DEFENDANT

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President's Column:

JAMES P. O'CONNOR*

"May you live in interesting times."

In looking up this quote, it has its origins as a Chinese curse.

Before going any further with my message, on behalf of our great organization, I would like to offer condolences to so many in our legal community that have experienced loss from the Coronavirus. It has impacted us all, and we pause out of respect for our members, our friends, our brothers in the bar, our Judges, our clients, our neighbors and anyone who perished from this fatal disease. Words cannot adequately express the sympathy that our organization shares with you.

It was a crazy term as your organization President. I am grateful for the opportunity that I had to host our annual Past President's Dinner this past November at the Down Town Association. Thanks to all who supported that night's festivities. Many thanks to our generous sponsors from that evening.

I am also grateful to have participated in our continuing Young Lawyer Engagement program held in October 2019 at Chelsea Piers Golf and Lucky Strike Bowl. It was a fun night. Our organization understands and appreciates that our younger lawyers are our future, and while we have had as many of our traditional events over this past year due to compliance with social distancing mandates, it was nice that one of our events supporting the engagement and recruitment of Young Lawyers was a huge success.

Again, due to our current situation, we have not been able to host our traditional top-quality "in person" Continuing Legal Education ("CLE") programs, but we have hosted several very successful ZOOM virtual CLE's. All were well-attended, and

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Editor in Chief:

VINCENT P. POZZUTO

It is my honor and privilege to serve as Editor-In-Chief of the Defendant Magazine. I cannot thank enough my partner, friend and mentor, John J. McDonough, for his years of service as the Editor-In-Chief of this publication. I walked into John's office over twenty years ago to interview for an Associate's position at Cozen O'Connor, P.C. I began learning from him during that interview and I have not stopped learning from him ever since. Aside from being a top notch trial lawyer and litigator, John is a superb teacher. He introduced me to the Defense Association of New York, counseled me through my years as a Board Member and my year as President, and has instilled me a true appreciation for scholarly legal writing. I am certain that all members of the Board and DANY join me in thanking and congratulating John for his years of dedication to DANY and this publication.

I now have the pleasure of presenting to you the Premises Liability Issue, Volume I. This issue was the brainchild of Board Member Bradley Corsair, and is entirely the fruit of his labor. My sincerest thanks to Brad, and to all of the authors who have contributed the excellent articles that you are about to read.

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Snow and Ice Cases - Storm in Progress Doctrine


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

When defending cases involving snow and ice sidewalk liability, the storm in progress doctrine should always be examined as a possible defense. Within the five boroughs of New York City, it is important to review New York City Administrative Code § 16-123 as it is the governing statute setting forth the duties owed by property owners to remove snow, ice, and dirt from their sidewalks. When the accident occurs in other municipalities outside of New York City, local snow removal laws should be examined carefully.

The general rule is that no liability can be imposed on an abutting landowner if an accident occurs while a storm is in progress. In New York City, the storm in progress doctrine has been certified by New York City Administrative Code § 16-123(a) which states that persons, who own properties abutting a street or sidewalk, have four hours from the time snow or rain stops falling to remove snow, ice, or dirt from the subject sidewalk. This four-hour grace period does not run between the hours between 9:00 pm and 7:00 am. In all cases dealing with the storm in progress doctrine, it is important to obtain certified weather data. This data can show if a storm was ongoing at the time of an alleged incident or if a storm had recently occurred.

The Court of Appeals in *Sherman v. New York State Thruway Authority*[i] recently clarified this doctrine. In *Sherman*, the plaintiff, a New York State Trooper, initiated a personal injury action after he slipped and fell on an icy sidewalk that was owned and operated by The New York State Thruway Authority. In this case, the plaintiff testified that an ice storm had occurred the evening prior to the alleged incident. The plaintiff further testified that the ice storm had turned to an "intermittent wintery mix" by 6:50am, the time that the plaintiff arrived for work and entered the troop barracks. Between 6:50am and 8:15am, the wintery mix turned into rain. The plaintiff stated that it was raining when he exited the barracks at 8:15am to walk to his vehicle. It was at this point that the plaintiff slipped and fell on a patch of ice on the sidewalk. Defendant was granted summary judgment after defendant supported the plaintiff's testimony by submitting a verified weather report confirming that rain was indeed still falling at the time of the alleged incident and that the temperature remained around freezing form the time the ice storm began until the time the plaintiff fell. The Court ruled that this evidence was sufficient to establish that a storm was still in progress and, therefore, the defendant's duty to abate the icy condition had not yet arisen..

In a strong dissent, Justice Rivera expressed concern in applying the storm in progress doctrine to instances of freezing rain. The Justice stated that summary judgment was a drastic remedy and opined about the dangers of applying summary judgment to facts where is was not completely clear as to when an ice storm ceased and a freezing rain storm began. The majority was ultimately persuaded by certified weather data confirming that the temperature remained near freezing from the time the ice storm began until the time that the alleged incident occurred.

Within the five boroughs, the storm in progress doctrine has been further refined by the New York City Administrative Code § 16-123. In *Bi Fang Zhou v. 131 Chrystie St. Realty Corp.*,[ii] a plaintiff filed suit after she allegedly slipped and fell on a sidewalk located in front of a premises owned by the defendant. Plaintiff alleged that she fell at approximately 7:30am. Defendants submitted a metrological report showing that it had snowed until 11:00pm on the night prior to the morning of the plaintiff's alleged accident. The Court dismissed the plaintiff's complaint holding that, pursuant to Administrative Code § 16-123, the defendants had until 11:00am on the date of

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* *Kevin G. Faley and Andrea M. Alonso are partners in the firm of Morris Duffy Alonso & Faley. Colleen K. Signorelli, a paralegal, assisted in the preparation of the article.*

Snow and Ice Cases - Storm in Progress Doctrine

the alleged accident to remove snow and ice from the abutting sidewalk before defendants could be held liable. The code specifically states that no snow removal needs to be done between the hours of 9:00pm and 7:00am. Since the plaintiff alleged that the accident took place at 7:30am, the defendants did not yet owe a duty to the plaintiff under the storm in progress doctrine.

In *Schron v. Jean's Fine Wine & Spirits, Inc.*[iii] the Court cited to Administrative Code § 16-123 and confirmed that owners of abutting properties have four hours from the time the precipitation ceases, not including the hours of 9:00pm to 7:00pm, to clear snow and ice from the sidewalk. The plaintiff testified that she slipped and fell at approximately 8:20am. She further testified that there was no ongoing precipitation at the time of her incident. The abutting property owners established, prima facia, that they could not be held liable for failing to clear the sidewalk at the time of the accident. Through climatological data, defendants showed that snow had fallen the night before the plaintiff's accident and in the early morning on the date of the plaintiff's accident. The Court dismissed the plaintiff's complaint and held that defendants had until 11:00am to clear snow and ice from the sidewalk before any liability could be imposed.

The Court in *Rodriguez v. New York City Hous. Auth.*[iv] also confirmed that landowners have four hours from the time a snowstorm ceases to remove snow and ice from an abutting sidewalk. In *Rodriguez*, a plaintiff slipped and fell at 8:20 in the morning. Defendants submitted certified weather data indicating that trace amount of snow fell between 2:00am and 10:00 am on the day of the incident and that the temperature remained below freezing. The Court granted defendants motion for summary judgment holding that defendants had until at least 11:00am to complete snow removal before liability could be imposed. This ruling further clarified New York City Administrative Code § 16-123 (a) and confirmed that "building owners have four hours after a snowfall stops to remove snow and ice from abutting sidewalks, excluding the hours between 9:00 p.m. and 7:00 a.m."[v]

Generally, landowners will not be liable for accidents that occur while a storm is in progress. This is well established in *Sherman v. New York State Thruway Authority*. Within New York City, the storm in progress doctrine has been clarified by New York City Administrative Code § 16-123. As demonstrated in in *Schron, Bi Fang Zhou*, and *Rodriguez*, the storm in progress doctrine may be applicable even in instances when there is no active precipitation.

In the five boroughs, under Administrative Code § 16-123, abutting landowners are afforded a four-hour grace period during which liability cannot be imposed following the cessation of precipitation. This period of suspended liability can be extended if a storm occurs between the hours of 9:00pm and 7:00am as this time period has been exempt by statute. For instance, if a defendant submits verified weather data proving that snow was falling at 10:00pm on the 1st, that defendant would have until 11:00am on the 2nd to clear a sidewalk of snow and ice before liability could be imposed. In such an instance, the four hour "clock" would not start running until 7:00am on the 2nd. This hypothetical is similar to the facts discussed in *Schron* and *Bi Fang Zhou*.

The snow in progress doctrine is an extremely useful tool in defending sidewalk and premises cases. The doctrine should be used to avoid liability in all instances where a storm is ongoing. In the five boroughs, this doctrine has been codified by New York City Administrative Code § 16-123 and should be reviewed in all instances where the facts suggest that a snow or ice storm was ongoing or has recently occurred. Many municipalities also have statutes and ordinances similar to that of New York City Administrative Code § 16-123. As such, even cases venued outside the five boroughs may have similar defense options.

It may be useful for petitioner to take the following steps when litigating a case where the storm in progress doctrine may be applicable:

- Obtain a certified weather report for the date in question and the day before the date in question.
- Examine statutes relevant to the municipality in which the accident occurred.
- Tailor deposition questions to emphasize the exact weather conditions and temperature at the time the accident occurred.

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- Consider summary judgment immediately after depositions.

In premises liability cases, the storm in progress defense may just be the best defense you never heard of.

This article was prepared by Andrea M. Alonso and Kevin G. Faley, partners in the firm of Morris, Duffy, Alonso & Faley. Kelsey Dougherty Howard, a paralegal assisted in the preparation of this article.

[i] *Sherman v. New York State Thruway Auth.*, 27 N.Y.3d 1019, 1021, 52 N.E.3d 231, 232 (2016)

[ii] *Bi Fang Zhou v. 131 Chrystie St. Realty Corp.,* 125 A.D.3d 429, 430, 3 N.Y.S.3d 21, 22 (1st Dept. 2015)

[iii] *Schron v. Jean's Fine Wine & Spirits, Inc.*, 114 A.D.3d 659, 660, 979 N.Y.S.2d 684, 685 (2nd Sept. 2014)

[iv] *Rodriguez v. New York City Hous. Auth.*, 52 A.D.3d 299, 859 N.Y.S.2d 186 (2008)

[v] *Id.* At 300.

President's Column

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all were FREE. We are proud to continue to offer value-added member benefits to our tremendous membership. I know that our CLE Committee is discussing and planning future virtual ZOOM CLEs or Webinars. Stay tuned for more details as they develop.

Unfortunately, our Annual Awards Dinner that had been scheduled for May 2020 had to be cancelled. Hopefully, we can do it again in 2021, when we pray that it will be safe for all of us to assemble again.

Our Annual Golf outing also had to be put on hold. Maybe things like Golf Outings will return before long. As a Board, we will monitor the situation closely and keep everyone posted.

I hope you enjoy this issue of The Defendant. Many thanks to editors Brad Corsair, Vince Pozzuto and John McDonough for putting it together. And, many thanks to all the great authors on their well-timed, well-researched articles. From Coverage Considerations in Premises Liability Cases to an update on the Trivial Defect Doctrine in slip, trip and fall cases, I think you will find the articles of benefit to your practice.

Finally, let me conclude by begging all of you to please stay Healthy & Safe. As a legal community, we have sacrificed much, as has everyone we associate with. It would be such a waste to see us "let our guard down," or relax from the basic public health mandates we are being asked to follow. Everyone in this organization means so much to each other. We have seen enough loss. WE CAN DO THIS!

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Distinguishing Proximate Cause From "Merely Furnishing The Occasion" For An Occurrence In A Premises Liability Action

BY MELISSA A. DANOWSKI, ESQ.

Courts and legal scholars are familiar with the difficulty of determining when an act or omission constitutes a proximate cause of an accident, or when the resulting harm is either too remote or unforeseeable to be actionable.[1] Proximate cause, a requisite element in any negligence claim, will be found to be lacking where a defendant's act or omission only furnished the occasion for the accident. However, identifying whether this legal principle applies to a given case can be elusive and challenging, particularly in the absence of a bright line rule. To further complicate matters, "if there is any doubt, confusion, or difficulty in deciding whether the issue [of proximate cause] ought to be decided as a matter of law, the better course is to leave the point for the jury to decide."[2] This article provides an examination into the doctrine and when it may apply to sever the chain of causation and relieve a defendant of liability in a premise liability action as a matter of law.

The Element Of Proximate Cause

The seminal Court of Appeals case, *Palsgraf v. Long Isl. RR Co.*, and its progeny, confirm that the proximate cause analysis should center on foreseeability. As aptly stated by the dissent in Palsgraf, "[w]hat we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."[3] Although *Palsgraf* was decided nearly a century ago, case law developments confirm that there is still no identifiable bright line test for proximate cause. True to the dissent's sentiments in *Palsgraf*, an adverse outcome or an unexpected finding of proximate cause in a given case can certainly still feel quite "arbitrary" to the defense practitioner.

"The concept of proximate cause… has proven to be an elusive one, incapable of being precisely defined to cover all situations."[4] The proximate cause element of a negligence claim is unique in that it frequently involves policy considerations to determine an end to the chain of causation in order "to place manageable limits upon the liability that flows from the negligent conduct"[5] As a default rule, issues of proximate cause are fact questions to be decided by a jury.[6] However, it is appropriate for a court to decide the question of proximate cause as a matter of law "where only one conclusion may be drawn from the established facts." [7]

Therefore, proximate cause will be found to be lacking, and thus a negligence claim cannot stand, where the defendant's acts or omission can be said to have only furnished the occasion of the event, but did not proximately cause it. Stated differently, while it is true that an accident may have more than one proximate cause, a defendant is not responsible for the harm inflicted merely because the situation that his actions created afforded an opportunity for the infliction of damages.[8]

When Does Negligence "Merely Furnish The Occasion" For An Occurrence?

Convincing a court that a claim should not go before a jury because the alleged negligent act or omission merely furnished the occasion for the event is no easy feat. The Court of Appeals has recognized that the application of this legal doctrine is, in fact, "rare."[9] Obtaining summary judgment on that basis can be an uphill battle, particularly when the case involves

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a sympathetic plaintiff and where there is a judicial preference to let a jury decide issues of foreseeability and reasonableness in marginal cases. In recognizing this frequent and commonplace challenge, the First Department in *White v. Diaz* characterized this very issue in an appeal as "[t]he *often vexatious* question of whether a negligent act may be viewed as a proximate cause of an accident, as opposed to merely furnishing the occasion for it."[10] To resolve that issue, courts "must consider not only cases involving comparable (although not identical) fact patterns, but also the broader policy concerns behind the legal issues of intervening causation and foreseeability."[11]

It also bears noting the factors that should be considered in every proximate cause challenge. The Court of Appeals in *Hain v. Jamison*, delineated the following factors to consider in the proximate cause analysis:

> Such factors include, among other things: the foreseeability of the event resulting in injury; the passage of time between the originally negligent act and the intervening act; the spatial gap, if any, between the original act and the intervening act; whether the original act of negligence was a completed occurrence or was ongoing at the time of the intervening act; whether and, if so, what other forces combined to bring about the harm; as well as public policy considerations regarding the scope of liability.[12]

As desirable an infallible bright line test may be, it is not born out by the case law. Therefore, and in line with the dictates reiterated by the First Department in White, the analysis should be guided by a consideration of the aforementioned factors, and precedent involving comparable fact patterns.[13]

In *Hain*, the Court of Appeals identified two distinguishing features that exist in those "rare" cases where it can be determined, as a matter of law, that a defendant's negligence merely created the opportunity for, but did not cause, the event that resulted in harm.[14] The first scenario will exist when "the risk created by the original negligence was not the risk that materialized into the harm."[15] In other words, the intervening act that resulted in harm was not within the scope of foreseeable risk; it was *unforeseeable*. To further simplify, these cases typically involve an extraordinary or "freakish" accident.

