loosely establishes causality. Treatments become more and more invasive. Specialists become involved. A long and protracted course of non-operative treatment fails to improve the pain. Before you know it, at least one surgical procedure is performed and the claimants are often worse off than they were before they sought treatment in the first place. Obviously, there are times when a victim of a fall sustains an injury, improves from conservative treatments, or fails conservative treatments and undergoes a surgical procedure which cures them, and they return to normal levels of functioning. Such are the goals of the medical profession and when it works out it is great. But this is not typically the case when litigation is involved for several reasons.

First, it is well established that when litigation is pending, there is financial incentive to not improve with treatment, and success rates from all treatment modalities (especially surgery) are lower than average. Second, it is further well established in the orthopaedic community that degenerative changes occur in the cervical, thoracic and lumbar spine, asymptomatically, in just about everyone. Asymptomatic degenerative changes become visible on Xray and MRI imaging as early as the fourth decade. Therefore, it is overwhelmingly likely that once a trauma occurs, and a patient's pain persists to the point that advanced imaging is obtained (typically MRI), pathology will frequently be observed and reported by the radiologist.

The million dollar question (Billion dollar actually in this country) is, was the diagnosed pathology on advanced imaging caused by the fall, or was the process pre-existing and found incidentally? Certainly plaintiff's and their attorneys would argue that since the injured party was "fine before the fall", the pathology must have been caused by, or at the very least exacerbated by, the fall in question. Defense attorneys would argue oppositely stating that degenerative changes are universally seen on advanced imaging and this is no exception. So where is the truth? It likely rests on the shoulders of physics. Was the fall bad enough to cause an injury in the first place?

Complicating the situation is the very process of determining causality. The determination of causality is left to the treating physicians who, themselves are financially conflicted. In general, determinations of causality are made honestly and based on clinical evidence. When the evidence of causality is ambiguous, such as when there exists pathology which could equally be interpreted as a degenerative finding as much as a traumatic one, then things can get muddy. I have seen that sometimes, when a patient presents with an injury, and payment for services is provided by a payor who will only pay if the injury is causally related to a work related accident (in the case of Workers' Compensation) or a negligent act (in the case of some personal injury litigation), a provider will claim that the accident in question caused the injury that in turn required their expert medical care. This

Continued on next page

is not a general rule, but it does exist as an undeniable fact and potentially happens with higher frequency among certain physicians whose practices are catered to treating patients in the WC and personal injury domain.

To say otherwise could put the doctor in a position of not getting reimbursed for services and may put the patient in a position of not having adequate medical coverage for their injuries. This is justifiable in the eyes of those who consider that an accident did occur, the patient continues to feel pain (so they say), they have tried and failed various treatment modalities, and there is pathology on imaging. The temptation to conclude that the pathology noted on imaging was caused by the accident is great. But unfortunately, the logic that lead to the conclusion that the accident caused the underlying pathology, and the underlying pathology is the source of the pain, is based on an inaccurate premise and is frequently not true. The house of cards rests on the claim by the patient that they have pain after the injury that they didn't have before.

In reality, if there is no documentation of acute injury at the time a fall occurs, the likelihood that a fall created an exacerbation of an asymptomatic condition, or caused a degenerative process to accelerate, is next to nil. There are no studies supporting any claims that degenerative changes accelerate after routine fall injuries if there was no diagnosable injury at the time of the accident. There either was enough energy to cause harm, or there wasn't. There may be legal arguments supporting theoretical possibilities of worsening degeneration from mild trauma, but there aren't any medical arguments of merit.

Some physicians are sensitive to the causality dilemma and attempt to consider the truth by stating things like "assuming the history provided to me is true", or "assuming that there were no symptoms prior to the fall", then the current injuries are causally related. Statements like this acknowledge that there really is no way to tell based on physical examination and imaging studies when an injury occurred or what caused it if there was no pain initially. If what the injured party reports is true, and pain started at the time of the accident and there was no pain prior to the accident and no prior history of trauma to that body part, then it is reasonable to conclude that the accident caused the injury. Of course, if what the claimant reports is not completely true, then causality is not completely established. This is a more reasonable approach.

To come full circle, falls can cause injury to the spine, but when this happens it is usually obvious. Depending on the height from which a person falls, thoraco-lumbar fractures, long bone fractures, fractures about the heel and ankle, fractures around the hip and wrist, and occasionally soft tissue injuries can occur. That said, from the examinations I have performed, claims of rotator cuff tears, meniscal tears about the knee, lumbar disc herniations and cervical disc herniations after a fall are grossly over stated and not supported by clinical evidence. These represent a majority of the pathologies that require surgery in the medico-legal realm, but they also happen to be the among the most often performed surgeries for degenerative disease (joint replacement of the hip and knee not withstanding) in all of orthopedics as well.

This is not a coincidence. The confluence of factors, which includes conflicted patients, incentivized to not improve with conservative treatments, combined with the conflicts of treating physicians, who are usually well intended but also incentivized to conclude that causal relationships exist when they don't, serve as the life-blood of personal injury litigation. Add to this the enormous sums that are often awarded to claimants in certain jurisdictions simply because they underwent invasive surgical procedures, and the litigation isn't going to stop any time soon. But it is costly to our society and even more so to the claimants who arguably are receiving invasive treatments that are not justified by their injuries (or lack thereof), the effects of which are often life altering.

In my experience, spine surgeries performed in this patient population fall into one of three categories:

- Indicated in order to treat an actual injury sustained from the alleged fall
- Indicated in order to treat underlying pathology which existed prior to or came to be after the fall, but is not related to the fall
- Entirely unindicated (ie. Should not have been performed based on the clinical presentation,

Continued on next page

radiology, etc.).

Obviously, the first category of patients are treated appropriately and the outcomes (medically and legally) should reflect this. This is the smallest category of cases that I review. The third category of patients are themselves victims of a system designed to inflate the value of the legal aspects of the case under the guise of receiving appropriate medical treatment. Unfortunately, this diametrically opposes the concept of "do no harm" and belies the very fabric of the doctor-patient relationship- a concept for another article. The second category, in my experience, is the most common by far. These patients may have been treated appropriately for their underlying pathology or disease process, but the treatments, procedures and clinical outcome should (ideally) not factor into the outcome of their litigation case. This is a challenge to prove.

Here is where the quality of the analysis and report from the medical expert on the defense makes a real difference. It is not enough to simply state that an injury didn't occur or a surgery should not have been performed. When faced with the choice between believing a doctor who is (in the eyes of the plaintiff and possibly a juror) being paid to find fault with the medical care received, or believing a claimant with scars on her body and permanent impairment from titanium rods, the jury will believe the claimant more often than not. However, if the defense expert can back up their opinion with actual objective data from the case, or identify discrepancies between treating physicians and or radiological findings, clinical symptoms, etc., then the claims by the defense medical expert become more meaningful and hopefully the defense more powerful and compelling. The details matter.