The second scenario referenced in *Hain* applies where "even if there was some similarity between the risk created and the actual harm, the defendant's acts of negligence had ceased, and merely fortuitously placed the plaintiff in a location or position in which the secondary and separate instance of negligence acted independently upon the plaintiff to produce the harm."[16] In those instances, the defendant's actions did not "put in motion" or significantly contribute to "the agency by which the injuries were inflicted."[17]

In other words, the harm was far too attenuated, whether by time, place, or other such factor. These concepts are best understood by considering their application in the appellate courts.

Unforeseeable or Freakish Accidents

In the first category of cases where courts have found a defendant's actions merely furnished the occasion for an accident, the factual scenario involves an accident that can be described as unpredictable, extraordinary, or freakish. For example, in *Estate of Morgana v. Staten Island Hotel*, a nineteen year old woman fell to her death from the roof of a ten-story hotel in Staten Island.[18] The decedent's mother sued the premises owner for wrongful death under a premises liability theory. The defendant, however, moved for summary judgment and submitted evidence that the decedent climbed a parapet wall and jumped from the roof of the hotel. Given the unforeseeable and "extraordinary" nature of what was likely a suicide attempt, the Second Department held that the decedent's actions were superseding and relieved the hotel of liability. The Court emphasized that liability should not be imposed upon a party who merely furnishes the condition or occasion for the event, but is not one of its causes.

The First Department in *D'Avilar v. Folks Elec. Inc.*, applied the legal principle in the context of an unforeseeable worksite accident.[19] In *D'Avilar*, the plaintiff was a helper employed by an elevator maintenance company who sustained injuries when his hand became caught while he was cleaning

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a wheel, chain, and sprocket of an elevator. His supervisor mistakenly told him that the power was off, but it was actually left on. The plaintiff opposed the defendant building's summary judgment motion by submitting an affidavit of an elevator expert who opined that there were code violations in that there should have been a guard on the sprocket, and that the machine room was not in a reasonably clean and safe condition. The First Department found that this was insufficient to overcome the defendant's showing that the failure to turn off the power to the elevator was the proximate cause of the accident. In particular, the expert did not explain how the conditions he cited would have resulted in plaintiff's injury even if the power was turned off before the plaintiff began his work. Therefore, the First Department reasoned, the absence of a safety guard on the sprocket and the allegedly dirty work area, at most, merely set the occasion or facilitated the accident.[20]

In an unusual case recently decided by the Second Department, R*aldiris v. Enlarged City Sch. Dist. of Middletown*, a father fractured his hand while pushing his two-year-old daughter on a molded bucket seat swing at a playground located on the defendant-school's property.[21] The plaintiff in *Raldiris* sued the school district and the entities involved in the design and installation of the swing. The plaintiff pursued a theory that the swing was improperly installed, causing the swing to move crookedly. The crooked movement, in turn, caused the plaintiff to reach out to stop the swing to rescue his daughter, jamming his hand in the process.

The Second Department found that the trial court appropriately granted summary judgment to the school district defendants and the construction company that installed the swing. Specifically, the court found that the alleged negligent installation of the swing was not a proximate cause of the accident, but "merely furnished the occasion for the unrelated act of the plaintiff reaching out to grab the swing and jamming his hand."[22]

The unexpected accident in *Deschamps v. Timberwolf* occurred in the context of a jobsite accident where the plaintiff's finger was severed after a ring on his finger became caught on a spiked metal ridge on a graded step on a tree-trimming work vehicle.[23] While the defendant tree-trimming company was found to have been illegally operating the business without a license, its negligent acts were found to have only furnished the occasion for the plaintiff's accident. The Court also noted that the accident was an "extraordinary occurrence" for which there is no duty to warn against because it would not suggest itself to a reasonably careful and prudent person as a harm to be guarded against.[24] Therefore, there were also strong policy considerations at play given the unlikely nature of the accident and the corresponding reluctance to impose liability for failing to prevent an extraordinary and unlikely accident.

The Second Department, in *Ortiz v. Jimtion Food Corp.*, also had the occasion to examine an unusual fact pattern.[25] In *Ortiz*, the plaintiff brought suit against the owner of a building and parking lot leased to a supermarket. The plaintiff slipped and fell on accumulated snow and ice in the back lot of the supermarket. Fortuitously, he was not injured by the fall. Instead, he was injured by a branch that struck him in the eye after using the branch to get up and off the ground after his fall. Under those facts, the Second Department found that the snow and ice condition merely furnished the occasion for his fall, but was not the proximate cause of his injury.[26] The court reasoned that the plaintiff's action of grabbing the branch, and upon releasing the branch, being struck in the eye, was not a normal or foreseeable consequence of any situation created by the defendants' alleged failure to clear the area of snow and ice. In other words, the plaintiff's eye injury, caused by a branch, was one of those freakish accidents that could not have been foreseen and guarded against by the premise owner.

As demonstrated in the above cases, freakish accidents, that are completely unforeseeable, are precisely of the kind that justifies a finding of no proximate cause. As stated by the Second Department in *Pagan v. Goldberger*, "unusual or freakish accidents occur, in which the defendant's conduct is not directly related in the continuum of time or space or personal status to the plaintiff's injury."[27] It would be manifestly unjust to impose liability in a scenario

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where the event resulting in harm could not have been predicted or guarded against by even the most prudent of persons. Therefore, it is not surprising that in cases involving extraordinary or freakish accidents on premises, courts are more inclined to find that any negligence merely furnished the occasion for the unforeseeable accident, but did not otherwise cause it.

Where There Is Intervening Negligence Of Another

The second category of cases ripe for a finding that the defendant only furnished the occasion for the accident involve an intervening act of another tortfeasor. Unsurprisingly, "[t]he line between those intervening acts which severe the chain of causation and those which do not cannot be drawn with precision."[28] Nevertheless, a common fact pattern that lends itself to resolution under the second scenario described in Hain –when there is some similarity between the risk created and the actual harm— is where the allegations of negligence against a premise owner are based on improper design, maintenance, or supervision of the property and third persons on the property. The application of this doctrine frequently applies to the common fact pattern where a third party operating a vehicle strikes and injures a pedestrian on the defendant's property.[29]

For example, in *Margolin v. Friedman*, the plaintiff was injured at a car wash when a driver lost control of his vehicle and struck the plaintiff.[30] The plaintiff argued that the entities that constructed and operated the car wash proximately caused the accident by virtue of their improper design and maintenance, including the absence of a warning sign. The Court of Appeals determined that there was no causal connection between the design or maintenance of the car wash premises and the accident. Instead, the premises "merely furnished the condition or occasion for the occurrence of the event."[31]

In *Ventricelli v. Kinney Sys. Rent A Car*, the defendant automobile lessor negligently supplied a car with a defective trunk lid to the plaintiff who, while stopped to repair the trunk, was injured by the negligent driving of a third party.[32] The Court of Appeals held that although the negligence of the lessor was, of course, a "cause" of the accident, it was not the proximate cause. Specifically, the court noted that it was foreseeable that another vehicle would impact the plaintiff, especially since he was standing "in a relatively 'safe' space, a parking space," and he might have been there independent of any negligence.[33] Under those circumstances, the court reasoned that "to hold the accident a foreseeable consequence of [the lessor]'s negligence is to stretch the concept of foreseeability beyond acceptable limits."[34]

Likewise, in *Loquori v. Brown*, the plaintiff sustained injuries when he was struck by a vehicle that was backing into a loading dock at the defendants' premises.[35] The Second Department affirmed a trial court's order granting summary judgment to the premises owner on the basis that it merely furnished the occasion for the occurrence of the event, but was not one of its causes. The plaintiff claimed that the property owner, a plumbing supply company, was negligent in the design and maintenance of the parking lot. The Second Department disagreed and found that the premises merely furnished the condition or occasion for the occurrence.[36] Instead, it was the driver's failure to see the plaintiff as he backed his vehicle towards the loading dock that proximately caused the accident.

The Second Department case of *Rattray v. City of New York*, also illustrates when an intervening act and physical distance rendered the construction and maintenance of a premises far too remote to be a proximate cause.[37] In *Rattray*, an eleven-year-old girl was riding on her aunt's bicycle on a paved pedestrian path in a park. As the girl came down a hill, she lost control of the bicycle and was unable to get the brakes to work. The child left the pathway, traversed an area covered by dirt and grass, and eventually went over a retaining wall, falling five feet to the sidewalk below. The plaintiff contended that the City of New York should have erected a barrier on top of the retaining wall and was otherwise negligent in its design and maintenance of the park. The Second Department disagreed and determined that the infant's failure to control her bicycle and the failure of the bicycle's brakes were the proximate causes of the accident. As the retaining wall was

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erected at "a considerable distance" from the paved pedestrian path, the location and maintenance of the wall merely furnished the occasion for the plaintiff's accident, but was not one of its causes.[38]

Had the retaining wall been in closer proximity to the curve in the pedestrian pathway, there might have been a different result as the likelihood of a pedestrian falling over the barrier might have been more foreseeable under those different circumstances. Under the circumstances presented in Rattray, it was simply unforeseeable that a child would lose control of her bicycle, the bicycle's brakes would not work, and she would travel such a distance to the retaining wall.

Another common factual scenario is where a person suffers burn injuries from a fire on the premise due to the intervening negligence of a third party. For example, in *Riccio v. Kid Fit*, Inc., a plaintiff attended her grandchild's birthday party at a children's gym when she was burned by a lit sterno canister that was attached underneath a chaffing serving tray for food at the party.[39] The plaintiff argued that the defendants' employees negligently disposed of the caps to the sterno canisters. She also alleged that the employees were "rushing" to set up for the next party and told plaintiff and her daughter that they needed to "hurry up" and to clear the table.[40] Although the plaintiff and her daughter asked the defendant for a metal spatula or another object to extinguish the sternos, they did not have any object on site to do so.[41] The plaintiff was thereafter injured when she attempted to lift the chafing tray across the room to the sink while positioning the lit sterno canister and tray very close to her body, setting her shirt on fire.

The trial court determined, and the Second Department agreed, that the inadvertent disposal of the caps to the sterno canisters merely furnished the occasion for the accident, and any alleged negligence did not proximately cause the injuries. In particular, the court found that it was the adult plaintiff's negligence, in carrying the sterno so close to her body, which superseded the defendants' conduct and terminated the defendant's liability for her injuries.[42]

The Fourth Department case of *Bavisotto v. Doldan*, is another matter involving burn injuries caused by the negligence of a person not affiliated with the premises.[43] In *Bavisotto*, the plaintiff was at the defendant homeowner's party when he was accidentally set on fire by another guest at the party. The guest, also a defendant in the action, sprayed kerosene onto the fire in the fire pit, and accidentally ignited the plaintiff in the process. The injured plaintiff sued the party guest under the theory that she was negligent in spraying kerosene onto the active fire. The plaintiff also sued and faulted the homeowners under the theory that they breached their duty of care for guests on their property by supplying kerosene, and by allowing the party guest to use it in a dangerous manner. Because the guest had mentioned her intention to pour kerosene on the fire, then retrieved the kerosene from a distance "pretty far away from [the] fire," plaintiff contended that the homeowners proximately caused the accident because they had an opportunity to prevent the accident and did not do so. [44]

The Fourth Department in Bavisotto held that the premise owners were entitled to summary judgment because it was the party guest who created the dangerous condition when she committed the "unforeseeable superseding act of pouring the kerosene onto an open flame."[45] That unforeseeable act, severed any casual nexus between the homeowners' negligence and the plaintiff's injuries. Under those facts, the homeowners were found to have only furnished the occasion of the event. Notably, the court mentioned that all of the guests present at the small social gathering were adults. Had the party guests been minors, there may have been a stronger argument against the homeowners to the extent that they could be charged with the reasonable foresight to prevent minors from using kerosene.

In the context of a trip and fall premise liability claim, where the defect or condition causing the fall is not identified, a strong argument exists that the premises owner only furnished the condition or occasion for the act, but did not cause it. For example, in *Santodonato v. Clear Channel Broadcasting*, the Third Department held that the defendant radio station was entitled to summary

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judgment where the plaintiff could not identify the cause of the decedent's fatal fall, other than citing to a general overcrowding condition at the premises.[46] Specifically, the defendant radio station had misrepresented that it would be conducting a live interview with celebrity Brittany Spears. This publicity stunt prompted a large crowd, including the decedent and her ten-year-old daughter. At one point, a limousine transporting a Britany Spears impersonator moved from the front of the station to a side entrance, which caused the large crowd to shift. The decedent fell and stuck her head on a garage door handle. Tragically, she died the next day.

The trial court's decision illuminates the fact that the precise cause and mechanism of the fall was not known; there were varied accounts of what may have transpired.[47] There were several conflicting theories postulated, including that the decedent was pushed by a faux body guard, bumped by a member of the crowd, pushed into a parked van, or tripped over a curb. While the trial court found that there was sufficient circumstantial evidence to generate a question of fact as to proximate cause, the Third Department disagreed, finding that the defendants only furnished the occasion for the accident.[48]

The Second Department case of *Cangro v. Noah Builders, Inc.*, similarly involved a scenario where the precise mechanism of a plaintiff's fall was unknown.[49] The defendant construction company had left empty boxes strewn across the driveway at the premises. The plaintiff was visiting the location and was alone on the premises when he decided to gather and fold the boxes. The plaintiff fell as he put one foot on top of the boxes while attempting to tie them together with a rope or cord. The Second Department determined that, even if the defendant was negligent in leaving the boxes in the driveway, that negligent act, at most, merely created an opportunity for the plaintiff's injuries and did not cause it.

The Court of Appeals case of *Hain v. Jamison* serves as an example of when a second actor's negligence will not sever the causation chain between the defendant and the harm posed.[50] While at first blush, it may appear that a farm animal straying beyond its enclosure and causing a motor vehicle accident is an extraordinary occurrence, in *Hain*, the Court of Appeals found the opposite. The court held that the defendant farm's negligence in allowing a calf to stray did more than merely furnish the occasion for a motor vehicle and pedestrian collision. In *Hain*, the calf, owned by the defendant farm, escaped its nearby enclosure and wandered into the roadway in the late evening, when the sun had already set and it was dark outside. A woman driving on the roadway came across the cow, stopped her vehicle and walked into the roadway where she was struck and killed by another driver who did not see the woman until milliseconds before the impact.

The Court of Appeals rejected the argument that the calf's escape merely furnished the occasion for the accident. The court reasoned that the farm's negligence in failing to restrain or retrieve its calf, created a risk that the calf could enter the roadway and cause a collision. It was therefore not unforeseeable, as a matter of law, that a driver would stop her vehicle and attempt to assist the calf in exiting the roadway. Notably, the plaintiff submitted proof in opposition to the Farm's summary judgment motion that indicated that the fence surrounding the farm was in poor condition and, on prior occasions, cows had escaped and wandered near and onto the roadway.

Under those facts, the risk created by the farmer in allowing the calf to wander—and that the animal's escape from the property could cause a traffic collision—was ongoing, and therefore the causal connection was not severed.

The Role Of Policy Considerations

As demonstrated by many of the cases discussed herein, strong policy considerations may justify a tipping of the scales in favor of finding no proximate cause. In the event of an unpredictable harm, it makes sense that a court would be reluctant to impose liability where the premise owner could not have reasonably foreseen the risk of harm and take action to guard against it. There is a fundamental unfairness, as a matter of policy, to impose liability for truly "unusual or freakish" accidents.[51]

Similarly, where another actor's negligence severs causation or any active continuation of negligence by

Continued on next page

the premise owner, it is only fair that the other actor bear the liability in that particular case. A common theme throughout those cases is that the defendant's ability to control third persons on their property is limited. Absent the foresight of the particular harm and ability to control third persons, it is only fair that liability be severed in such circumstances.

In such cases, the adherence to concepts of proximate cause and foreseeability "serves to place reasonable limits on liability as a matter of public policy."[52] It is in this vein that proximate cause should be "determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent."[53] The Second Department in *Pagan* suggested that an important tool of analysis in determining matters of proximate cause is to ask "is there an identifiable policy which either protects the victim of the injury or forbids liability for the injury?"[54]

Conclusion

For defense counsel, the opportunity to characterize a defendant's actions as merely furnishing the occasion for an accident, may limit liability in appropriate cases. Best practice would be to frame the facts and legal arguments in a way that analogizes the facts to favorable precedent, perhaps some of the cases mentioned in this article, to demonstrate why the defendant premises owner merely set the scene for the accident. As the decisional authority makes clear, that, in and of itself, is not sufficient for an imposition on liability. Further, the power of emphasizing policy considerations cannot be underestimated in cases where proximate cause is disputed. Such arguments may help tip the scales in favor of finding that the defendant only furnished the occasion for the event, consistent with the Court's inherent power to limit liability to manageable and fair proportions.

1 *Palsgraf v. Long Isl. RR Co.*, 248 N.Y. 339 (1928).
2 *White v. Diaz*, 49 A.D.3d 134, 139 (1st Dept 2008).
3 *Palsgraf*, 248 N.Y. at 352 (Andrews, J., dissenting).
4 *Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 314 (1980).
5 *Id.*
6 *Id.* at 312.
7 *Id.*
8 *Penovich v. Schoeck*, 252 A.D.2d 799 (3d Dept 1998).
9 *Haim v. Jamison*, 28 N.Y.3d 524 (2016).
10 *White v. Diaz*, 49 A.D.3d 134 (1st Dept 2008) (emphasis added).
11 *Id.* at 135.
12 *Hain*, supra, 28 N.Y.3d at 530.
13 *White*, supra, 49 A.D.3d at 135.
14 *Hain*, supra, 28 N.Y.3d at 530.
15 *Id.*
16 *Id.* at 532.
17 *Id.*
18 *Estate of Morgana v. Staten Island Hotel*, 140 A.D.3d 1113 (2d Dept 2016).
19 *D'Avilar v. Folks Elec. Inc.*, 67 A.D.3d 472 (1st Dept 2009).
20 *Id.* at 473.
21 *Raldiris v. Enlarged City Sch. Dist. of Middletown*, 2020 WL 465204, -- N.Y.S.3d ---- (2d Dept 2020).
22 *Id.*
23 *Deschamps v. Timberwolf,* 172 A.D.3d 1308 (2d Dept 2019).
24 *Id*. at 1309.
25 *Ortiz v. Jimtion Food Corp.*, 274 A.D.2d 508 (2d Dept 2000).
26 *Id.*
27 *Pagan v. Goldberger,* 51 A.D.2d 508, 550-551 (2d Dept 1976).
28 *Hain v. Jamison*, 28 N.Y.3d 524 (2016).
29 See, e.g., Margolin v. Friedman,43 N.Y.2d 982 (1978) (plaintiff struck by a vehicle at the defendants' car wash); Loquori v. Brown, 172 A.D.3d 1354 (2d Dept 2019) (plaintiff was struck by a vehicle near a loading dock at defendants' premise); Bun II Park v. Korean Presbyterian Church of New York, 267 A.D.2d 268 (2d Dept 1999) (finding that by providing an area to drop off passengers, the church merely furnished the occasion for a vehicle driver to lose control of his vehicle and kill a patron standing on the church's steps); Shatz v. Kutshers Country Club, 247 A.D.2d 375 (2d Dept 1998) (finding no proximate cause when the decedent was struck by a vehicle and catapulted to the ground after the vehicle's driver lost control at the country club's arrival and departure circle).
30 Margolin v. Friedman, 43 N.Y.2d 982 (1978).
31 Id. at 983.
32 Ventricelli v. Kinney Sys. Rent A Car, 45 N.Y.2d 950 (1978).
33 Id. at 952.
34 Id.
35 Loquori v. Brown, 172 A.D.3d 1354 (2d Dept 2019).
36 Id.
37 Rattray v. City of New York, 123 A.D.3d 688 (2d Dept 2014).
39 Id.
39 *Riccio v. Kid Fit, Inc.*, 126 A.D.3d 873 (2d Dept 2015).
40 *Riccio v. Kid Fit, Inc.*, No. 50146/12, 2013 WL 10725338

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Coverage Considerations in Premises Cases

BY: JULIAN D. EHRLICH[i]

Insurance coverage issues can be of decisive importance in determining which parties and insurers pay throughout tort litigation and premises cases are no exception.

For defense counsel, maximizing coverage, avoiding breaches of contract to purchase insurance and understanding risk transfer in multi-party claims may have a greater ultimate impact on the client than defending liability ordamages.

Accordingly, clients will expect defense counsel to take coverage considerations into account in protecting their interests in the underlying case.

Three recurring areas of insurance coverage that counsel defending a premises claim are likely to encounter relate to: 1) additional insured (AI) coverage; 2) certificates of insurance; and 3) insurance procurement provisions.

AI

As measured just by the number of reported decisions, the majority of AI disputes are between owners and contractors in construction site losses. However, the lessons learned from these decisions are largely transferable to owners, tenants and maintenance or repair contractors in premises cases even if the underlying liability theories may be different.

Moreover, many, if not most, construction site accidents involve the same basic mechanics as premises cases, i.e., somebody fell, or something fell on somebody.

In these scenarios, and others, where essentially failures in housekeeping are alleged be the cause of loss, owners are likely to be sued under theories of violations non-delegable statutory and common law duties. Owners will, in turn, seek to transfer the risk to tenants and maintenance or repair contractors which will have agreed to purchase insurance obligations in leases or contracts.

Those owing the obligation to buy additional insured coverages are referred to as downstream parties and those owed the obligation are known as upstream parties.

Two Standards

AI coverage has been hotly contested for years but recently there has been a vast amount of case law from the appellate divisions around the two most common variations of trigger wording.

For most copyright and manuscript endorsements, AI coverage is triggered when a loss either "arises out of work" of the named insured or "is caused by acts or omissions" of the named insured.

The "caused by" standard is found in the current 04 13 and 12 19 ISO (Insurance Services Office) AI endorsements. The "arising out of" trigger, is in the 10 01 and earlier ISO forms but is still often referenced in insurance procurement provisions and endorsements.

Understanding the courts' latest interpretation of these two standards can be of critical importance to defense attorneys since the application of AI can determine which party or insurer pays and in what order of priority.

Moreover, challenges and misunderstandings around AI coverage continue to delay risk transfer often resulting in costly declaratory judgment (DJ) actions and claims for breach of contract to purchase insurance.

Such was the case in *Port Auth. of N.Y. & N. J. v. Brickman Group*, decided by the First Department December 12, 2019, (2019 N.Y. LEXIS 8988), which contains a wide-ranging discussion and useful review of the present state of AI coverage trigger interpretation.

Continued on next page

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Coverage Considerations in Premises Cases

The underlying action involved a multi-vehicle pile-up on the Van Wyck Expressway and allegations of negligent roadway surface maintenance. Accordingly, the coverage lessons in this case are directly applicable to premises cases.

The injured parties sued the Port Authority and the Brickman Group, which had a contract with the Port to maintain the roadway, alleging that an irrigation sprinkler zone valve was negligently left open causing water seepage which froze on the roadway. At trial, Brickman was dismissed and a jury found that the Port was solely negligent.

The Port brought a DJ action against Brickman's primary CGL (Ace with a $500K SIR) and excess (Everest) insurers seeking AI coverage and alleging

breach of contract to purchase insurance against Brickman.

The Ace policy contained two AI endorsements each with separate triggers, one with "caused by acts or omissions" and another with "arising out of work." Because this decision addressed both trigger variations within the same case, it is particularly instructive.

In the DJ action, the Appellate Court held that despite the eventual finding that the Port was solely negligent, Ace owed a duty to defend to the Port above the SIR and up to the time Brickman was dismissed based on the allegations in the pleadings against Brickman and the policy coverage grant wording.

This aspect of the holding makes sense since coverage under the duty to defend is intended to pay for attorneys' fees regardless of whether the allegations have merit. See "The Duty to Defend: Contrasting Coverage and Contracts," by Julian D. Ehrlich, *NYLJ*, August 23, 2019.

In addition, the Court in Port Auth. of N.Y. & N. J., found that neither Ace nor Everest owed a duty to indemnify based on the jury finding that the Port was

solely negligent and lack of nexus between Brickman and the loss.

This portion of the holding is consistent with the latest major Court of Appeals AI case, Burlington v. N.Y.C. Tr. Auth., 29 N.Y.3d. 313 (2017), which held

that sole negligence on the putative AI upstream party defeats coverage under endorsements with the "caused by" wording.

Moreover, the Court held that the Port's claim for breach of contract to purchase insurance against Brickman was barred by a 6-year statute of limitations which began when the maintenance contract was signed.

Finally, the Court found that there was no ongoing breach for failing to purchase insurance.

Impact

The Port Auth. of N.Y. & N. J. decision provides guidance on these two most common AI trigger variations and on claims for breach of contract to purchase insurance.

As to "caused by acts or omissions," this case had the rare set of circumstances like Burlington v. N.Y.C. Tr. Auth., 29 N.Y.3d. 313 (2017), where the putative AI upstream party was solely negligent, thus, precluding additional insured coverage.

As to "arising out of operations," the Court in Port Auth. of N.Y. & N.J., even under this broader standard, there must be some nexus between the loss and the named insured which was not met in this case.

Here the existence of a contract obligating the named insured, Brickman to maintain the roadway surface without additional facts linking Brickman to the ice failed to create even a non-negligent link in the causation chain that led to the accident and thus, the putative AI failed to establish even the lower threshold for AI.

On first read, this may be a bit surprising. However, this aspect of the case may be limited to its facts because there is no discussion of the scope of responsibility in the contract and the Port only provided testimony from a single witness who failed to indicate who was responsible for the valve being left open.

Moreover, NY high courts have long held that responsibility for the situs of an accident does not necessarily equate to causal connection to the loss.See, *Worth Constr. Co., Inc. v. Admiral Ins. Co.*, 10 N.Y.3d 411 (2008).

However, the Court in *Port Auth. of N.Y. & N.J.* did suggest that where the named insured is the claimants' employer, the employment relationship will satisfy the "arising out of work" trigger for AI cover. Nonetheless, as made clear in Burlington, an employment relationship alone will not satisfy the

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caused by acts or omissions" trigger.

An important lesson learned from *Port Auth. of N.Y. & N.J.* is that the putative AI must develop a sufficient nexus between the loss and the named insured through discovery and investigation to trigger coverage. Often in premises cases, this will involve matching the description of the premises and responsibilities of the tenant in the lease with witnesses' description of the loss location and condition alleged to have caused the accident.

Certificates

Another aspect of coverage important for defense counsel in premises cases to recognize relates to certificates of insurance.

It is common practice for upstream parties to require and collect certificates of insurance as proof of downstream parties' compliance with contract requirements to purchase insurance.

Certs are often derided as "not worth the paper they are written on" but courts can give significant weight to certs.

Moreover, certs typically have useful information as to lines, limits, policy numbers and the identity of issuing insurers which can be helpful in determining where to direct tender letters.

Acord provides widely used copywrite certificate forms. These forms contain a host of disclaimers reflecting the intent that the insurance policy rather than the cert govern the scope and terms of coverage.

However, in a decision dated October 10, 2019 which generated national attention, numerous amicus briefs from general contractor and insurance trade groups and widespread commentary, the Washington State Supreme Court in *T-Mobile USA, Inc. v. Selective Ins. Co. of Am.*, 194 Wn. 413 (2019), held that a certificate bound AI coverage despite the Acord disclaimers.

The facts span the country but are straight-forward and familiar. T-Mobile NE, Inc., a subsidiary of T-Mobile USA, hired a contractor, Innovative Engineering Inc., to install a cell tower on a rooftop in NYC. The building owner claimed damage and sued Innovative, T-Mobile NE and the parent TMobile USA.

The CGL insurer for Innovative, Selective Insurance, accepted the AI tender for T-Mobile NE based on a blanket AI endorsement but denied a similar tender by T-Mobile USA arguing there was no contract procurement requirement for that entity. T-Mobile USA as a putative AI argued that the Acord 25 cert issued by Selective's agent indicating there was AI coverage was binding notwithstanding the disclaimers on the cert.

The cert contained seven (7) separate disclaimers including that it was for information only, conferred no rights on the certificate holder, did not amend, extend or alter the coverage provided by the policy, did not constitute a contract, if the cert holder is an AI then the policy must be endorsed and finally, that the cert does not confer rights on the cert holder in lieu of such endorsements

T-Mobile USA brought a DJ action against Selective seeking AI coverage. Through twists and turns, the case wound its way to the United States Court of Appeals for the 9th Circuit which certified the question of the disclaimer's effect to the Washington State Supreme Court.

That Court found that because the cert was issued by the insurer's authorized agent, it bound AI coverage. The specific, written-in statement of AI cover prevailed over the general preprinted disclaimer. Because the disclaimers "completely and absolutely contradict[ed]" the specific promise of coverage, giving the disclaimer effect would render the cert "pointless."

Cert Disclaimers

Disputes around certificates often present in the context of AI coverage like T-Mobile USA so on first read, this decision could be viewed as a significant change especially if adopted by other jurisdictions.

The dissent and some commentators have criticized the decision as resulting in a windfall to a party that never contracted for or purchased insurance.

They argue that there was no need to interpret the cert in a manner understandable to the average person when the putative AI here was a sophisticated business entity with extensive experience in insurance matters. If there is now AI coverage not written in the policy, what are the terms of that coverage?

A cert simply cannot supplant a policy or as stated by the New Hampshire Supreme Court in *Bradley Real Estate Tr. v. Plummer & Rowe Ins. Agency, Inc.*, 136 N.H.1,4 (1992), "the certificate is a worthless document."

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However, a closer read of *T-Mobile USA* reveals a heavy emphasizes on the nature of this agents' relationship with the insurer. As noted by the 9th Circuit, for years the insurer had delegated authority to the agent to execute and issue binders, policies and certs. The agent's authority to bind the principal insurer was decisive.

Moreover, when a Court uses phrases like "in these circumstances" and "under Washington law," there is built-in caution not to over read.

The long standing general rule has been that agents can bind insurers while brokers cannot. Indeed, in T-Mobile USA, the Court reaffirmed a prior finding no coverage where a cert was issued by a broker.

Nonetheless, forewarned is forearmed and now there is a high court decision which finds the Acord disclaimers ineffective and that a cert can bind an insurer to provide coverage not contained in the referenced policy - at least where issued by an agent granted wide authority by that insurer.

Procurement Provisions

The allocation of risk through insurance between owners, tenants, and maintenance and repair contractors typically originates with insurance procurement provisions in lease and trade contract agreements.

However, unlike insurance policies which are more often either on ISO forms or based on ISO wording, there is no standard procurement wording.

Accordingly, attorneys representing owners, tenant and contractors may be requested to review or draft and likely will need to interpret such provisions.

Again, in this context it is incumbent upon defense counsel to maximize coverage and minimize the chance of putting clients in breach.

Lack of clarity in insurance procurement provisions has generated a great deal of coverage litigation. These costs to parties and insurers often could have been avoided had procurement provisions been clearly worded at time of drafting.

This is increasingly important as insurance requirements become more sophisticated and comprehensive, and more states restrict AI requirements in anti-indemnity statutes.

In a time of increasing self-insured retentions and deductibles, and as socalled swiss cheese policies rife with exclusions become more common, defense attorneys can expect more involvement with insurance procurement provisions. See "Insurance Procurement Provisions; What to Leave in, What to Leave Out," by Julian D. Ehrlich, NYLJ, July 30, 2018.