Litigator's Perspective[5]

Falls represent a large percentage of litigation in the New York courts. The majority of personal injury cases involve either a motor vehicle accident or a fall of some type. Falls that result in a spinal fusion surgery are becoming more and more common. From a medical treatment standpoint, as opposed to a legal standpoint, causation may not be the most important factor in determining a diagnosis, a prognosis and need for future care. It is more of a black and white proposition with less consequence. However, from a legal standpoint, to the lawyer, causation is very important and a cornerstone element with many shades of grey. To the treating physician, an accident is either the cause of the injury or not, with no real consequence as to treatment either way the question is answered, while to the lawyer, the inquiry in forming a theory of a case begins with the answer to that question of causation and can provide a roadmap to a case.

The difficulty confronted by a personal injury defense attorney when faced with the question of whether the fall was a substantial factor in bringing about the injury (as well as the resulting surgery) is that there exists an inevitability of an adverse physician (examining or treating doctor retained by the plaintiff) attributing the causation of the injury to the fall in question. It is a simple answer to a complex question, rendering one of those essential elements almost anticlimactic. Anticlimactic to the extent that there is great importance placed on it yet with one line in a medical report or just a line of questions at trial, the plaintiff gets what they need. In practicality, we all know that finding a physician to give causation in a personal injury suit is not such a difficult task. So then what are we to do as litigators defending a personal injury lawsuit? Pay the plaintiff what they want? Fold our cards? Absolutely not!

The next step once faced with the inevitability of that causation, whether legitimate or not, is to leave no stone unturned in disputing it. We must always recall the basics of a negligence cause of action – a duty, a breach of that duty, resultant damages and the causal connection between the negligence and the damages alleged.[6] Therefore, the ability to dispute causation can present a major hurdle to a plaintiff's damages claim. . However, as indicated, the issue of causation is often loaded with grey areas, especially when viewed considering issues of compensation for recoverable damages. So while the basic causation between an accident and an injury may appear at times to be somewhat inevitable in our practice (I mean ask yourself when was the last time a plaintiff could not find a doctor to give him or her causation?), there is

Continued on next page

Spinal Injury Causation in Trip and Fall Cases: Medical and Legal Perspectives

still much dispute to be had as to whether the accident caused the damages alleged or I should say caused the damages to the extent alleged. Most importantly, if you can give the jury a credible alternative theory as to what caused the plaintiff's alleged injuries, you can cast serious doubt on the plaintiff's case.

While the defense of a lumbar fusion case requires an obvious dispute as to the causation, to truly be successful it takes more than just a declaration that "a slip and fall cannot cause a herniated disc". As a defense attorney, it would be ideal to present the jury with a credible alternate explanation as to causation. As many of us who have a had a spinal fusion case go to a jury can attest, the idea that a jury is going to believe, with nothing else, that a person would subject themselves to a surgery just for the sake of increasing their potential recovery in a lawsuit is a "tough sell".

Now in all actuality it is not the plaintiff making that conscious decision of submitting themselves to an invasive surgery alone, but as pointed out by Dr. Brandoff above, it is the convergence of factors, including conflicted plaintiffs who are incentivized to not improve with conservative treatments and possibly afflicted with "compensation neurosis" (an exaggeration of symptoms that occur as a result of the stressor of seeking legally awarded compensation), combined with the conflict of treating physicians who also may be incentivized to conclude that causal relationships exist when they do not. Developing and presenting a viable alternative for the injury and the surgery is the best way to defend one of these cases. Considering, the verdict amounts for pain and suffering currently being sustained by the appellate divisions of this state, the need to aggressively develop a theory on causation is even more important.

In general, there are three typical scenarios within which a defendant may offer such an alternative theory as to injury causation. However, please note that there is no "cookie cutter" method to dispute causation, rather the defense attorney should explore every angle uncovered through investigation and discovery. Diligent investigation can pay off in yielding a solid and believable alternative theory as to damages causation.

Firstly, the defendant may assert that prior to the fall in question the plaintiff had the same condition in the same form and to the same degree. For example, the defense may contend that a back complaint such as a herniated disc alleged after a fall is in actuality a longstanding degenerative condition, completely unaffected by the fall. Likewise, the defendant may argue that the herniated disc was caused by a prior accident and was not affected by the trauma of the fall In other words, it was the same before the fall as after the fall.

Secondly, the defendant may assert that before the fall the plaintiff had the same condition alleged, and that although the post-fall condition is alleged to be more serious or somewhat different in form from the pre-existing condition, the post-fall condition is actually the result of the normal progress of the pre-existing condition and was unaffected by the fall. For example, in a suit for an alleged herniated disc, the defendant argues that the herniated disc was caused by a prior accident and was not affected by the trauma of the fall but followed its normal course. Similarly, the defendant may assert that before the fall the plaintiff had a congenital condition, and that the post-fall condition is actually the result of the normal progress of the congenital condition and was unaffected by the fall. For example, in a suit for an alleged herniated disc, the defendant argues that the disc was caused by spondylolisthesis and was not affected by the trauma of the fall but followed its normal course.

Lastly, the defendant may admit that the plaintiff had a pre-existing condition (whether it be degenerative or congenital in nature) and that the fall resulted in an aggravation of the prior condition as opposed to a new injury. While this may not yield as good of a result as being able to dispute causation fully, it is better to have to compensate a plaintiff for an aggravation than a brand new injury. Under the law in New York, where the defendant's wrongful act does not cause the condition, injury or illness, but only aggravates and increases the severity of a condition existing at the time of the injury, the plaintiff may recover only for such increased or augmented suffering or damage as are caused by the defendant's act.[7]

A note on compensation neurosis since that may be an underlying motivation. It has been opined

Continued on page 51

Effective...

social media investigations, inc.

Time and again, the data collected by SMI has changed the course of a lawsuit by uncovering contradictory evidence, directly aimed at the plaintiff's credibility. SMI is key to helping you prove your case.

Call us today at 516-209-3232 and visit us at sminexus.com.

social media investigations, inc.

734 Franklin Avenue
Suite 175
Garden City, NY 11530

(P) 516-209-3232
(F) 516-209-3233
www.sminexus.com
info@sminexus.com

View our site at www.defenseassociationofnewyork.org

that compensation neurosis is an enhancement of symptoms that occur due to a person seeking legally awarded compensation. However, please note that it is not just the mere buildup of expectations by lawyers and doctors that create this situation, as many defense attorneys may believe. Financial reward can clearly be a component in the condition and may influence the course, but the overall assembly of symptoms can be due to more than just the pursuit of money. Compensation neurosis is born out of many factors, such as unwarranted suggestions of illness and/or long-term injury by lawyers, friends, family and doctors; the prolonged time and resultant stress incurred when litigating a lawsuit; tendencies for stress to cause somatization, which is when psychological concerns are converted into physical symptoms; possibilities for tension to exacerbate underlying personality undercurrents such as dependent, avoidant, borderline, histrionic, and narcissistic disorders; rationalization, which is a defense mechanism in which controversial behaviors or feelings are justified in a seemingly rational or logical manner to avoid the true explanation; a need for justice, retaliation, or vindication; the advantages of embracing the role of the victim; or a sense of entitlement.[8]

What is causation under the law? New York uses a "substantial factor" standard in determining proximate cause. Under the substantial factor causation test, an act or omission is regarded as a legal cause of an injury if it was a substantial factor in bringing about the injury.[9] According to the jury charge on Proximate Cause[10], causation may be established if the act or omission had such an effect in producing the injury that "reasonable people would regard it as a cause of the injury"[11].

Please note that the jury charge on causation specifically states, "a cause of the injury" and not "the cause of an injury" since there may be more than one cause of an injury.[12] The jury is instructed that there may be more than one cause of an injury, but to be substantial, it cannot be "slight or trivial."[13] The substantial factor causation test recognizes "that often many acts can be said to have caused a particular injury, and requires only that the defendant's actions be a substantial factor in producing the injury."[14]

In New York, we have a longstanding principle in the law that proximate cause is generally an issue of fact to be decided by the jury.[15] Contentions regarding the permanency and severity of a plaintiff's injuries that turned largely on conflicting medical evidence and other issues of credibility have been deemed to be properly resolved by a jury.[16]

When there is evidence of a possible cause of the incident for which the defendant would not be responsible, in order to recover, the plaintiff must demonstrate to the jury that the defendant's act was a proximate cause of his injury, however, it has been held by the court that this showing by the plaintiff "need not, however, be made with absolute certitude nor exclude every other possible cause of injury".[17] It is important to note that while in this article we are discussing causation with regard to damages (i.e. a spinal injury), the issue of causation is not one that is only decided with regard to liability only or damages only, rather it is relevant both to liability and to damages.[18] In other words, not only does the issue of causation involve whether the alleged negligence of the defendant caused the accident, but also whether the accident caused the injury alleged.

It is important to note that it is error for the court to fail to include on a verdict sheet an interrogatory requiring the jury to conclude, prior to awarding damages, that the plaintiff's injuries were proximately caused by the injury producing event.[19] When the injured party has a pre-existing condition, the recovery, however, as indicated earlier, is confined to those damages resulting from the enhancement and aggravation of the pre-existing condition, not the condition itself, and only to those damages which flow from the defendant's culpable conduct.[20] The burden is on the defendant to prove the apportionment between the pre-existing condition and defendant's contribution to the plaintiff's harm.[21] The question of whether a subsequent accident has caused a plaintiff's pre-existing condition to become symptomatic is a question for the jury and there is specific jury charge as set forth above.[22]

As a defense attorney, when disputing causation, you will be faced with and uncover issues related to concurrent and intervening causes, so they are

Continued on next page

legal concepts to be familiar with. With respect to concurrent causes, the law is generally that there may be more than one cause of an injury and where the independent and negligent acts or omissions of two or more parties cause injury to another, each of those negligent acts or omissions is regarded as a cause of that injury provided that it was a substantial factor in bringing about that injury.[23]

With regard to intervening causes, the defendant will claim that they are not responsible for the plaintiff's injuries because the injuries were caused by a third person. The intervening act of a third party which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about.[24] The fact that the acts of a third person or persons intervened between defendant's conduct and the plaintiff's injury does not automatically sever the causal connection necessary to establish liability if that intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence.[25] The law on intervening causes states that if the defendant was negligent but that the plaintiff's injuries were caused by the third person, the defendant may still be responsible for the plaintiff's injuries, if it is determined that a reasonably prudent person in the defendant's situation, before they committed their act of negligence, would have foreseen that an act of the kind committed by the third person would be a probable result of the defendant's negligence. The defendant is not responsible for the plaintiff's injuries and plaintiff may not recover if it is determined that a reasonably prudent person would not have foreseen an act of the kind committed by the third person as a probable consequence of the defendant's negligence.[26]

So, what are we talking about when disputing causation in a spinal fusion case? It is showing no causal link between the accident and the claimed injuries. It is about disputing the link between the accident and the injury (and the resulting surgery). It is about formulating a defense wherein we rebut the "assumption" of the causal link and provide a jury with an alternative theory as to the cause of the injury. Obviously, if you can affirmatively prove that the alleged spinal injury was caused by degeneration or by a prior or subsequent incident, as a defense attorney you would then have established that alternative theory for the injury and the surgery, however you may not always have that depending upon the facts.

It is important to recognize that the issue of causation is a legal issue as opposed to being a health care issue. Causation of injuries and damages is an issue that is often termed one that is "medicolegal," which is defined as "pertaining to medicine and law or to forensic medicine". An analysis of causation relating to an accident or incident is often unnecessary for diagnosing and treating a patient from a strictly healthcare perspective. It is also unnecessary in many forensic circumstances if the referral issues are limited to diagnosis, treatment planning, prognosis, and/or impairment. It is important not to confuse the analysis of causation with that of an impairment, such as what you may find in a Workers' Compensation case. To make a causal connection, the doctor must testify within a reasonable degree of medical certainty that the accident was a substantial factor in bringing about the injury. So, while a great amount of effort can go into disputing causation, please keep in mind that the plaintiff can meet that burden with one or two questions of his or her doctor. That is not to say that an aggressive effort is not made to dispute causation, of course it should be and formulating an alternative theory can cast that testimony into uncertainty.

Medicolegal analysis typically has a primary goal of providing lawyers and ultimately presenting juries and/or judges with evidence regarding the causal relationship between an alleged action and an injury. The establishment of causation in the realm of a forensic inquiry in connection with a lawsuit is different from the process of finding a diagnosis in clinical medicine.[27]

With that in mind and with the idea that as lawyers defending a lawsuit we are seeking to dispute a determination that an act or omission be found to be a "substantial factor in bringing about the injury" along with evidentiary admissibility, we are often faced with the task of finding as much objective evidence as possible to dispute causation. The kinds of questions that are commonly asked of treating

Continued on next page

orthopedic surgeons in the "medicolegal" context are often outside of the scope of ordinary clinical practice. Although questions regarding diagnosis and treatment are easily answered, questions regarding causal connection are more difficult to address.[28]

So as defense attorneys we are faced with the ultimate question of whether the disc herniation and the resultant surgery were caused by the accident. This question often has us focused on the disc and whether it is degenerated or not, as the central issue, while the plaintiff's pain is the factor that is often the central focus. We lose sight of that since it is an age-old tenet in New York law that complaints of pain are subjective.[29]

In formulating a causation defense in a spinal injury case, we should be looking at certain factors to determine what potential there is. The age of the plaintiff is of the utmost importance. After the age of 40 (and possibly even younger depending on the source), there is better than an even chance that the plaintiff had a disc herniation that pre-dated the accident.[30] In a very typical scenario, the disc herniation may have occurred well before the accident and there may (or may not) have been no pain until the accident. For this reason, a clear picture of the plaintiff's physical condition prior to the accident is needed so as to determine any congenital issues. Also, the full history of the plaintiff regarding prior accidents and prior injuries is essential and that includes an inquiry into subsequent injuries as well.