Conclusion

There are, of course, many other potential insurance issues that may be important for attorneys defending premises cases.

For example, defense counsel should have a working understanding of antisubrogation, where coverage can bar cross claims between multiple insureds covered on the same policy for the same risk.

And of course, since Shaya B. Pac. LLC v. Wilson, Elser, Moscowitz, Edelman and Dicker, LLP, 38 A.D.3d 34 (2006), defense counsel must be cognizant of notice to all applicable lines and layers of coverage.

The list goes on, but this discussion ends.

Contrary to the belief prevalent among some old school thinking, defense attorneys' working understanding of coverage implications is essential to representing clients.

Construction Defect Claims: A Mediator's Perspective

BY: RICHARD P. BYRNE, ESQ.

Construction defect claims often evolve into one of the most complex, expensive, unwieldy and exasperating types of litigation. Numerous parties, extensive documentation, never-ending depositions and competing experts - with underlying insurance coverage disputes and parallel declaratory judgment actions - have the potential to cumulatively present all the negatives of the litigation process in one setting. This article will address the alternative route of Mediation as a means to cast a net over the situation and provide a forum to address the issues in a controlled fashion - before the parties and their insurers find their resources impaired and their options curtailed by litigation - with no way to reverse course.

Aggregating the parties and their issues

To begin, the parties and their issues need to be aggregated as a means to organize the litigants and identify those with commonality. The Mediator should begin with a basic breakdown of the parties' roles on the project: (i) owner; (ii) developer; (iii) general contractor/construction manager; (iv) subcontractors; (v) and design professionals. Within the category of subcontractors, the parties can then be broken down further by trades. For example: (i) demolition contractors; (ii) framers; (iii) roofers; (iv) façade contractors; (v) window installers; (vi) drywall contractors; (vii) painters; (viii) plumbers; and (ix) electricians. The same can be done with the design professionals: (i) architects; (ii) engineers (civil, structural, soils); and (iii) landscape designers.

These parties should then be grouped based upon the issues with which they are involved - with those issues, in turn, prioritized. As a result, if one of the leading issues concerns water infiltration via the façade, the Mediator should be looking to group the general contractor, framers, window installers and façade contractors. The point of the exercise being to create and implement the most effective means of communication with the parties whose work is at issue.

Owner/developer

In looking at the parties' respective relationships to the claims through the lens of a Mediator, we begin with the owner. The owner is often a Homeowners Association or Condominium Board that has recently taken control from the developer and, in doing so, had an engineering firm come in, perform an inspection, and prepare a Transition Report, which has identified a host of alleged defects/deficiencies in the construction. The drivers in the case, therefore, may be a board of lay person unit owners, represented by a law firm which specializes in construction defect litigation, who believe that they have been victimized by the developer and are concerned that their units may have significant flaws - impacting the value of their property. From a Mediator's perspective, he or she needs to be mindful of this reality and manage the emotional component of the claims from the start.

The developer, while facing the direct wrath of the unit owners, is going to endeavor to point downstream to everyone else, but may be facing independent claims relative to the representations made to the then prospective purchasers. And there may be an affiliation between the developer and the general contractor with consequent efforts under way by the unit owners to pierce the corporate veil. That may ultimately prove to be a pressure point at the Mediation, which the Mediator can employ to encourage full participation at all levels.

General contracting

The general contractor, though, is generally going to be the prime practical target for the plaintiffs since they are the party ultimately responsible for the construction and the alleged defects. The general contractor also provides the point from which the plaintiffs' claims are pressed down to the subcontractors as well as their insurers. From a Mediator's perspective, the general contractor has to come to understand that despite any expectations to the contrary, they are not

Continued on next page

Constructing Defect Claims: A Mediator's Perspective

going to be able to off-load all of the risk and exposure downstream and that they, in the end, may be facing a significant percentage of the ultimate settlement. Out of the gate, this should be employed as an incentive for the general contractor to take the lead on gathering up all of the parties' contract documents and insurance information.

In this regard, on a practical level, one of the early goals of the Mediation process is to identify where the coverage lies. Developing a coverage chart is critical - outlining where the coverage stands horizontally and vertically - and who is claimed to be an additional insured on whose policies.

Subcontractors

While the general contractor might have strived for contractual consistency and uniformity in approach at the first level of subcontracting, it can all fall apart at the next level of sub-subcontractors - with poor contract documents and missing or vaguely defined obligations relative to contractual indemnification and additional insured status. As a result, it is very important for the Mediator to understand and appreciate the contractual relationships beginning with the general contractor and flowing downstream to those with hands-on responsibility.

There are a host of issues in this vein relative to the subcontractors, which leads us back to the aggregation of the parties and their issues. Whose work is in question? Which subcontractors have a second-tier of sub-subcontractors? What do their respective contracts and insurance documentation provide? Are any of the subcontractors now defunct and/or uninsured? Will there be finger-pointing back at the general contractor based on the oversight of the project and the coordination of the trades?

Design vs construction

It is also important to determine if issues are being raised relative to alleged flaws in design. The overriding question is whether damages flowed from deficiencies in the original design or whether the defects claimed stem from the manner in which the work was performed and a failure to follow the design. It is obviously not a straightforward question and can be the subject of great debate. Here, though, there is often a sub-plot of the design professionals being insured via cost-inclusive policies - meaning that every dollar spent on defense is one less dollar available for indemnity. From a Mediator's perspective, this dynamic can cut both ways and the prospect of a design professional's coverage being dissipated by defense costs, leaving the design professional under/uninsured, can be employed as leverage for an earlier contribution towards settlement.

Experts

The debate of construction vs. design also leads us to the topic of experts who, of course, play a central role in construction defect litigation and efforts to mediate the parties' differences. As noted earlier, it is generally an expert which first framed the claims by preparing a Transition Report that identified a wide range of defects in the construction. Those claims, in turn, need to be addressed by experts retained to defend the design and the construction and/or point fingers at others who, in response, have to do the same. The inherent costs are obvious, and the experts' opinions drive the litigation not only as to liability, but as to damages as well. For example, what are the repair protocols being advanced and how are those proposed "fixes" being countered by the experts on the other side? In the meantime, the experts also play a role in testing - particularly invasive testing, and all the negotiations that go into the development and implementation of testing protocols. The experts' views can additionally have an impact on the coverage issues, e.g., the timing of the "occurrence(s)" and whether and to what extent third-party damage has, in fact, taken place for purposes of implicating the contractors' policies.

As a result, not surprisingly, the experts play a key role at Mediation. They need to present the claims and defenses and be able to respond to inquiries posed so that the attorneys are simply not arguing over their respective interpretations of the experts' opinions and filtering those opinions when advantageous to their case.

Insurance coverage

Overlaying all of this is the question of insurance coverage. To begin, we have the well-known legal

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precept that the duty to defend is broader than the duty to indemnify; meaning, that if the allegations of the Complaint are adequate to trigger coverage, even theoretically, an insurer is obligated to defend. This becomes critical in the context of construction defect litigation because the greatest fear for the primary insurers of the lesser players is that they will get hooked on the defense and never be able to step away. They may admittedly have limited coverage from an indemnity perspective but, in the end, could pay more in defense than their limit of liability. From a Mediator's perspective, this is important because the primary insurers may ultimately consider releasing their coverage defenses and contribute toward settlement due the harsh economic reality of doing otherwise.

Compounding matters further, these insurers may have the obligation to defend more than one party and/or under more than one policy. As a result, when it comes time for Mediation, there is great debate and discussion over the insurers' respective defenses and limitations to coverage as a means of prioritizing the various insurers' levels of participation. Issues can relate to the broad topic of coverage for faulty workmanship (depending on the state's law, which may control)to inter-insurer arguments over which policies on the horizontal timeline are implicated, and on to specific exclusions that may limit the scope of coverage - many of which are now customized or "manuscripted" through a particular insurer.

Setting aside the traditional coverage issues between particular contractors and their insurers, there are additional battlegrounds with upper tier contractors seeking coverage under the lower tier contractors' policies by way of claims for additional insured status and contractual indemnification coverage. Tenders are conveyed; possibly accepted - but often rejected or deferred – all of which sets the stage for coverage litigation.

These parallel declaratory judgment actions can take the form of insurer versus the insured - where the insurer is seeking to limit the scope of its coverage or the number of policies exposed. Or they can take the form of claims by purported additional insureds seeking confirmation that they have coverage under a lower tier contractors' policy. They can also take the form of excess insurers bringing suit against primary insurers which are seeking to employ a non-cumulation endorsement or a pre-existing damages exclusion to limit their coverage horizontally.

Obviously, these parallel actions need to be drawn into the Mediation process as well if resolution is to be achieved. From a Mediator's perspective, he or she needs to focus on the issues to which the insurers will be most sensitive: (i) first and foremost, the cost - particularly with those insurers that may be defending one or more parties in the underlying litigation; (ii) the reality that a trial in the underlying matter will not resolve issues attendant to coverage; (iii) the potential ramifications of an uninsured verdict against an insured; and (iv) the risk of unfavorable judicial interpretations and bad precedent relative to the insurers' policy language.

The alternative of mediation

When all of these issues are considered together, Mediation becomes increasingly attractive. Indeed, it is the only forum where all of the parties' respective interests can be addressed in one setting. Now, that is not to say that the road is easy - even the mechanics of the Mediation itself can be daunting. Great advance work needs to be employed in order to coordinate and address the issues in an effective fashion, which often entails a series of preliminary telephone calls, meetings, small-scale Mediation sessions and the like as a means by which foundational goals can be identified and, hopefully, achieved. Part of that foundation building may also involve the need for limited discovery. Here, the exchange of contracts, insurance policies, expert reports and project files may be necessary and productive. Indeed, limited expert testing may also assist in addressing questions of liability, damages and coverage. That limited discovery, though, in and of itself, will also provide a taste of the tremendous amount of time and expense which will be incurred if the case is not settled and is allowed to proceed into full-blown discovery.

The bottom line is that while the Mediation of construction defect claims is a significant undertaking, it provides the most effective route for parties to gather, air and resolve the wide-range of disparate interests presented, short of years of expensive and ultimately unsatisfying litigation.

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Playground Safety

BY: KENNETH A. KRAJEWSKI*

Introduction

Playgrounds are a great place for children to enjoy needed exercise and to develop essential social and cognitive abilities[1]; however, they can also be dangerous. In fact, each year in the United States, according to the U.S. Consumer Product Safety Commission (CPSC), more than 200,000 children are sent to emergency rooms because of playground-related injuries. Many of these injuries, such as fractures, lacerations, and concussions, can be serious.[2] Fatalities, while not common, can also occur on playgrounds. From 2009 to 2014, there were 34 deaths associated with playground equipment, with the average victim being about 5 years old.2 Of the 34 deaths, 19 of them were caused by hangings or asphyxiations, 10 were associated with slides or swings, and 8 were the caused by head or neck impact injuries.[3]

In 1981, as a response to the growing number of serious accidents reported on playgrounds, the CPSC published its first Public Playground Safety Handbook (Handbook).[4] The Handbook has been revised several times over the years, with the latest revision occurring in 2010.[5] The goal of the Handbook is to promote greater safety awareness among those who purchase, install, and maintain public playground equipment.[6] The Handbook is intended for use by childcare personnel, school officials, parks and recreation personnel, equipment purchasers and installers, playground designers, and members of the general public.[7] The Handbook's recommendations address the hazards that have caused playground injuries and deaths.[8] Currently, several states[9], including New York, have adopted all or part of the CPSC or American Society for Testing Materials (ASTM) guidelines.[10]

The CPSC believes that compliance with the Handbook's recommendations along with other technical information in the ASTM standards[11] will contribute to greater playground safety.[12] There is some evidence to suggest that the CPSC is correct. The National Program for Playground Safety (NPPS) conducted a study in which they graded playground safety in all 50 states.[13] The study took into account several factors such as supervision, age-appropriate design, fall surfacing, and equipment maintenance.[14] According to the study, states that adopted the CPSC guidelines, on average, scored higher than those that did not.[15]

This article provides a brief overview of the recommendations contained in the CPSC's Public Playground Safety Handbook. Nevertheless, not every recommendation in the Handbook is mentioned. The purpose of this article is only to give a general idea the recommendations provided in the Handbook. We begin with a brief summary of the general considerations that playground designers should take into account when designing a playground. Next, we summarize some of CPSC's recommendations regarding equipment related hazards, which were the leading cause of reported injuries on playgrounds from 2009 to 2014.[48] The last two topics addressed are 2 playground maintenance and the Handbook's recommendations regarding the design of various playground parts.

General Playground Considerations

The Handbook begins by discussing general playground considerations, which are meant to provide park designers and architects with guidance for creating a safe playground. This section offers suggestions on site selection, playground layout, selecting equipment, surfacing, and equipment materials.

There are several important factors that park designers should consider when selecting a site for a new playground. For instance, the CPSC recommends that park designers select playground sites that are

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free from hazards, such as fallen tree limbs, puddles, or large rocks, that prevent children from moving freely about the playground.[16] If the site contains such hazards, however, the Handbook recommends that they should be cleared.[17] Next, playgrounds should be blocked off from nearby hazards, such as small bodies of water that children could easily wander into.[18] The Handbook suggests creating barriers such as fences or dense hedges to contain children within the playground.[19] Furthermore, playground sites should have proper drainage to prevent surfacing materials from washing away.[20] Lastly, the Handbook advises that designers should take into account the amount of sun exposure in an area, as metal slides and platforms can heat up and burn children.[21] Moreover, exposure to the sun during the most intense parts of the day may increase the risk that a child develops skin cancer.[22]

Next, the Handbook discusses fundamental factors to remember when designing the layout of a playground. First, the Handbook recommends that playgrounds contain accessible surfaces in play areas that meet ASTM standards[23], and which ensure the opportunity for disabled children to use the playground.[24] Second, playgrounds should be separated into distinct areas for children of different age groups.[25] Third, the play area should be organized into different sections to prevent injuries caused by conflicting activities and children running between activities.[26] Fourth, playgrounds should be laid out so that playground supervisors can watch the children as they move throughout the playground.[27] For example, a parent watching a child in the younger children's area should be able to see children playing in the older children's area.[28] Lastly, a playground should contain signs that give parents and supervisors some guidance as to the age appropriateness of the equipment.[29]

Selecting proper playground equipment is also important. When selecting playground equipment, the Handbook recommends that park designers know the age range of the children who will be using the equipment, as children of different ages and stages of development have different needs and abilities.[30] Playgrounds should stimulate children and encourage them to develop new skills. To avoid serious injuries, however, the CPSC recommends that playground equipment should be tailored to children's sizes, abilities, and developmental levels.[31]

Falls from, into, or onto playground equipment are one of the leading hazards on playgrounds, accounting for about 44 percent of reported incidents from 2001 to 2008, and about 17 percent from 2009 to 2014.[32] To mitigate harm caused by falls, the Handbook offers guidance on proper surfacing material that should be used on playgrounds. For example, playgrounds should never be installed over hard surfaces. Instead, the guidelines recommend installing loose-fill surfacing materials such as engineered wood fiber, shredded rubber mulch, wood chips[33] or unitary surfacing materials such as rubber mats or tiles, poured in place rubber, and rolled products like artificial turf.[34] Both loose-fill and unitary surfacing material may be used as long as they comply with ASTM guidelines.[35] The Handbook generally recommends never using less than 9 inches of loose-fill material.[36] The Handbook's guidelines also suggest that park designers and manufacturers test their surfacing material, using the testing methods described in the ASTM safety standards. For example, manufacturers should test their surfacing materials to determine the "critical height" rating of the surface.[37] The critical height is the approximate fall height below which a life threatening head injury would not be expected to occur.[38] By calculating the critical height rating of surfacing materials, park designers can design playground equipment, such as elevated platforms, at safer heights for children.

The CPSC also recognizes that certain materials such as metals, paints and finishes, and chemically treated wood may pose risks to children. The Handbook advises against using bare metal for platforms because metal equipment may heat up when exposed to sunlight and cause burn injuries.[39] Regarding paints and finishes, park designers may use them.[40] Nonetheless, if they contain preservatives or chemicals, manufacturers should ensure that a child cannot inhale or absorb hazardous amounts of those chemicals.[41] Next, the Handbook advises that playgrounds with lead paints should be identified, and that strategies to prevent children from being exposed should be developed.[42] With regard to wood based materials, the guidelines state that creosote-treated wood[43], and wood coatings that contain pesticides should not be used on playgrounds.[44]

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Older playgrounds, however, may contain wooden surfaces treated with a chemical called chromate copper arsenate, which contains arsenic (CCA).[45] Several groups have suggested applying surface coatings to CCA-treated wood to reduce a child's exposure to arsenic from the wood surface.[46] CPSC and EPA studies suggest that regular use of an oil or water based, penetrating sealant or stain can reduce arsenic exposure from CCA treated wood.[47]

Equipment related hazards

From 2009 to 2014 equipment related hazards replaced falls as the most reported cause of injury on playgrounds.[48] The Handbook points out that playground equipment can crush, shear, entangle, impale, or entrap a child's limbs.[49] For that reason, the Handbook contains several guidelines on how to avoid injuries caused by playground equipment.

Head entrapment, in particular, is a major concern on playgrounds because it can cause strangulation and death[50], and because the hazard may not be patent or overt. Head entrapment occurs when a child's head becomes stuck in between an opening, such as the vertical bars of a barrier, and the child is unable to remove his head.[51]

To prevent head entrapment the Handbook recommends that playgrounds should be designed so that parts or groups of parts should not form an opening that could entrap a child's head.[52] Moreover, the Handbook provides a simple, step-by-step test that park designers, childcare workers, or other supervisors can use to test whether piece of equipment poses an entrapment risk.[53] The test involves using templates based on the torso of the smallest user at risk, and the largest dimensions on the head of the largest child at risk.[54] To test an opening, a person must first attempt to place the small torso template into the opening.[55] If the torso template cannot freely pass through the opening, then the opening does not pose an entrapment risk.[56] If the torso template, however, can move freely through the opening, then the large head template should then be tested.[57] If the opening admits the small torso template but does not admit the large head template, it poses an entrapment risk.[58] Using this test to determine what pieces of equipment present entrapment risks could help playground supervisors prevent serious injuries as they can provide greater supervision to children using those pieces of equipment.

Protruding objects on playground equipment are another hazard addressed by the Handbook.[59] The Handbook points out that a child may fall into, collide, or become entangled with a piece of equipment containing a protruding object such as a hook or bolt.[60] To avoid such risks, the guidelines recommend that playground equipment should not contain protruding objects large enough to entangle a child's clothing or to impale the child.[61] To aid playground designers, the Handbook provides guidance on how to mitigate injuries from collisions with playground equipment. For instance, any hooks protruding from playground equipment should be closed so that there is no gap or space greater than 0.04 inches.[62]

Lastly, children at play may be injured by sharp edges, suspended components such as cables, and by tripping hazards such as to sudden changes in elevation.[63] Thus, the CPSC also provides several recommendations on how to avoid these risks. For example, the CPSC recommends that all metal edges should be rolled or have rounded capping, and that slides should free from sharp objects.[64] Regarding suspended hazards, the Handbook recommends, among other things, keeping them out of high traffic areas.[65]

Playground Maintenance, Inspection, and repair

CPSC recognizes that proper maintenance of playground equipment is crucial to playground safety.[66] Thus, the Handbook recommends that all playground areas and equipment should be routinely inspected for wear, deterioration, and any potential hazards.[67] Loose-fill surfacing[68], in particular, should be checked frequently to ensure surfacing has not displaced significantly, especially under swings or slides.[69] The Handbook further advises playground maintenance workers to strictly follow the manufacturer's maintenance instructions and recommended maintenance schedules.[70] If the manufacturer does not provide a maintenance checklist, the Handbook contains a checklist that may be used as a general guide for routine inspections of public playgrounds.[71] Additionally, some insurance providers may provide general guidelines or checklists for proper playground

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maintenance on their websites.[72]

Although the Handbook provides a maintenance checklist, it does not provide a fixed schedule for playground inspection. Instead, it recommends that playground maintenance workers either follow the manufacturer's instructions regarding the frequency of maintenance inspections or develop their own schedule based on actual or anticipated playground use.[73] While important, maintenance inspections alone do not constitute a comprehensive maintenance program.[74] The Handbook further advises that any issues found during an inspection should be noted and promptly repaired. Such repairs should be completed following the manufacturer's instructions.[75] Lastly, Handbook instructs that records of any maintenance inspections including the manufacturer's maintenance instructions should be retained.[76]

Parts of the Playground

The final section of the Handbook contains many recommendations on how different parts of a playground should be designed to reduce injuries. It begins with guidelines for designing platforms, guard rails, and protective barriers.[77] For example, the guidelines advise that guard rails and protective barriers should completely surround any elevated platform. Moreover, they should be designed to discourage children from climbing over or through the barrier, to prevent unintentional falls, to prevent the possibility of entrapment, and to facilitate supervision.[78] Height requirements, which vary according to the age of the user, are also mentioned. For example, the recommended maximum height of a stepped platform (a platform layered so that a child may access higher platforms without steps or ladder) for toddlers is 7 inches, for preschool-age children 12 inches, and for school-age children 18 inches.[79] Next, this section also provides recommendations on how access methods to play equipment such as ramps, stairways, and ladders should be designed to prevent injuries.[80] For example, the Handbook recommends that stairways and rung ladders should be designed so that the spaces between the stairways or the rungs do not create an entrapment hazard.[81] The handbook also provides a chart with the recommended dimensions for access ladders, stairs, and ramps.[82]

Lastly, this section of the Handbook provides recommendations for the design of "major" playground equipment.[83] Major types of playground equipment include swings, slides, seesaws, balancing beams, merry-go-rounds, log rolls, and climbing equipment.[84] For each piece of major equipment, the Handbook discusses how it should be designed, including the appropriate fall height. The fall height of a piece of equipment is the distance between the highest designated play surface on the piece of equipment and the protective surface beneath it.[85] The Handbook also provides age recommendations for some pieces of equipment. For example, log rolls, which require greater balance and strength to use should have handholds for children to assist with balance and are not recommended for toddlers or preschool aged children.[86]

Conclusion

reduce the frequency and seriousness of such injuries. The CPSC's Public Playground Safety Handbook offers many guidelines intended for park designers, teachers, schools, childcare workers, and parents to use in order to reduce the chance that a playground-related injury will occur. The guidelines discuss several dangers that may be found on playgrounds and offers recommendations on how to avoid them. Such dangers include falls, equipment-related hazards, collisions, entrapment, and more. Most of the guidelines discuss ways to properly design playgrounds in order to prevent or reduce the amount and severity of playground related injuries. The CPSC believes and some evidence suggests that following the recommendation in the Handbook will contribute to greater playground safety. Thus, park designers, parents, and childcare workers should use the Handbook as guidance or simply as a way to learn more about public playground safety.

1 http://voiceofplay.org/benefits-of-play/

2 U.S. Consumer Product Safety Commission, Injuries and Investigated Deaths Associated with Playground Equipment 2009-2014 at 16. Published August 2016.

3 Id.

4 https://playworld.com/psi_files/web/dwnld/PlayworldAuditGuide.pdf.

5 U.S. Consumer Product Safety Commission, Public Playground Safety Handbook.

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Playground Safety

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6 Id. at 1
7 Id.
8 Safety Handbook at 3.
9 http://www.playgroundsafety.org/standards/regulations
10 NY Gen. Bus. § 399-dd
11 The following ASTM standards have to do with to playground safety: ASTM F1487, F2373, F2075, F2223, F1292, F2479, F1951, F1816, F2049, F1148, and F1918.
12 Safety Handbook at 1.
13 http://www.playgroundsafety.org/research/state-report-cards
14 http://www.playgroundsafety.org/sites/default/files/us.pdf
15 Id.
16 Handbook at 5
17 Id.
18 Id.
19 Id.
20 Id.
21 Id. at 5
22 Id.
23 Id. at 6
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 Id. at 8
31 Id.
32 Injuries and Investigative Deaths associated with Playground Equipment at 6.
33 Id. at 9
34 Id., see also http://www.playgroundmedic.com/?surfacing, https://www.zeager.com/planning-resources/playground-ground-cover-materials/
35 Safety Handbook at 9
36 Id. at 10
37 Id. at 9
38 Id.
39 Id. at 12
40 Id.
41 Id.
42 Id.
43 Creosote is a wood preservative derived from the distillation of tar from wood or coal. See https://www.epa.gov/ingredients-used-pesticide-products/creosote
44 Safety Handbook at 12
45 Id.
46 Id.
47 Id.
48 Injuries and Investigated Deaths Associated with Playground Equipment 2009 to 2014, at 6.
49 Id. at 14, 15
50 Safety Handbook at 15
51 Id.
52 Id.
53 Id. at 52.
54 Id.
55 Id.
56 Id.
57 Id.
58 Id.
59 Id. at 14
60 Id.
61 Id.
62 Id.
63 Id. at 16
64 Id.
65 Id.
66 Id. at 18
67 Id.
68 E.g. wood chips or rubber mulch.
69 Safety Handbook at 18.
70 Id.
71 Id.
72 https://www.churchmutual.com/7428/Playground-safety-and-maintenance, https://www.markelinsurance.com/-/media/specialty/risk-management/safety-guides/safe-playgrounds-tip.pdf?la=en, https://www.hanover.com/risksolutions/playground-inspection.html
73 Safety Handbook at 18.
74 Id.
75 Id.
76 Id. at 19
77 Id. at 20
78 Id.
79 Id.
80 Id. at 22
81 Id. at 23
82 Id.
83 Id. at 24
84 Id. at 24-33
85 Id. at 4
86 Id. at 30.

Distinguishing Proximate Cause From "Merely Furnishing The Occasion" For An Occurrence In A Premises Liability Action

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(N.Y. Sup. Ct. Dec. 09, 2013).

41 *Id.*

42 *Riccio*, 126 A.D.3d 873 at 874.

43 *Bavisotto v. Doldan*, 175 A.D.3d 891 (4th Dept 2019).

44 *Id.* at 894.

45 *Id.* at 893.

46 *Santodonato v. Clear Channel Broadcasting*, 6 A.D.3d 543 (3d Dept 2006).

47 *Santodonato v. Clear Channel Broadcasting, Inc.*, 791 N.Y.S.2d 310 (N.Y. Sup. Ct. Broome Cty. 2004)

48 *Santodonato*, 6 A.D.3d at 545-546.

49 *Cangro v. Noah Builders, Inc.*, 52 A.D.3d 758 (2d Dept 2008).

50 *Hain v. Jamison*, 28 N.Y.3d 524 (2016).

51 *Pagan v. Goldberger*, 51 A.D.2d 508, 509 (2d Dept 1976).

52 *Id.*

53 *Id.* at 509-510.

54 *Id.* at 512.

Constructing Defect Claims: A Mediator's Perspective

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Richard P. Byrne, Esq., has successfully mediated issues in a wide variety of specialty areas, including commercial matters, employment discrimination claims, employment contract disputes, construction litigation, complex personal injury and property damage claims, together with insurance, reinsurance and risk transfer matters. Mr. Byrne has earned the distinction of being voted a Top 3 Mediator in the United States for the sixth straight year in the 2020 National Law Journal Best of Survey. Further, he was ranked a Top 10 Mediator by the 2020 New York Law Journal Best of Survey for the past seven years. He was also voted a Top 3 Mediator by the 2018 Corporate Counsel Best of Survey and for the third straight year, was named a National Law Journal Alternative Dispute Resolution Champion, as part of a select group of only 46 Neutrals nationwide. He has been awarded an A-V rating by Martindale-Hubbell, the highest rating available, based on its peer review process.

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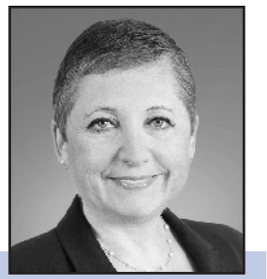
Has Plaintiff Assumed or Not Assumed the Risk, That is the Question



BY: MAGGY MAZLIN*

At common law, an injured person's right to recover in a negligence action, other than one for wrongful death, depended on his or her ability to prove freedom from negligence contributing in the slightest degree to the occurrence based on the reasoning that plaintiff's negligence was an intervening cause, which broke the causal connection between defendant's negligent act and plaintiff's injury.1 Under that scheme, an injured person's failure to appreciate a known danger could represent contributory negligence completely barring all recovery.2 Similarly, a determination that the injured person had assumed the risk of harm relieved defendant from its duty of care and precluded recovery.3 The choice of theory determined which side carried the burden of proof.4

The 1975 enactment of Civil Practice Law and Rules ("CPLR") Article 14-A, New York State's comparative negligence statute, changed the landscape completely in that neither the injured person's negligent failure to appreciate a known danger nor his or her assumption of risk operated as a complete bar to recovery in all situations.5 Under CPLR §1411, in actions seeking damages for personal injury, property damage or wrongful death, the injured person's culpable conduct, whether in failing to appreciate a known danger or assuming the risk thereof, only reduces his or her recoverable damages but does not completely bar recovery.

How does assumption of the risk fit into this comparative negligence setting? Implied assumption of the risk is the type of "culpable conduct" that can mitigate defendant's liability and reduce the damages to be paid.6 The fundamental distinction between the two concepts is that comparative negligence rests on an omission, the failure to use reasonable care under the circumstances, while implied assumption of the risk involves an affirmative act, the voluntary encounter with a known risk of harm or failure to appreciate same.7 An implied assumption of risk analysis turns on what was known to plaintiff at the time of the underlying accident.8

The comparative negligence statute applies only to implied assumption of the risk, not "express" assumption of the risk, where the parties have entered into an agreement that plaintiff would assume the risk of known harms resulting from his or her participation in a given activity. Where a person has expressly agreed to assume the risk of harm, defendant is relieved of the duty to exercise reasonable care for the benefit of that person, whose recovery is completely barred.9 The effectiveness of written liability waivers or releases is discussed later in this article.