The MRI results are also of extreme importance. An MRI will show the disc herniation, but as pointed out by Dr. Brandoff, evidence of acute disc herniation or injury such as edema or hemorrhage, that would be caused by significant force, is rarely present. The majority of MRIs will not show those acute findings, rather the degenerated disc will be shown alone, and those MRIs are not conclusive of a newly caused disc herniation.[31] As indicated, findings of edema and hemorrhage on an MRI are rare, but if they are found, they do indicate an acute event.[32] However, disc dehydration (desiccation) and osteophyte formation (bone spurs) are more common findings and are signs of degeneration. Often, despite showing a herniation, the true results of the MRI leave us in a grey area with regard to causation.

Other factors we need to look to in formulation of a theory to dispute causation is looking at when the pain started. We need to look at whether the plaintiff was having radiculopathy and when that began. Naturally there should always be an inquiry into a prior accident, prior injury and prior complaints. In addition, the plaintiff's medical history needs to be examined for congenital issues that may be relevant. Also, the question as to whether the herniation is aggravated or exacerbated is always one that will come up. Lastly, as Dr. Brandoff indicated, we need to examine whether the fall was the mechanism of the injury and the resultant surgery. All told, as we have now discussed, there are numerous potential avenues of attack for defense counsel to consider, which may be raised or supported by an expert spinal surgeon.

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

1 Masud T, Morris RO. "Epidemiology of falls" *Age and Ageing* 2001;30-S4: 3-7

2 James SL, Lucchesi LR, Bisignano C, et al. "The global burden of falls: global, regional and national estimates of morbidity and mortality from the Global Burden of Disease Study 2017" *Injury Prevention* 2020;**26**:i3-i11.

3 Hahn MP, Richter D, et al. "Injury pattern after fall from great height. An analysis of 101 cases" *Unfallchirurg*. 1995 Dec;98(12):609-13.

4 Granhed H, Altg rde E, et al. "Injuries Sustained by Falls-A Review" *Trauma & Acute Care*. 2017 Apr;2(38):1-5.

5 The following section is authored by Leon R. Kowalski, Esq. Please note that each case is unique and has different facts and issues, and any approach suggested here may not be appropriate in a given case.

6 *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1st Dept. 2005) (the plaintiff must prove the traditional common-law elements of negligence: duty, breach, damages, causation and foreseeability).

7 PJI 2:282 – Personal Injury – Aggravation of Pre-Existing Injury - If you find that before this (accident, occurrence) the plaintiff had a [*specify the particular condition*] and further find that because of the (accident, occurrence) this condition was aggravated so as to cause (increased) suffering and disability, then the plaintiff is entitled to recover for any (increased) disability or pain resulting from such aggravation. (He, she) is not, however, entitled

Continued on page 57

The Slip and Fall of Snow and/or Ice: Defending the Case

BY MICHAEL S. GREENFIELD, ESQ.

When undertaking the defense of a slip and fall on snow and/or ice, understanding the defendant's relationship to the subject premises is of paramount importance. Those who privately own or possess property where a slip and fall on snow/ice has occurred have a separate and distinctset of responsibilities than that of third-parties snow removal companies. Let's look into what the defense of both entail, what defenses are available to them, and what evidentiary considerations defense counsel should pay attention to when mounting a defense.[i]

Regarding: the property owner/possessor of property:

First and foremost, when defending a landowner/possessor of the land, defense counsel should remember that general principles of premises negligence still apply. There still needs to be a duty to the plaintiff breached by the landowner/possessor that was the proximate cause of the plaintiff's damages. The landowner also needs to have had actual/constructive notice of the condition that caused the slip and fall. Also, was it foreseeable that the injured plaintiff would take the path where the slip and fall occurred?

An illustrative example can be found in *Auletta v. New York*.[ii] In that case, a snowbank measuring eight inches above the natural snowfall was not necessarily a dangerous condition because there was a path clear that plaintiff chose to not walk on. Plaintiff instead decided to cross the snowbank rather than make use of the cleared path. Because there was a cleared path for use, the court determined the snow bank did not create a foreseeable risk of injury to pedestrians.

What duties are owed to pedestrians on a landowner's property? As a general rule, private landowners/possessors are "under no duty to remove ice and snow that naturally accumulates upon the sidewalk unless a statute or ordinance specifically imposes tort liability for failing to do so."[iii] In the absence of such a statute or ordinance, the owner can be held liable only if s/he, or someone on his or her behalf, "undertook snow and ice removal efforts which made the naturally-occurring conditions more hazardous."[iv] However, this principle does not apply when the dangerous condition was created by an independent contractor employed by the owner (to be discussed further below).[v]

When it comes to statutes or ordinances imposing tort liability, municipalities across New York State have imposed such a duty on landowners.[vi] In New York City, under Section 7-210 of the Administrative Code of the City of New York (AKA: "the Sidewalk Law"), commercial property owners have a duty to remove snow/ice and are liable for injuries arising from noncompliance.[vii] However, certain properties will not be found liable for injuries caused by the failure to maintain their sidewalks free from snow. These properties include one to three-family residential properties that are owner occupied and used exclusively for residential purposes.viii For such properties, the City of New York may still be a potentially liable party.

With snow/ice accumulation, liability can also arise depending on how the water entered the property. When snow and ice are transferred by artificial means from an abutting premises to the sidewalk or permitted to flow onto the property and freeze, the landowner may be liable.