As with express assumption of the risk, primary assumption of the risk focuses on limiting the scope of defendant's duty in certain circumstances. For example, the Court of Appeals has held that the duty of care owed to a participant in a professional sporting event must account for the risks that the participant assumed when he or she freely and knowingly chose to participate.10 Critical to this analysis is the particular participant's awareness of the risk based on his or her background, skill and experience.11 Where that risk awareness is present, defendant must exercise only that degree of care as needed to make the sporting event "conditions as safe as they appear to be."12 Thus, when the participant fully comprehends the risks of the activity or those risks are perfectly obvious, his or her "actual" consent is implied from the voluntary participation and that consent relieves defendant of the duty of care, as a matter of law.13 Since the participant's assumption of risk in this scenario is "a measure of defendant's duty of care," rather than an absolute defense, primary assumption of risk bars recovery even in the wake of the comparative fault statute.14

Primary assumption of risk applies to both professional and amateur sporting and recreational

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activities.15 This doctrine is largely limited to sponsored sporting or competitive events and recreational activities, rather than ones undertaken casualy or randomly.16 The injury must have occurred during or involving an actual athletic, recreational or entertainment-related activity.17 The injured person must have participated in the activity voluntarily, rather than in compulsory fashion.18

The doctrine may be implicated even before play has formally begun19 but persons preparing to participate in sporting activities do not necessarily assume the risks that arise before warm-up and actual play have begun.20

The activity at issue must be one worth protecting and encouraging without the threat of boundless liability based on the likelihood that this activity, albeit an inherently dangerous one, will cause injury. The Court of Appeals has struggled with reconciling the primary assumption of risk doctrine and the concept of comparative causation. In Trupia ex rel. Trupia v. Lake George Central School District, 14 NY3d 392 (2010), the high court commented that this doctrine is "most persuasively justified… simply for its utility in 'facilitat[ing] free and vigorous participation in athletic activities.' "21 Several years later, the Court of Appeals held that, as a general rule, "application of assumption of the risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic, recreative activities, or athletic or recreational pursuits that take place at designated venues.22 Thus, the high court has applied this doctrine to bar recovery by a bobsledder injured on a bobsled course23, two students injured while attending martial arts classes24 as well as participants in college basketball25, high school football26, recreational basketball on an outdoor court27, professional horse racing28, speedskating at an enclosed ice rink29 and a round of golf at a golf course.30 By contrast, primary assumption of the risk did not bar recovery by an 11-year old participant in a summer program, administered by defendant's school on their grounds, who was injured while engaging in "horseplay," namely riding and then falling from a banister, this activity was "not one that recommends itself worthy of protection."31

The court must, as a matter of law, determine the key questions of whether a particular risk is inherent in a given activity, whether the injured plaintiff knew of that risk and appreciated it.32 However, certain cases arise from scenarios which raise factual questions for a jury to determine.33

Since implied assumption of risk is triggered by one's voluntary encounter with a known risk of harm notwithstanding a full understanding of said risk34, this doctrine only applies when the injured person had the capacity to understand and fully appreciate the risk in the first place.35 This risk awareness is measured against the injured person's skill, background and experience.36 The doctrine will only be applied when the person had knowledge of the defective or condition or danger and appreciated the risk it posed.37 The participant's age may be a factor in assessing whether he or she knew about and appreciated the risks inherent in a given activity.38

A participant in a sporting or recreational activity is deemed to have consented to those commonly appreciated risks which are inherent in, generally arise out of and flow from participation in that sport or activity.39 Included are those risks associated with the construction of the playing field as well as any open and obvious condition thereon.40 Participants in sporting and recreational activities will not be deemed to have assumed risks of concealed, unreasonably enhanced risks or those risks which are not inherent in the activity.41 In this regard, consideration is given to the actions of defendant's staff with regard to organizing and instructing the activity participants as well as maintaining the venue.42 Notably, primary assumption of risk does cover those risks related to merely "less than optimal conditions."43

The Court of Appeals has said that although the injured person's knowledge is important to the determination of whether or not primary assumption of risk is applicable, the inherency of the risk in the activity "is the sine qua non."44 To invoke this defense, it is not necessary to show that the participant anticipated the precise manner in which the injury occurred, just that he or she was aware that the mechanism of the injury had the potential to cause the harm.45

What about the risk that another participant will act negligently during a sporting or recreational activity?

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Has Plaintiff Assumed or Not Assumed the Risk, That is the Question

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It has been held that a participant in a sporting event does not assume the risk of another participant's negligence which enhances the dangers inherent in that sport.46 The determination of whether the risk of other participants' culpable conduct is assumed depends on whether that conduct is itself a risk inherent in the activity.47 When the other participants' conduct is a flagrant infraction unrelated to the normal method of playing the game and has no competitive purpose, it does not trigger primary assumption of risk.48

Sporting event participants and venue patrons do not assume the risk of foreseeable harm arising from the venue owner and/or event sponsor's breach of the duty to provide reasonable supervision.49 Similarly, they do not assume the risks associated with the venue or event sponsor's employees' reckless conduct that heightens the risks inherent in the activity.50 On the other hand, non-reckless conduct by employees is not actionable51 unless the conduct unreasonably enhanced the risk of injury.52

The primary assumption of risk doctrine has been extended to limit the duty owed by private schools, camps, boards of education, their employees, agents and athletic councils to student athletes voluntarily involved in sports.53 In such circumstances, defendant's duty is limited to protecting student athletes from "unassumed, concealed or unreasonably increased risks."54

There is disagreement among the courts on the question of whether primary assumption of risk is a complete defense or bar to a claim of negligent supervision. The Fourth Department has held that it does not automatically bar a claim for negligent supervision arising from the facts.55 By contrast, the First Department has disagreed and held that negligent supervision is only viable or actionable to the extent that the risk at the heart of the claim has not been assumed.56 Some courts have held that primary assumption of risk does not preclude liability for inadequate supervision where that increased the risk of the activity beyond those risks that are otherwise assumed by participants.57

In Trupia ex rel. Trupia v. Lake George Central School District, supra at 396, the Court of Appeals cautioned against applying primary assumption of risk to children's "horseplay" in schools and other organized settings because that can extinguish the institutions' obligation to provide adequate supervision. Nevertheless, the high court did "not hold that children may never assume the risks of activities, such as athletics, in which they freely and knowingly engage, either in or out of school – only that the inference of such an assumption as a ground for exculpation may not be made in their case, or for that matter where adults are concerned, except in the context of pursuits both unusually risky and beneficial that the defendant has in some nonculpable way enabled." Id. Thus, some children will be barred from recovery due to their assumption of risks inherent in certain sporting and recreational activities when the venue owner and/or activity sponsor has not unreasonably enhanced said risks.

Primary assumption of risk has been applied to a variety of sporting and recreational activities, including high school football resulting in an injury which rendered the 19-year old player paralyzed,58 baseball,59 softball,60 stickball,61 basketball,62 tennis,63 racquetball,64 handball,65 cheerleading,66 soccer,67 lacrosse,68 skiing,69 ice skating,70 roller skating,71 hockey,72 boxing,73 martial arts,74 paintball or splatball,75 gymnastics,76 use of exercise equipment,77 weightlifting,78 dancing,79 swimming,80 water sports,81 recreational hiking82 and go-cart riding.83

Application of the primary assumption of risk doctrine to bicycling has met with mixed results. It has barred recovery by a plaintiff who was thrown when his mountain bike hit an exposed tree root while he was riding on an unpaved dirt and rock, park path,84 a rider whose bicycle hit a hole along a dirt trail in a wooded area,85 an experienced rider whose bicycle hit a hole in the dirt base of a baseball field,86 a rider whose bicycle hit a pothole or rut in a closed school parking area or driveway87 and an experienced, 14-year old who swerved to avoid a pedestrian after his bicycle hit a non-continuous curb.88 On the other hand, a bicyclist whose front wheel went through the gap between a sewer grating and the roadway did not assume that risk because those conditions were not open and obvious, so not within the class of risks assumed by bicyclists.89 The Second Department has

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held that primary assumption of risk is not applicable to bicyclists engaged in recreational rather than competitive riding and whose bicycles struck defects along paved pathways in public parks or roads,90 even when the injured plaintiff is an "avid" bicyclist albeit participating in a noncompetitive, recreational ride with eight or nine other riders.91 Interestingly, mountain biking and other forms of off-road biking are more readily classified as sporting activities and, therefore, may be subject to the primary assumption of risk doctrine.92

When it comes to skiing, the legislature has expressly found that downhill skiing contains inherent risks of injury or death from surface or subsurface snow, ice, bare spots or areas of thin cover, moguls, ruts, bumps, other skiers, rocks, forest growth, debris, branches, tree roots, stumps or other natural or man-made objects that are incidental to the ski facility's provision or maintenance.93 Consequently, the Legislature adopted a code of conduct applicable to downhill skiers and ski area operators to "minimize risk of injury" and "promote safety."94 Notwithstanding this code of conduct, the duties of skiers, lift passengers and ski operators are governed by the common law unless General Obligations Law Article 18 specifically provides otherwise.95

The effectiveness of a written waiver or release of liability signed by the injured participant in the sporting or recreational activity setting is governed by General Obligations Law §5-326, which provides that:

The effectiveness of a written waiver or release of liability signed by the injured participant in the sporting or recreational activity setting is governed by General Obligations Law §5-326, which provides that:

> "Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable."

The effectiveness of such a written liability waiver or release turns on the question of whether the facility or activity is recreational or instructional. Courts have held that document would not protect the owner of a facility or sponsor of an activity which is recreational in nature96 because liability waivers or releases are void under those circumstances. A liability waiver or release would not be void and may protect the sponsor of an instructional activity or the owner of its venue. Even if deemed void, such a document may also serve as a warning about the risks inherent in the activity to be undertaken.

As with many areas of the law, the primary assumption of risk doctrine has and continues to evolve. One should not make assumptions on this topic without doing the necessary research.

1 Arbegast v. Board of Education of South New Berlin Central School, 65 NY2d 161, 165 (1985); *citations omitted.*

2 Arbegast v. Board of Education of South New Berlin Central School, *supra; see*, Shire v. Mazzilli, 203 AD2d 275 (2nd Dep't, 1994).

3 Arbegast v. Board of Education of South New Berlin Central School, *supra*.

4 Arbegast v. Board of Education of South New Berlin Central School, *supra*.

5 Turcotte v. Fell, 68 NY2d 432 (1986); Arbegast v. Board of Education of South New Berlin Central School, *supra*.

6 Beadleston v. American Tissue Corp., 41 AD3d 1074 (3rd Dep't, 2007); *see,* Arbegast v. Board of Education of South New Berlin Central School, *supra*.

7 Arbegast v. Board of Education of South New Berlin Central School, *supra*; Beadleston v. American Tissue Corp., *supra*; Shire v. Mazzilli, *supra*.

8 Beadleston v. American Tissue Corp., *supra*.

9 For instance, where defendant's employee told plaintiff that she was participating in a game of "donkey basketball" at her own peril, plaintiff's participation constituted an express assumption of risk and defendant was entitled to a directed verdict dismissing the action. Arbegast v. Board of Education of South New Berlin Central School, *supra*.

10 Turcotte v. Fell, *supra* [plaintiff, a professional jockey, sought recovery for injuries that he sustained when the horse he was riding in the eighth race at Belmont Park clipped the heels of another horse, tripped and fell, throwing plaintiff to the ground – defendants were entitled

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to summary judgment because, by participating in this horse race, plaintiff assumed the risks inherent in this activity and consented that defendants only owed him a duty to avoid reckless or intentionally harmful conduct].

11 Morgan v. State, 90 NY2d 471 (1997).

12 Turcotte v. Fell, *supra* at 439.

13 Turcotte v. Fell, *supra; see*, Custodi v. Town of Amherst, 20 NY3d 83 (2012); Trupia ex rel. Trupia v. Lake George Central School District, 14 NY3d 392 (2010).

14 Turcotte v. Fell, *supra* at 439.

15 Benitez v. New York City Board of Education, 73 NY2d 650, 657 (1989); Bukowski v. Clarkson University, 19 NY3d 353, 358 (2012) [doctrine applies to educational institutions that organize team sporting activities].

16 Ashbourne v. City of New York, 82 AD3d 461 (1st Dep't, 2011) [plaintiff's leisurely roller-blading on a public sidewalk does not constitute a sponsored sporting event or recreational activity for purposes of applying the assumption of risk doctrine]; Cotty v. Town of Southampton, 64 AD3d 251 (2nd Dep't, 2009) [inapplicable to bicyclist injured while riding in a public park]; Vestal v. County of Suffolk, 7 AD3d 613 (2nd Dep't, 2004) [inapplicable to bicyclists injured while riding on paved pathways in public parks]; and Corrigan v. Musclemakers Inc., 258 AD2d 861 (3rd Dep't, 1999) [plaintiff's first time on a treadmill does not trigger primary assumption of risk].

17 Roe v. Keane Stud Farm, 261 AD2d 800 (3rd Dep't, 1999) [assisting a horse onto a trailer for transport does not involve an athletic or entertainment-related activity].

18 Stoughtenger v. Hannibal Central School District, 90 AD3d 1696 (4th Dep't, 2011) [doctrine inapplicable to infant plaintiff injured at a wrestling unit during defendant's compulsory physical education class]; Fabricius v. County of Broome, 24 AD3d 853 (1st Dep't, 2011) [same for a plaintiff injured during a soccer game in which her community college English professor required his students to participate as an example of a communal activity which the former Soviet Union used to demonstrate team versus individual achievement]; Pfeifer v. Musiker Student Tours, Inc., 280 AD2d 266 (1st Dep't, 2001) [same for a 15-year-old plaintiff injured when she fell off while riding a bicycle on a student tour operated by defendant, which she was compelled to do by counselors over plaintiff's objection and after she got off the bicycle three times].

19 O'Neill v. Daniels, 135 AD2d 1076 (4th Dep't, 1987) [plaintiff injured during warm-up for a softball game]; Marino v. Bingler, 60 AD3d 645 (2nd Dep't, 2009) [plaintiff injured when one defendant, another player, shot a paintball in her eye during a ten minute break from their paintball activity in a field on the other defendants' property – the property owners were entitled to summary judgment because the condition of the field had nothing to do with plaintiff's injury, the risk of which she had assumed – but the other paintball participant was not entitled to summary judgment because conflicting testimony raised issues of fact as to whether, before plaintiff got hit in the eye, the paintball game had resumed, she had put on her mask to begin playing and had already exchanged fire with that other paintball participant].

20 Marino v. Bingler, *supra; see also*, Hawkes v. Catatonk Golf Club Inc., 288 AD2d 528 (3rd Dep't, 2001) [plaintiff struck in the eye by an errant golf ball while standing in the parking lot of defendant's golf course, about to head into the clubhouse, did not assume that risk]; and Vogel v. Venetz, 278 AD2d 489 (2nd Dep't, 2000) [same for a plaintiff who slipped on ice in a motel parking lot while preparing to mount a snowmobile to a trailer – this was not a danger inherent in snowmobiling].

21 Trupia ex rel. Trupia v. Lake George Central School District, *supra* at 395; *quoting*, Benitez v. New York City Board of Education, *supra*; *citing to*, Morgan v. State, *supra* at 484; Turcotte v. Fell, *supra* at 439.

22 Custodi v. Town of Amherst, *supra* at 89.

23 Morgan v. State, *supra* at 486.

24 Morgan v. State, *supra* at 488.

25 Bukowski v. Clarkson University, *supra* at 358.

26 Benitez v. New York City Board of Education, *supra* at 658-659.

27 Sykes v. County of Erie, 94 NY2d 912, 913 (2000).

28 Turcotte v. Fell, *supra* at 437.

29 Ziegelmeyer v. United States Olympic Committee, 7 NY3d 893, 894 (2006).

30 Anand v. Kapoor, 15 NY3d 946, 948 (2010); *see also*, Bouck v. Skaneateles Aerodrome, LLC, 129 AD3d 1565 (4th Dep't, 2015) [primary assumption of risk applicable to and barred recovery by a plaintiff piloting a small aircraft who was injured during an unsuccessful take off from the runway of an airport which had been designated as the venue of this recreational activity, private aviation]; Litz v. Clinton Central School District, 126 AD3d 1306 (4th Dep't, 2015) [same for plaintiff injured right after hockey practice, in the arena's locker room, which had been designated for his team's exclusive use]; Wolfe v. North Merrick Union Free School District, 122 AD3d 620 (2nd Dep't, 2014) [same for plaintiff injured during a game of "manhunt," akin to hide-and-seek, because this game is not a socially valuable activity]; and Filer v. Adams, 106 AD3d 1417 (3rd Dep't, 2013) [same for plaintiff and her daughter, who were injured while riding their horses on a public highway].

31 Trupia ex rel. Trupia v. Lake George Central School District, *supra* at 396; see also, Custodi v. Town of Amherst, *supra* at 89 [primary assumption of risk is not applicable to and did not bar recovery by a non-competitive but experienced roller-blader injured when she tripped and fell over a height differential near defendant's driveway]; and DeMarco v. DeMarco, 154 AD3d 1226 (3rd Dep't, 2017) [same for plaintiff jumping on a trampoline in the yard of a private home].