Examples of this include snow dripping from a sign, [ix] eaves/roof,[x] a drainpipe,[xi] or sidewalk shed.[xii] However, when the abutting owner neither changes the grade of the land or otherwise allows water to follow artificially onto the sidewalk, s/he will not be found liable.[xiii]

Counsel should also be mindful of some other special cases where landowners undertook actions that exposed plaintiffs to snow/icy conditions. For example, if sidewalk repairs are voluntarily undertaken

Continued on next page

* *Michael S. Greenfield is an associate in the New York City office of Lewis Brisbois and a member of the General Liability Practice.*

by the landlord and negligently performed, it may be open the landlord to liability if the repair led to the accumulation of snow/ice.[xiv] Additionally, a landowner may be found liable when the landowners' unreasonable obstruction of a sidewalk caused a pedestrian to sustain injury while walking on the icy street.[xv]

In terms of defenses, the "Storm in Progress" doctrine is a powerful tool in the defense counsel's arsenal. In general, this doctrine holds that no liability can be imposed on an abutting landowner if an accident occurs while a storm is in progress. It has been adopted and codified in various municipal codes across the state. In New York City, this was codified in New York City Administrative Code 16-123(a). In essence, owners of abutting properties have four hours from the time the precipitation ceases, excluding the hours between 9:00 p.m. and 7:00 a.m., to clear ice and snow from the sidewalk. xvi (For more in-depth analysis of this defense, please refer to Premise Liability Issue, Part One, pp. 4-6).

Regarding snow removal companies:

In defending the third-party snow removal company, defense counsel must pay particular attention to the contractual obligations of the both the landowner and the snow removal company. Generally, third-parties who are contracted to remove snow do not owe a duty to plaintiffs who slip and fall on snow/ice.[xvii] The idea is that courts do not want parties entering into a contract to perform services to be liable to an indefinite number of potential beneficiaries.[xviii] However, there are instances in which contractual performance may expose third-parties to liability for slip and falls.

In the seminal case *Espinal v. Melville Snow Contractors, Inc.*, the court explained how there are three exceptions to this general rule in which a party who signs a contract may be held to have assumed a duty of care to a non-contracting third party.[xix] These exceptions are: 1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm; 2) where plaintiff detrimentally relies on the continued performance of the contracting party's duties; and 3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.[xx]

Regarding the force or instrument of harm exception from *Espinal*, a passive omission by a contractor will not give rise to liability.[xxi] For example, in *Santos v. Deanco Servs.*, Inc., a snow removal contract called for the defendant snow removal company to plow snow accumulations of two inches or more and apply salt and/or salt and sand mixture for accumulations less than two inches. After plowing an area, the defendant company failed to apply the salt (or the salt and sand mixture) after plowing an area where the plaintiff fell. The Second Department held that the failure to salt after plowing did not constitute launching a force or instrument of harm. To do so, the court reasoned, would be to expand the *Espinal* exception to include any breach of a snow removal contract.[xxii] The court observed that the failure to apply salt would not ordinarily create ice, nor exacerbate an icy condition. The absence of salt would merely prevent a preexisting ice condition from improving.

In terms of the detrimental reliance exception, unless the plaintiff was aware of the snow removal contract before the slip and fall, plaintiff will have a hard time showing that s/he detrimentally relied upon the performance of the contract.[xxiii]

As to the exception regarding the contracting party entirely displacing the other party's duty to maintain the premises safely, a contract merely addressing the removal of snow will not suffice. Instead, the contract must be a comprehensive and exclusive property maintenance obligation intended to displace the landowner's general duty to keep the premises in a safe condition.[xxiv]

Mounting a Defense:

Upon assignment of the slip and fall on snow/ice, counsel should coordinate with their client early-on to gather relevant evidence. This will certainly include any photos and videos of the scene as close to the time period after the incident. Surveillance video is of particular importance, showing not only the incident as it was captured on the video (if possible), but the accumulation of snow over time and what measures were taken before/after the storm. Incident reports should be gathered, along with police and ambulance call reports. Statements should be taken from witnesses and employees, with particular emphasis on timing of the events and how the weather progressed, what the visibility was like, how

Continued on next page

the snow stuck to the pavement, and so on. If snow removal services were contracted out, the contract should be analyzed to determine when the snow removal company's duty to plow, shovel, and/or salt kick in. The contract should also be scrutinized to see if there are provisions regarding indemnification or contribution. Logs detailing when services were performed are also of great importance.

Meteorological data is invaluable to the defense of these matters. Certified weather records can be obtained from the National Climatic Data Center website. They can be used to show when a storm started and ended and whether the "Storm in Progress" doctrine is applicable. Similarly, weather records can help determine whether lowered temperatures led to a pool of water freezing after a thaw. Additionally, consider the use of a weather expert, who may be useful in making sense of the various weather data obtained.

When taking the plaintiff's deposition, counsel should explore lines of questioning regarding timing, visibility, path of travel, location of the fall, types of footwear worn on the date of the incident, and the mechanism of injury. Was the plaintiff aware of any snow removal efforts before the fall? Did the plaintiff notice salt and/or sand in the area of the fall? Did the plaintiff know what the source of the snow/ice was? Did water accumulate due to an overhanging structure, piling, pipe, drain, et al?

When dealing with the deposition of the snow removal company, contractual duties will need to be explored at length. When were snow removal efforts triggered and what did the contract call for? Did the contract require follow-up efforts? Did snow removal logs detail the timing and details of the snow removal services provided? Did the company use hand shoveling in addition to plows? Where was snow to be piled? Were there any complaints made during the course of performance? Did the snow removal company have any interactions with the plaintiff? In the cases of a parking lot, did the snow removal company shovel between parked cars and/or return once the lot was cleared?

In Conclusion:

Defense counsel should be mindful of how the slip and fall case is akin to a general premises negligence slip and fall case, with a few caveats. As a landowner, understanding how municipal/local statutes come into play regarding the obligation to remove snow is of paramount importance. It will determine whether there is an affirmative duty to remove snow and whether the "Storm in Progress" doctrine defense is available. For those defending the snow removal company, understanding contractual duties and *Espinal* and its associated caselaw are of the utmost importance.

[i] For the purposes of this article, and for the sake of brevity, only liability for private landowners/possessors and third-party snow removal companies/contractors will be explored. Those seeking to learn more about the public entities liability in connection with the slip and fall on snow and ice would be advised to refer to PJI 2:25C for more information.

[ii] *Auletta v. New York*, 22 NY2d 738, 292 NYS2d 119, 239 NE2d 212 (Ct. of Appeals 1968).

[iii] *Bruzzo v. County of Nassau*, 50 AD3d 720, 721 (2d Dept 2008); *Huguens v. Village of Spring Val.*, 86 AD3d 593, 594 (2011); *Plotits v. Houaphing D. Chaou, LLC*, 81 AD3d 620, 621 (2011)

[iv] *Robles v. City of New York*, 56 AD3d 647, 647; *Martinez v City of New York*, 20 AD3d 513.

[v] *Caracciolo v. Allstate Ins. Co.*, 40 AD3d 798, 935 NYS3d 740 (2d Dept 2007).

[vi] Note: In order for a statute, ordinance or municipal charter to impose tort liability upon abutting owners for injuries caused by their negligent conduct, the language must not only charge the landowner with a duty, but must also specifically state that if the landowner breaches such duty he will be liable to those who are injured for any defects in the sidewalk. *Jacques v Maratskey*, 41 AD2d 883; *Beltzer v City of Long Beach*, 24 Misc 2d 279, *affd* 15 AD2d 789; cf., *Willis v Parker*, 225 N.Y. 159.

[vii] NYC Administrative Code 7-210 (a), (b); see also *Gyokchyan v. City of New York*, 106 AD3d 780, 781 (2013); Harakidas v. City of New York, 86 AD3d 624, 626 (2011).

[vii] NYC Administrative Code 7-210 (c).

[ix] *Roark v. Hunting*, 24 NY 2d 470 (Ct of Appeals 1969); *McKay v. New York*, 269 App Div 760, 54 NYS2d 794 (2d Dept 1945).

[x] *Tremblay v. Harmony Mills*, 171 NY 598, 64 NE 501 (1902).

[xi] *Herbert v. Rodriguez*, 191 AD 2d 887 (3d Dept 1993); *Patterson v. New York City Transit Authority*, 5 AD 3d 454 (2d Dept 2004).

[xii] *Schnur v. City of New York*, 298 AD 2d 332 (1st Dept 2002)

[xiii] See, for example: Kossoff v Rathgeb-Walsh, 3 NY2d 583, 589-590 (1958); Biaglow v Elite Prop. Holdings, LLC, 140 AD3d 814, 815 (2d Dept 2016).

[xiv] *Roark v. Hunting*, 24 NY 2d 470 (Ct of Appeals 1969); *Epner v. Rhulen*, 8 AD 2d 646 (3d Dept 1959).

[xv] *Fleischer v. White Rose Food Corp.*, 152 AD2d 489, 543 NYS2d 456 (1st Dept 1989).

Continued on page 61

to recover for any physical ailment or disability which existed prior to the (accident, occurrence) or for any injuries from which (he, she) may now be suffering which were not caused or contributed to by the (accident, occurrence). The plaintiff can recover only for damage caused by aggravation of the pre-existing condition, not the condition itself. The plaintiff should be compensated only to the extent that you find (his, her) condition was made worse by the defendant's negligence.

[8] Hall, Ryan C.W. and Richard C.W. Hall. "Compensation Neurosis: A Too Quickly Forgotten Concept?" *The Journal of the American Academy of Psychiatry and the Law*. Vol. 40, 2012, 390-398. www.jaapl.org/content/jaapl/40/3/390.full.pdf.

[9] *In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.*, 725 F.3d 65, 116 (2d Cir. 2013) (quoting *Schneider v. Diallo*, 14 A.D.3d 445, 788 N.Y.S.2d 366 (1st Dep't 2005)).

[10] PJI 2:70 Proximate Cause - In General - An act or omission is regarded as a cause of an injury [in bifurcated trial, substitute: accident or occurrence] if it was a substantial factor in bringing about the injury [in bifurcated trial, substitute: accident or occurrence], that is, if it had such an effect in producing the injury [in bifurcated trial, substitute: accident or occurrence] that reasonable people would regard it as a cause of the injury [in bifurcated trial, substitute: accident or occurrence]. [The remainder of the charge should only be provided where there is evidence of comparative fault or concurrent causes.] There may be more than one cause of an injury [in bifurcated trial, substitute: accident or occurrence], but to be substantial, it cannot be slight or trivial. You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it.

[11] PJI 2:70 Proximate Cause - In General

[12] PJI 2:71 Proximate Cause - Concurrent Causes - There may be more than one cause of an injury. Where the independent and negligent acts or omissions of two or more parties cause injury to another, each of those negligent acts or omissions is regarded as cause of that injury provided that it was a substantial factor in bringing about that injury.

[13] *See*, PJI 2:70 Proximate Cause - In General

[14] *In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.*, 591 F. Supp. 2d 259, 266 (S.D.N.Y. 2008).

[15] *Turturro v. City of New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Hain v. Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016); *Newman v. RCPI Landmark Properties, LLC*, 28 NY3d 1032, 42 NYS3d 668, 65 NE3d 698 (2016); *Hicksville Water Dist. v. Philips Elecs. N. Am. Corp.*, 2018 WL 1542670, at *6 (E.D.N.Y. Mar. 29, 2018).

[16] *St. Hilaire v White*, 305 A.D.2d 209, 759 N.Y.S.2d 74 (1st Dept. 2003)

[17] *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980).

[18] *Oakes v. Patel*, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013).

[19] *Siagha v. Salant Jerome, Inc.*, 271 AD2d 274, 706 NYS2d 634 (1st Dept 2000).

[20] *Ortiz v. Mendolia*, 116 A.D.2d 707, 497 N.Y.S.2d 761 (2d Dept. 1986); *Sanchez v. Morrisania II Assocs.*, 882 N.Y.S.2d 53 (1st Dept. 2009) (Personal injury plaintiff appealed jury verdict in her case. The court ruled that it was not error for the jury to conclude that plaintiff's back injuries were not caused by the accident, where defendant's expert testified that the back injury was not traumatically induced, and that any lumbar condition was due to a congenital abnormality and chronic degenerative changes, as seen on the diagnostic films entered into evidence.); *Doucette v. Cuviello*, 159 A.D.3d 1528, 73 N.Y.S.3d 334 (4th Dept. 2018) (Vehicle passenger brought action against motorist of another vehicle for injuries sustained in accident. Sufficient evidence supported jury's verdict that motorist's negligence was not a substantial factor in causing injury to plaintiff; in light of evidence of passenger's preexisting injuries and treatment, jury could have concluded that neck and back injuries and plaintiff's consequent surgeries were not the result of the accident.)

[21] *Rodgers v. Duffy*, 95 A.D.3d 864, 944 N.Y.S.2d 175 (2d Dept. 2012) (Passenger brought action against driver and owner of vehicle for injuries sustained in an accident in which the driver was intoxicated. The court ruled that defendant failed to establish, prima facie, that the plaintiff's wrist injury was entirely preexisting and not causally related to the accident).

[22] *Rodgers v. New York City Transit Auth.*, 896 N.Y.S.2d 113 (2d Dept. 2010) (Pedestrian struck by a bus while crossing the street sued the Transit Authority and the bus driver. The court ruled that it was error for trial court to charge the jury that it could award damages for increased susceptibility to injury, where plaintiff did not allege that he sustained aggravation of any preexisting degenerative disc condition as a result of the accident. The erroneous jury charge required reversal because the appellate court could not determine wether the jury's finding of a "serious injury" under the no-fault law was unsupported by legally sufficient evidence or was contrary to the weight of evidence.); *Ortiz v. Mendolia*, 116 A.D.2d 707, 497 N.Y.S.2d 761 (2d Dept. 1986). *See*, PJI 2:282 – Personal Injury – Aggravation of Pre-Existing Injury.