32 Weinberger v. Solomon Schechter School of Westchester, 102 AD3d 675 (2nd Dep't, 2013).

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[33] Hyde v. North Collins Central School District, 83 AD3d 1557 (4th Dep't, 2011) [there was a triable issue of fact about whether the infant plaintiff, who was injured while sliding into second base during a junior varsity softball game, fully comprehended the risks inherent in that activity since she was never taught how to slide, had never tried to slide in practice, that was only discussed for five minutes in practice and although she had seen her teammates slide and get hurt, she had never seen any of them suffer a serious injury]; Gortych v. Brenner, 83 AD3d 497 (1st Dep't, 2011) [same for plaintiff who was injured while bicycling through Central Park during a biathlon]; Allwood v. CW Post College, 190 AD2d 704 (2nd Dep't, 1993) [same for a plaintiff who slipped in a puddle of water while participating in a basketball practice at defendant's gym]; Henig v. Hofstra University, 160 AD2d 761 (2nd Dep't, 1990) [same for a student plaintiff injured when he fell in a hole, several feet wide and several inches deep, on the field during an intramural football competition]; and Tepper v. City of New Rochelle School District, 143 AD2d 133 (2nd Dep't, 1988) [same for a high school junior injured during a one-on-one ground ball drill when a 260-pound, senior with three years of experience collided with him as they dashed for the ball and both fell].

[34] Arbegast v. Board of Education of South New Berlin Central School, *supra*; see, DeMarco v. DeMarco, *supra*.

[35] Clark v. Interlaken Owners, Inc., 2 AD3d 338 (1st Dep't, 2003) [implied assumption of risk is inapplicable to a five-year-old child who climbed over a fence to play on heavy construction equipment situated on defendant's premises and had his finger crushed by that equipment]; see also, Roberts v. New York City Housing Authority, 257 AD2d 550 (1st Dep't, 1999) [same for the infant plaintiff who, while at a playground, suffered burns when 200 degree Fahrenheit steam emitted from a fire hose which defendant ran from the adjacent building's basement out to a small, fenced playground, in order to discharge excess steam condensate from the building's hot water system].

[36] Morgan v. State, supra; Maddox v. City of New York, 66 NY2d 270 (1985); Myers v. Friends of Shenendohowa Crew, Inc., 31 AD3d 853 (3rd Dep't, 2006); Laboy v. Wallkill Central School District, 201 AD2d 780 (3rd Dep't, 1994).

[37] Morgan v. State, *supra*.

[38] Smith v. Sapienza, 115 AD2d 723 (2nd Dep't, 1985) [assumption of risk, whether express or implied, did not apply to a 3 ½ year old child, who, as a matter of law, cannot be held responsible for his actions and a jury must be instructed accordingly]; and Trainer v. Camp Hadar Hatorah, 297 AD2d 731 (2nd Dep't, 2002) [seven year old plaintiff was deemed not to have appreciated the risks of playing on a swing set]; see also, Douglas v. John Hus Moravian Church of Brooklyn, Inc., 8 AD3d 327 (2nd Dep't, 2004) [question of fact as to whether a nine year old child knew and appreciated risks inherent in playing tag]; Rivera v. Board of Education of Yonkers, 19 AD3d 394 (2nd Dep't, 2005) [same for a six year old child playing on monkey bars]; Bello v. Fieldhouse at Chelsea Piers, 18 AD3d 272 (1st Dep't, 2005) [same for a ten year old running through an obstacle course of balance beams]; but see, Auwarter v. Malverne Union Free School District, 274 AD2d 528 (2nd Dep't, 2000) [an eleven year old seventh grader who fell while playing on and around a playground "jungle gym" was deemed to have consented to those commonly appreciated risks inherent in that activity, such as falling].

[39] Anand v. Kapoor, *supra*; Morgan v. State, *supra*; Siegel v. Albertus Magnus High School, 153 AD3d 572 (2nd Dep't, 2017); Huneau v. Maple Ski Ridge, Inc., 17 AD3d 848 (3rd Dep't, 2005); and Sharrow v. New York State Olympic Regional Development Authority, 307 AD2d 605 (3rd Dep't, 2003).

[40] Zachary G. v. Young Israel of Woodmere, 95 AD3d 946 (2nd Dep't, 2012); Palladino v. Lindenhurst Union Free School District, 84 AD3d 1194 (2nd Dep't, 2011); and Bendig v. Bethpage Union Free School District, 74 AD3d 1263 (2nd Dep't, 2010).

[41] Morgan v. State, *supra* at 485; Owens v. R.J.S. Safety Equipment, 79 NY2d 967, 970 (1992); Cole v. New York Racing Association, 24 AD2d 993 (2nd Dep't, 1965); aff'd no opinion, 17 NY2d 761 (1966); Lamey v. Foley, 188 AD2d 157 (4th Dep't, 1993).

[42] Connolly v. Willard Mountain, Inc., 143 AD3d 1148 (3rd Dep't, 2016) [questions as to whether defendants unreasonably increased risks inherent in snow tubing because question as to whether snow tubing course attendant adequately maintained run-out area of course and whether defendant's staff appropriately allowed plaintiff to ride tandem with her son]; Zelkowitz v. Country Group, Inc., 142 AD3d 424 (1st Dep't, 2016) [question as to whether faulty equipment created or enhanced risk encountered by zip liner, to wit, being thrown off the zip-line while approaching the landing pad when he put his feet out fearing that the braking mechanism was not slowing him down as he had anticipated it would]; Dann v. Family Sports Complex, Inc., 123 AD3d 1177 (3rd Dep't, 2014) [question of fact as to whether concrete footer on which plaintiff smashed his knee while playing indoor soccer was open and obvious]; McGrath v. Shenendehowa Central School District, 76 AD3d 755 (3rd Dep't, 2010) [question as to whether rut that allegedly caused plaintiff's accident on a lacrosse field was open and obvious or concealed]; Demelio v. Playmakers, Inc., 63 AD3d 777 (2nd Dep't, 2009) [increased risk of ricocheting baseballs presented by an unpadded metal pole in an enclosed batting case may not be a risk inherent in hitting balls in the cage]; Kaczynski v. United Skates of America, Inc., 4 AD3d 337 (2nd Dep't, 2004) [defect in metal molding separating the beginner's area of the skating rink from the carpeted area was not a risk inherent in the spor of roller skating]; Laboy v. Wallkill Central School District,

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supra [pole vaulter did not assume the risk of separated floor mats]; and Lamey v. Foley, supra [question of fact as to whether a participant in an ATV stunt performance assumed the risk of riding on a course with unpadded fences].

43 Bukowski v. Clarkson University, supra [practicing pitching "live" indoors without a certain protective device called an L-screen and with somewhat dull indoor lighting were not actionable albeit less than optimal conditions]; Litz v. Clinton Central School District, *supra* [same for the condition of the hockey team's locker room where plaintiff's foot was cut by a sharp skate blade].

44 Morgan v. State, *supra* at 484; citing to, Maddox v. City of New York, *supra*; Turcotte v. Fell, *supra*; Scaduto v. State of New York, 56 NY2d 762 (1982).

45 Maddox v. City of New York, *supra*; Bouck v. Skaneateles Aerodrome, LLC, *supra*; Bendig v. Bethpage Union Free School District, *supra*.

46 Cruz v. New York, 288 AD2d 250 (2nd Dep't, 2001) [high school football player did not assume the risk of being injured by a push sled left on the sideline].

47 Turcotte v. Fell, *supra* at 440-441 [the Court of Appeals held that plaintiff, a professional jockey, assumed the risk of being injured by another jockey's violation of horse racing rules]; *see also*, Barton by Barton v. Hapeman, 251 AD2d 1052 (4th Dep't, 1998) [13 year old plaintiff assumed the risk of being injured by another youth hockey game participant "cross-checking" her in violation of the league and sport's rules – this conduct was not intentional or reckless so as to constitute an exception to the primary assumption of risk doctrine].

48 Turcotte v. Fell, *supra* at 441; Clauss v. Bush, 79 AD3d 1397 (3rd Dep't, 2010) [in a case involving two skiers, issue of fact as to whether plaintiff assumed the risk of defendant, another skier, having difficulty controlling his speed and direction as well as radically criss-crossing the trail to avoid an icy patch]; Filippazzo v. Kormoski, 75 AD3d 618 (2nd Dep't, 2010) [issue of fact as to whether plaintiff, injured during a roller hockey game by other players charging into him, knocking him as well as other players down and punching him, assumed those risks when playing roller hockey]; Pelkey v. Viger, 289 AD2d 899 (3rd Dep't, 2001) [issue of fact as to whether plaintiff, a hunter, shot in the leg by another hunter assumed that risk when hunting].

49 Kramer v. Arbore, 309 AD2d 1208 (4th Dep't, 2003) [rink owners could be liable to a hockey player injured by another player's reckless or intentional conduct based on evidence that the game was "rougher than normal" and refereeing was "poor" or "terrible"].

50 Reid v. Druckman, 309 AD2d 669 (1st Dep't, 2003) [rink patron did not assume the risk of being bowled over by the reckless rink safety personnel].

51 Kaufman v. Hunter Mountain Ski Bowl, Inc., 240 AD2d 371 (2nd Dep't, 1997) [plaintiff assumed the risk of colliding with a ski patroller who was not acting recklessly].

52 Gahan v. Mineola Union Free School District, 241 AD2d 439 (2nd Dep't, 1997) [plaintiff did not assume risk that coaches would exacerbate her injury by moving her before medical personnel arrived]; *see also*, Hope v. Holiday Mountain Corp., 123 AD3d 1274 (3rd Dep't, 2014) [issue of fact as to whether amusement park's employees' actions unreasonably heightened risk of collision at the base of a slide by failing to adequately staff or supervise that area]; Huneau v. Maple Ski Ridge, Inc., *supra* [issue of fact as to whether the actions of snow tubing facility's attendants unreasonably increased risk of injury – the 16 year old plaintiff testified that the attendant at the summit spun his tube as he pushed him and that spinning made him dizzy, thereby slowing down his ability to exit the tube at the bottom, which is where he collided with another participant's tube]; and Rosati v. Hunt Racing, Inc., 13 AD3d 1129 (4th Dep't, 2004) [question as to whether an improperly trained or negligent, 14 year old flagman is a risk inherent in the sport of motocross racing].

53 Benitez v. New York City Board of Education, *supra*.

54 Benitez v. New York City Board of Education, *supra*; Simmons v. Saugerties Central School District, 82 AD3d 1407 (3rd Dep't, 2011); Rawson v. Massapequa Union Free School District, 251 AD2d 311 (2nd Dep't, 1998); Laboy v. Wallkill Central School District, supra; see also, Bukowski v. Clarkson University, *supra*.

55 Garman v. East Rochester School District, 46 AD3d 1354 (4th Dep't, 2007); Hochreiter v. Diocese of Buffalo, 309 AD2d 1216 (4th Dep't, 2003); Havens v. Kling, 277 AD2d 1017 (4th Dep't, 2000).

56 Roberts v. Boys & Girls Republic, Inc., 51 AD3d 246 (1st Dep't, 2008) [plaintiff, a field spectator at her son's baseball practice, assumed the risk of getting hit with a bat swung by another player]; aff'd, 10 NY3d 889 (2008) [the Court of Appeals affirmed the dismissal but did not discuss the viability of a negligent supervision cause of action in these circumstances]; see also, Shakura T. v. New York, 116 AD3d 596 (1st Dep't, 2014); and Morabito v. MacArthur, 70 AD3d 792 (2nd Dep't, 2010) [affirming dismissal of a negligent supervision cause of action where it was established that plaintiff, a high school soccer player, assumed the risk of contact with another player during the soccer game].

57 Simmons v. Saugerties Central School District, *supra*; Royal v. City of Syracuse, 309 AD2d 1284 (4th Dep't, 2003) [the infant plaintiff was injured when she fell while performing a cheerleading stunt without a spotter – there was an issue of fact as to whether the coach's failure to provide proper supervision and a spotter unreasonably enhanced the risks inherent in cheerleading – plaintiff submitted an affidavit from an expert stating that it was improper to perform this stunt without a spotter, so the coach should not have allowed this to be done]; Traficenti v. Moore Catholic High School, 282 AD2d 216 (1st Dep't, 2001) [plaintiff was injured when she fell while doing a stunt during a cheerleading competition because her spotter failed to catch her – the testimony of plaintiff and a witness raised an issue as to whether defendant failed to adequately supervise the

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cheerleading squad thereby unreasonably increasing the risks inherent in cheerleading].

58 Benitez v. New York City Board of Education, *supra*.

59 Bukowski v. Clarkson University, *supra*.

60 Rosenblatt v. Kahn, 245 AD2d 438 (2nd Dep't, 1997) [risk of being injured by a sliding runner].

61 Checci v. Socorro, 169 AD2d 807 (2nd Dep't, 1991) [risk of being hit in the eye by a stickball bat which flew out of the infant player's hands during a stickball game].

62 Steward v. Town of Clarkstown, 224 AD2d 405 (2nd Dep't, 1996) [a basketball player injured when he made a jump shot and landed on an area of the outdoor court that was only partially paved assumed that risk].

63 Wertheim v. U.S. Tennis Association, Inc., 150 AD2d 157 (1st Dep't, 1989) [a wrongful death action jury verdict in plaintiff's favor was set aside because plaintiff's decedent, a line umpire with a prior history of heart disease, who died after suffering a stroke when he was hit in the groin by a tennis ball during a match, assumed that risk and the risk that his condition might be aggravated by his participation in a major national tournament – defendant did not unreasonably enhance that risk by requiring umpires to stand in the "ready position," leaning forward with their hands on or above their knees]; Kazlow v. City of New York, 253 AD2d 411 (2nd Dep't, 1998) [tennis player assumed the risk of injury from running into a wall while playing at an indoor tennis facility]; Viniar v. Town of Oyster Bay, 197 AD2d 683 (2nd Dep't, 1993) [same for the risk of running into the tennis net]; and Bendig v. Bethpage Union Free School District, *supra* [same for risk of catching one's thigh on a fixed net winder handle at the end of the tennis net pole, which the 14-year old plaintiff assumed when she played tennis on defendant's grounds].

64 Rutnik v. Colonie Center Court Club, Inc., 249 AD2d 873 (3rd Dep't, 1998) [wrongful death action dismissed because plaintiff's decedent, an experienced, amateur racquetball player and a frequent racquetball tournament participant who collapsed and died of cardiac arrest during such a tournament, assumed that risk – defendant's staff was trained in CPR, an emergency 911 was called shortly after decedent collapsed and a rescue squad arrived at the facility within five minutes – plaintiff's contention that defendant was negligent for not having a defibrillator present during tournaments for immediate use, lacks merit].

65 Palladino v. Lindenhurst Union Free School District, 84 AD3d 1194 (2nd Dep't, 2011) [an 11-year old who was injured when, while playing handball on defendant's premises, he stepped on an improperly placed, metal grate, assumed that risk].

66 Weber v. William Floyd Union Free School District, 272 AD2d 396 (2nd Dep't, 2000) [infant plaintiff injured while performing an assisted straddle jump during a varsity cheerleading practice at defendant's high school assumed that risk]; see also, Jurgensen v. Webster Central School District, 126 AD3d 1423 (4th Dep't, 2015) [high school cheerleader assumed the risk of performing stunts with a teammate she knew had an injured ankle which rendered the teammate unable to provide sufficient support during the stunt]; and Traficenti v. Moore Catholic High School, supra [high school cheerleader assumed the risk of performing stunts on a floor without mats].

67 Shelmerdine v. Town of Guilderland, 223 AD2d 875 (3rd Dep't, 1996) [an experienced soccer player who participated in games knowing that there were drain covers scattered throughout the playing field assumed the risk of injuries associated with that hazard]; but, see also, Dann v. Family Sports Complex, Inc., *supra* [question as to whether the concrete footer on which plaintiff smashed his knee while playing indoor soccer was open and obvious].