[23] PJI 2:71 Proximate Cause - Concurrent Causes - There may be more than one cause of an injury. Where the independent and negligent acts or omissions of two or more parties cause injury to another, each of those negligent acts or omissions is regarded as a cause of that injury provided that it was a substantial factor in bringing

Continued on page 61

Defending Governmental Entities: Key Issues in Their Premises Case

BY: ANDREA M. ALONSO AND KENNETH E. PITCOFF

Three strong defenses are available to defense counsel representing governmental entities in premises cases: First; prior written notice laws, second; notice of claim requirements; third; one year and ninety day commencement requirement.

The Survey

In defending governmental entities in premises cases the first step is to obtain a complete survey of the area in question. This is critical to the defense of the case. As soon as defense counsel is made aware of a claim, a competent, experienced investigator must be hired to obtain a recent survey. Numerous suits are dismissed by summary judgment when a survey is submitted indicating that plaintiffs have sued the wrong governmental entity. For example: does a street, highway or sidewalk belong to: the State of New York, a county, a city, village or a public authority? This must be determined to learn what laws will be applied to the case. Don't ever assume the plaintiff knows the ownership of the premises in question. Do not rely on Google maps. Pay for a survey. At times it can provide the basis for dismissal of the case.

Prior Written Notice

Once ownership is conclusively determined prior written notice laws must be examined for the municipal entity. Many municipalities have statutory and local laws which provide protection from liability caused by defects located on certain types of property unless the municipality has received prior written notice of the defect. In addition, it must be shown there was a reasonable time thereafter for the municipality to repair the defect.

Villages

The broadest prior written notice protection is given to villages.

Village Law 6-628: Liability of Village in Certain Actions

> No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed or for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice of the defective, unsafe, dangerous or obstructed condition or of the existence of the snow or ice, relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or to cause the snow or ice to be removed, or the place otherwise made reasonably safe. (Emphasis supplied).

Towns

The next level of protection is afforded to towns. This protection is the same given to New York City in N.Y.C. Administrative Code 16-123. Unlike the Village Law which applies to street, highways, bridges, culverts, sidewalks and crosswalks, the Town Law's prior written notice requirements are limited to sidewalks and snow and ice.

Town Law 65-a(2): Liability of Towns and Town Superintendents of Highways in Certain Actions

> No civil action shall be maintained against any town or town superintendent of highways for damages or injuries to person or property sustained by reason of any defect in its sidewalks or in consequence of the existence of snow or ice upon any of its sidewalks, unless

Continued on next page

Andrea M. Alonso and Kenneth E. Pitcoff are partners in the firm of Morris Duffy Alonso & Faley.

such sidewalks have been constructed or are maintained by the town or the superintendent of highways of the town pursuant to statute, nor shall any action be maintained for damages or injuries to person or property sustained by reason of such defect or in consequence of such existence of snow or ice unless written notice thereof, specifying the particular place, was actually given to the town clerk or to the town superintendent of highways, and there was a failure or neglect to cause such defect to be remedied, such snow or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

The Village and Town Laws regarding on written notice are self-executing as opposed to Second Class City Prior Written Notice Law 244 which is not. By definition, a second class city is a city with a population of 50,000 to 175,000.

Second Class Cities

Second Class Cities Law 244: Liability of City in Certain Actions; Commencement of Actions

No civil action shall be maintained against any town or town superintendent of highways for damages or injuries to person or property sustained by reason of any defect in its sidewalks or in consequence of the existence of snow or ice upon any of its sidewalks, unless such sidewalks have been constructed or are maintained by the town or the superintendent of highways of the town pursuant to statute, nor shall any action be maintained for damages or injuries to person or property sustained by reason of such defect or in consequence of such existence of snow or ice unless written notice thereof, specifying the particular place, was actually given to the town clerk or to the town superintendent of highways, and there was a failure or neglect to cause such defect to be remedied, such snow or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

Actual or Constructive Notice

Actual or constructive notice of the defect is not a substitute for compliance with prior written notice statutes. The notice must prove that the particular condition was brought to the attention of the responsible governmental officials. It must be fairly specific as to the notice and location of the defect.

Delivery

If the notice is not delivered to the specific official designated by law, the case can be dismissed. In cases involving villages it must go to the village clerk. In towns the notice must go to the town clerk or the county highway superintendent. In second class cities the city commissioner of public works must receive the notice. Delivery to any government official will not suffice. Any private citizen, not necessarily the plaintiff, may furnish the notice. This includes any municipal employee. The Court of Appeals in Groninger v. Village of Mamaroneck, 17 N.Y.3d 125 (2011) has held that prior written notice statutes apply where any location "functionally serves the same purpose" as the location specifically enumerated by the statutes. Municipalities cannot independently expand locations specifically listed in the statutes. These attempts were held invalid under State and Federal constitutions as being beyond the supersession authority of the municipality.

There are two major exceptions to the prior written notice statutes. The first is that a municipality immediately created the defect or hazard through an affirmative act of negligence. See, San Marco v. Village/Town of Mount Kisco, 16 N.Y.3d 111 (2010). The second exception is when a "special use" confers a special benefit upon the locality. See, Poirier v. City of Schenectady, 85 N.Y.2d 310 (1995).

Prior written notice statutes are the greatest defense governmental entities have available to them in premises cases. They do not affect two other statutes which also provide a basis for dismissing plaintiff's cause of action in premises cases.

GMU 50-e-1(a)-2

The first one is General Municipal Law 50-e which provides that it is a condition precedent to commencing a lawsuit against a governmental entity and that a notice of claim must be served within ninety days after the claim arises.

General Municipal Law 50-e.

Notice of claim.

Continued on next page

1. (a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises;

2. Form of notice; contents. The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable.

Thus, if a notice of claim is not served within ninety days of a claim, plaintiff cannot serve a summons and complaint. His/her case can be dismissed upon motion. Prior written notice is not a substitute for timely service of a notice of claim.

GMU 50-i-1

The second statute which provides a defense to governmental entity premises case is: General Municipal Law 50-i-1

1. No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firefighters of any such city, county, town, village, fire district or school district or any volunteer firefighter whose services have been accepted pursuant to the provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this article, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice, or if service of the notice of claim is made by service upon the secretary of state pursuant to section fifty-three of this article, that at least forty days have elapsed since the service of such notice, and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death.

It provides that after a notice of claim has been served upon the governmental agency, an action must be commenced within one year and ninety days after the claim arose. Failure to commence within a year and ninety days after the claim will result in dismissal of plaintiff's case. Thus, the standard three years statute of limitations for negligence cases is essentially shortened to one year and ninety days.

Conclusion

In sum, in defending premises cases brought against governmental entities, the following steps must be taken:

- Obtain a recent survey of the property in question;
- Determine which governmental entity owns the property;
- If plaintiff has sued the wrong entity, move to dismiss;
- Determine which prior written notice law applies;
- Determine if proper written notice of the defect was given to the proper official and was specific and detailed;
- Move to dismiss if no written notice was given.

If prior written notice was given ask:

- Was a separate notice of claim filed within ninety days of the occurrence?
- Was a summons and complaint filed within a year and ninety days?

If a notice of claim was not filed or not timely

Continued on next page

Spinal Injury Causation in Trip and Fall Cases: Medical and Legal Perspectives

Continued from page 57

about that injury.

[24] Restatement [Second] of Torts 443.

[25] *Derdiarian v. Felix Contr. Corp.*, supra; Carolck v. Westchester Light. Co., 268 NY 345; Kingsland v. Erie County Agric. Socy., 298 NY 409.

[26] PJI 2:72 Proximate Cause - Intervening Causes - The defendant claims that (he, she) is not responsible for the plaintiff's injuries because the injuries were caused by (AB, a third person). If you find that the defendant was negligent but that the plaintiff's injuries were caused by the act of (AB) you may still find the defendant responsible for the plaintiff's injuries, if you also find that a reasonably prudent person in the defendant's situation, before the defendant allegedly committed (his, her) act of negligence, would have foreseen that an act of the kind committed by (AB) would be a probable result of the defendant's negligence. If you find that a reasonably prudent person would not have foreseen an act of the kind committed by (AB) as a probable consequence of the defendant's negligence, then the defendant is not responsible for the plaintiff's injuries and plaintiff may not recover.

[27] Meilia, Putri Dianita Ika, Michael Freeman, Herkutanto, Maurice P. Zeegers. "A review of causal inference in forensic medicine". *Forensic Science, Medicine and Pathology*. June 2020. 16, 313-320. https://doi.org/10.1007/s12024-020-00220-9.

[28] Freeman, Michael. "A Practicable and Systematic Approach to Medicolegal Causation". *Healio Orthopedics Journal*. March/April 2018. Vol. 41, No. 2, 2018, 70-72. www.healio.com/orthopedics/journals/ortho/2018-3-41-2.

[2] [9]*Scheer v. Koubeck*, 70 N.Y.2d 678, 679, 518 N.Y.S.2d 788 (1987)

[30] Shim, John. "Did The Accident Cause The Disk Herniation?" *ShimSpine*. February 2013. https://www.shimspine.com/did-the-accident-cause-the-disk-herniation.

[31] Shim, John. "Did The Accident Cause The Disk Herniation?" *ShimSpine*. February 2013. https://www.shimspine.com/did-the-accident-cause-the-disk-herniation.

[32] Shim, John. "Did The Accident Cause The Disk Herniation?" *ShimSpine*. February 2013. https://www.shimspine.com/did-the-accident-cause-the-disk-herniation.

Defending Governmental Entities: Key Issues in Their Premises Case

Continued from page 60

filed, move to dismiss. If the summons and complaint commencing the action was not served within one year and ninety days, move to dismiss. There is no simple premises case. There are numerous defenses available to governmental entities in these cases. Prior written notice is the strongest defense available. Two limitations of time shortening traditional statute of limitations also protect governmental entities: the ninety day notice of claim and the one year and ninety day limitations to commence an action. Strong defenses are available to those who represent governmental entities in premises cases and are thoroughly familiar with these statutes and the applicable case law.

The Slip and Fall of Snow and/or Ice: Defending the Case

Continued from page 56

[xvi] NYC Administrative Code 16-123(a); See also *Bogdanova v Falcon Meat Mkt.*, 107 AD3d 638, 639 (2013); Colon v 36 Rivington St., Inc., 107 AD3d 508 (2013; Rodriguez v New York City Hous. Auth., 52 AD3d 299, 300 (2008).

[xvii] Rudloff v. Woodland Pond Condominium Assn., 109 AD3d 810, 971 NYS2d 170 (2d Dept 2013).

[xviii] H.R. Moch Co. v. Rensselaer Water Co., 247 NY 160, 168, 159 NE 896, 899 (1928) (J., Cardozo) (opining that "liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty")

[xix] Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136, 138, 773 NE2d 1019, 390 NYS2d 120 (2002).

[xx] Id.

[xxi] Santos v. Deanco Servs., Inc., 142 AD3d 137 (2d Dept. 2016).

[xxii] Id. at 142.

[xxiii] See Espinal v. Melville Snow Contrs., 98 NY2d at 142; Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., 76 NY2d 220 (1990); Gor v. High View Estates Owners Corp., 17 AD3d 316, 317 (2005); Bugiada v. Iko, 274 AD2d 368, 369 (2000).

[xxiv] See Linarello v Colin Serv. Sys., Inc., 31 AD3d 396, 397 (2d Dept 2006); Gaitan v Regional Maintenance Corp., 6 AD3d 495 (2d Dept 2004).

DEFENSE ASSOCIATION OF NEW YORK, INC.

PO BOX 950, Bowling Green Station, New York, NY 10274-0950
Connie McClenin, Executive Director 212.313.3657
danyexecdir@gmail.com

PAY WITH CREDIT CARD AT
www.defenseassociationofnewyork.org

Or EMAIL:

APPLICATION FOR MEMBERSHIP 2021-2022

I hereby wish to enroll as a member of DANY.

Check one:

❑ **First Time Member - One Year Free Membership** for an attorney or law firm in the State of New York, Supreme Court, Appellate Third or Fourth Departments

❑ **First Time Member - One Year Free Membership** for an attorney admitted in New York State less than 2 years

❑ I enclose my check **Or** ❑ Email me an invoice for:

_____ $1000.00 for a Firm/Corporate Member over 20 attorneys.

_____ $750.00 for a Firm/Corporate Member under 20 attorneys.

_____ $195.00 for an individual attorney admitted to practice for more than 7 years.

_____ $100.00 for an individual attorney admitted to practice 5 - 7 years.

_____ $50.00 for an individual attorney admitted to practice 2 - 5 years.

NAME: _____

ADDRESS: _____

EMAIL: _____TEL NO.: _____

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

Please check this box ❑ if you would like to receive info on membership incentives from $500 to $875 in value when you join DRI!

Applicant: _____ Date: _____

Referred By: _____

The many BENEFITS OF DANY MEMBERSHIP include:

- Networking with peers - collegiality with fellow attorneys, in-house counsel, judges and other Bar groups

- Regular FREE CLE seminars accompanying membership meetings

- Social outings, including two annual golf tournaments*, member dinners and conferences with Judges, annual NY Yankee DANY Day*
  (*all as allowed given Covid circumstances)

- "The Defendant" magazine, consisting of professional articles in fields of practice important to our membership

- Active Young Lawyers' Committee

- Active Amicus Committee