68 Charles v. Uniondale School District Board of Education, 91 AD3d 805 (2nd Dep't, 2012) [being hit by a passed ball is a known risk inherent in lacrosse but question as to whether defendant unreasonably increased that risk of harm by failing to provide plaintiff with head and face protection during a preseason high school lacrosse practice].

69 Giardano v. Shanty Hollow Corp., 209 AD2d 760 (3rd Dep't, 1994) [an experienced skier assumes risks of injury caused by, among other things, terrain, weather conditions, ice, natural objects and man-made objects that are incidental to provision or maintenance of the ski facility, all of which are inherent in the sport of downhill skiing]; Calabro v. Plattekill Mountain Ski Center, Inc., 197 AD2d 558 (2nd Dep't, 1998) [same for risk of visible dip in trail].

70 Ziegelmeyer v. United States Olympic Committee, *supra* [short-track, Olympic speedskater who was injured when she fell on the ice during practice and hit the surrounding boards in such a way that her feet lifted the pads, causing her to hit the boards directly, assumed that risk]; Vaughan v. Skate Key, Inc., 270 AD2d 103 (1st Dep't, 2000) [same for ice skater who fell as she tried to step over two fallen skaters].

71 Kleiner v. Commack Roller Rink, 201 AD2d 462 (2nd Dep't, 1994) [abrupt and sudden collisions with other roller skaters are a common occurrence, so plaintiff, a roller skater, assumed that risk and failed to establish that any amount of supervision by defendant would have prevented this random collision]; Lopez v. Key Skate, Inc., 174 AD2d 534 (1st Dep't, 1991) [same for a roller skater struck from behind by an out-of-control skater while standing in line with a group of other skaters waiting to exit from the rink].

72 Duffy v. Suffolk County High School Hockey League, Inc., 289 AD2d 368 (2nd Dep't, 2001) [experienced hockey player participating in a practice with his team, assumed the risk of being struck by a puck that another player shot]; and Barton by Barton v. Hapeman, *supra* [same for a 13 year old plaintiff injured when another youth hockey game participant "cross-checked" her in violation of the league and sport's rules].

73 DiMarco v. New York City Health and Hospitals Corp., 187 AD2d 479 (2nd Dep't, 1992) [plaintiff, a firefighter and experienced boxer who was injured while boxing in a boxing event at the gym, assumed that risk].

74 Beck v. Scimeca, 90 NY2d 471 (1997) [30 year old

Continued on next page

participant in a martial arts class assumed the risk of landing incorrectly when tumbling in the way he had been trained during his 15-month attendance at defendant's school, under defendant/owner's training].

75 Cook v. Komorowski, 300 AD2d 1040 (4th Dep't, 2002) [risk of eye injury is inherent in splatball and paintball, so the primary assumption of risk doctrine bars a participant's recovery for such an injury when he or she was aware of that risk]; but, *see also*, Herdzik v. Chojnacki, 68 AD3d 1639 (4th Dep't, 2009) [paintball guns, which use springs or air as the propelling mechanisms, are covered by Penal Law §265.05, which prohibits the possession of weapons by persons under the age of 16 – so an adult who provides the paintball gun to an infant under the age of 16 may be held liable to a person injured by that infant's use of the gun].

76 Hopkins v. City of New York, 248 AD2d 441 (2nd Dep't, 1998) [gymnast injured while performing a somersault on a mat during his gymnastics floor exercise routine, assumed the reasonably foreseeable risks associated with this sport, including a certain amount of variability in the mats' resiliency].

77 Marcano v. City of New York, 99 NY2d 548 (2002) [plaintiff, an inmate in defendant's correctional facility who was injured when he fell from a set of parallel exercise bars in that facility's recreation yard, assumed that risk]; Sajkowski v. YMCA of Greater New York, 269 AD2d 105 (1st Dep't, 2000) [plaintiff, who injured her ankle when she fell while swinging from a rope during a weekend recreational program for adults sponsored by defendant, assumed that risk]; Ingram v. Life Fitness, 140 AD3d 628 (1st Dep't, 2016) [plaintiff, a longtime user of treadmills, assumed the risks of injury associated with that activity]; DiBenedetto v. Town Sports International, LLC, 118 AD3d 663 (2nd Dep't, 2014) [same for a member of defendant's gym who was a frequent treadmill user and was injured when she stepped onto a treadmill that another member vacated but did not turn off].

78 Lee v. Maloney, 270 AD2d 689 (3rd Dep't, 2000) [an experienced weightlifter assumes the risk that a heavily weighted bar might slip out of his control and injure him even in the presence of an attentive spotter].

79 LaFond v. Star Time Dance & Performing Arts Center, 279 AD2d 509 (2nd Dep't, 2001) [a tap dancing student who had taken dance lessons for fifteen years assumed the risk of injury on a dance floor that she knew was slippery].

80 Garcia v. City of New York, 205 AD2d 49 (1st Dep't, 1994) [wrongful death action dismissed because plaintiff's decedent, who was intoxicated when she drowned after illegally entering a public swimming pool facility well after the pool had officially closed for the day, so it was dark, assumed that risk]; Salas v. Lake Luzerne, 296 AD2d 643 (3rd Dep't, 2002) [jury verdict in plaintiff's favor was set aside and wrongful death complaint dismissed where plaintiff's decedent, an inexperienced swimmer who entered the river fully clothed, waded into the area under the waterfall, bodysurfed down the river and drowned on his first run, assumed those risks and his actions were the sole, proximate cause of his death].

81 Best v. Town of Islip, 265 AD2d 357 (2nd Dep't, 1999) [plaintiff, who was injured after he slipped on accumulated seaweed along defendant's boat launch ramp, assumed that risk]; Ferrari v. Bob's Canoe Rental, Inc., 143 AD3d 937 (2nd Dep't, 2016) [same for plaintiff and her decedent, who assumed the risk of becoming stuck during low tide while canoeing on a tidal river and were both aware of the tidal times for that river – defendant's employee's statement that plaintiff and her decedent would have enough time to complete their trip before low tide, did not enhance or create any additional risk].

82 Bouchard v. Smiley Brothers, Inc., 258 AD2d 548 (2nd Dep't, 1999) [hiker assumed the risks inherent in recreational hiking, including risks of injury caused by the open and obvious physical features of advanced trails].

83 Loewenthal v. Catskill Funland, Inc., 237 AD2d 262 (2nd Dep't, 1997) [plaintiff, who was injured while riding a go-cart driven by his daughter at defendant's amusement park when his daughter failed to negotiate a turn and the go-cart struck the pit barrier wall, assumed the risk that the go-cart would bump into objects].

84 Calise v. New York, 239 AD2d 378 (2nd Dep't, 1997).

85 Rivera v. Glen Oaks Village Owners, Inc., 41 AD3d 817 (2nd Dep't, 2007).

86 Goldberg v. Town of Hempstead, 289 AD2d 198 (2nd Dep't, 2001).

87 Restaino v. Yonkers Board of Education, 13 AD3d 432 (2nd Dep't, 2004).

88 DeJesus v. City of New York, 29 AD3d 401 (1st Dep't, 2006).

89 Moore v. City of New York, 29 AD3d 751 (2nd Dep't, 2006).

90 Caraballo v. City of Yonkers, 54 AD3d 796 (2nd Dep't, 2008); Moore v. City of New York, *supra*; Vestal v. County of Suffolk, *supra*; Berfas v. Town of Oyster Bay, 286 AD2d 466 (2nd Dep't, 2001).

91 Cotty v. Southampton, *supra*; see also, Fornuto v. County of Nassau, 149 AD3d 910 (2nd Dep't, 2017); Weller v. Colleges of the Senecas, 217 AD2d 280 (4th Dep't, 1995).

92 Cotty v. Southampton, *supra*; *see also*, Mamati v. City of New York Parks & Recreation, 123 AD3d 671 (2nd Dep't, 2014) [motocross bicyclist assumed the risk of voluntarily jumping his bicycle from one dirt mound to another on a dirt bike trail]

93 General Obligations Law §18-101; *see also*, Schorpp v. Oak Mountain, LLC, 143 AD3d 1136 (3rd Dep't, 2016) [risk of a slope depression].

94 General Obligations Law §§18-102 to 18-106; *see also*, Painter v. Peek'n Peak Recreation, Inc., 2 AD3d 1289 (4th Dep't, 2003).

95 General Obligations Law §§18-107.

96 Lee v. Brooklyn Boulders, LLC, 156 AD3d 689 (2nd Dep't, 2017) [the release of liability signed by plaintiff upon entering defendant's indoor rock climbing facility was void

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Trivial Pursuit of the Trivial Defect Defense

BY: ROBERT J. FERRERI*

In a trip and fall case, it is exceedingly difficult for a defendant property owner to prevail on a motion for Summary Judgment to dismiss the complaint on the basis that the alleged defect is trivial as a matter of law. This article will address the origins of the doctrine, the current legal standard applied by New York Courts, recent decisions in which Courts held that a defect was trivial as a matter of law and defense strategies to put your client in the best possible position to prevail on a motion for Summary Judgment.

Origin of the Trivial Defect Doctrine

The trivial defect doctrine has been a part of New York jurisprudence dating back to the 19th Century. In 1895, the New York Court of Appeals held that a property owner is not liable for a defect on its premises as a matter of law when it is "so slight that no careful or prudent [person] would reasonably anticipate any danger from its existence."This general principal applies to both municipalities and private owners and covers defects located on 1 the interior and exterior portions of the premises.2 Over the years, the Courts have repeatedly declined to provide a bright line rule regarding what constitutes an actionable defect but instead, require a determination based upon the totality of the circumstances. In Trincere v. County of Suffolk, the Court of Appeals held that there is no "'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable."3 In order to determine whether a defect is trivial, courts must evaluate the "peculiar facts and circumstances of each case" including "the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury."4

Current Legal Standard: Totality of the Circumstances

The Court of Appeals most recently addressed the trivial defect doctrine in 2015 when it decided a trilogy of cases in a consolidated appeal, Hutchinson v. Sheridan Hill House Corp.5 At the outset, the Court acknowledged that "it is usually more difficult to define what is trivial than what is significant."6 The Court of Appeals reiterated the standard set forth in Trincere and explained that a defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, "physically insignificant" and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses.7

In the first case, the plaintiff, Leonard Hutchinson, was walking along a concrete sidewalk abutting a building owned by the defendant, Sheridan Hill House Corp., when his right foot "caught" on a metal object protruding from the sidewalk.8 At his deposition, Hutchinson provided "rough estimates of its dimensions".9 An employee of Sheridan's counsel visited the sidewalk over one year after the accident, photographed and measured the object and concluded that it was cylindrical in shape, approximately 5/8 of an inch in diameter and protruded between 1/8 of an inch and 1/4 of an inch above the sidewalk.10 Sheridan filed a motion for summary judgment relying upon photographs of the object, an affidavit of the employee that photographed the object and provided its measurements and an engineer's report.11

The Supreme Court granted summary judgment in favor of Sheridan and the Appellate Division, First Department affirmed.

The Court of Appeals held that, under the circumstances, the trip hazard was trivial as a matter of law and affirmed the dismissal of Hutchinson's complaint. It noted that Sheridan met its burden of making a prima facie case specifically referencing

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the measurements of the metal object and the photographs showing ruler measurements of the object.12 In addressing Hutchinson's contention that the "abruptness of the projecting edge, the alleged irregularity of its shape, and its rigidity and firm insertion into the sidewalk" increased the risk the defect posed, the Court stated that "the test established by case law in New York is not whether a defect is capable of catching a pedestrian's shoe . . . [but] whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances."13 The Court noted that the metal object protruded only about a quarter of an inch above the sidewalk, was in a well-illuminated location towards the middle of the sidewalk and in a place where "a pedestrian would not be required, by crowds or physical surroundings, to look only ahead."14 The Court further noted that the object was not hidden or covered in any way that would make it difficult to see or identity as a hazard, its edge was not jagged and the surrounding surface was not uneven.15 A photograph of the alleged defect from the Supreme Court, Bronx County file (Index No. 307060/09) is reproduced below:

In the second case, the plaintiff, Matvey Zelichenko, fell while walking down a staircase in the lobby of a residential building.16 On the second step tread from the bottom, Zelichenko's right leg "got caught" when he stepped on a part of the nosing where there was a missing piece or "chip."17 The property owner, defendant, 301 Oriental Boulevard LLC, moved for summary judgment relying upon an affidavit of an engineering consultant who inspected, measured and photographed the stairs in May 2011 (approximately one year post-accident), photographs that the plaintiff identified as fairly and accurately depicting the stairway and alleged defect and the deposition testimony of the Zelichenko and superintendent of the building.18 According to the engineer, the dimensions of the missing "chip" was 3.25 inches in width and 0.5 inches in depth.19 Zelichenko opposed the motion relying on the photographs of the staircase and an affidavit of a different engineer who challenged the depth of the missing area stated by the defense expert engineer.20

The Supreme Court denied 301 Oriental's motion finding a question of fact as to whether the alleged defect was trivial as a matter of law. The Appellate Division, Second Department reversed noting that the alleged defect was "located almost entirely on the edge of the second to last step from the bottom, and not on the walking surface [and] … [u]pon examination of all of the facts presented … "the alleged defect was trivial, did not possess the characteristics of a trap or nuisance and, therefore, was not actionable."21 The Court of Appeals reversed finding that the Appellate Division erroneously decided that the "chip" was not on the walking surface of a step tread.22 The Court held that a triable issue of fact existed based upon the dimensions of the "chip," its irregular shape, its location on the nosing of the step where a person might step and Zelichenko's expert's affidavit explaining the necessity for step treads to be of uniform horizontal depth.23

In the third case, the plaintiff Maureen Adler fell on the interior staircase of an apartment building where she lived.24 She testified that she was walking down the stairs when her right foot "got caught" on a "big clump in the middle of the stair – a protrusion of some sort in a step tread – that had 'been painted over.'"25 Adler identified photographs taken by her counsel as fairly and accurately depicting the stairway and the "clump." She testified that she was "very familiar" with the stairway and had observed the "clump" on prior occasions.26 The building superintendent testified that he had not noticed any uneven surface on the stairs prior to the accident. The defendants moved for summary judgment relying upon Adler's photographs as well as the deposition

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transcripts but did not produce any measurements to establish the dimensions of the "clump."27 The Supreme Court denied the motion but the Appellate Division, Second Department reversed. Ultimately, the Court of Appeals reversed finding that summary judgment record which included "indistinct photographs" and no measurements of the alleged defect was inconclusive.28 It held that, without "without evidence of the dimensions of the 'clump,' it is not possible to determine whether it is the kind of physically small defect to which the trivial defect doctrine applies" and, therefore, the defendants failed to meet their initial burden.29

The Court of Appeals ends the decision by ominously stating "[i]n sum, there are no shortcuts to summary judgment in a slip-and-fall case."30

Post-Hutchinson Decisions Providing Examples of Trivial Defects

In Garcia v. 549 Inwood Associates LLC, the Appellate Division, First Department upheld the lower court's decision holding that a sidewalk crack was trial as a matter of law and affirmed the dismissal of a trip and fall case.31 The Court noted that the sidewalk crack was just one quarter inch deep, was openly visible, and located in a well-lit area.32 It noted that the defendant relied upon deposition testimony, an affidavit of an inspector who measured the crack and photographs of the alleged defect.33 Photographs obtained from the Supreme Court, Bronx County file (Index No. 306129/2010) depicting two purported defects in the area of the accident are reproduced below

Figure 10: We did observe this 27 inch by 2 inch seam crack. It is less than ¼ inch deep, thus not much of a hazard.

Figure 11: Another seam crack 8 feet long, but again, not very deep is located nearest the public sidewalk.

In Kavanagh v. Archdiocese of City of New York et al., the Appellate Division, Second Department, reversed the lower court's denial of defendant, Our Lady of Mount Carmel Church's, motion for Summary Judgment finding that a damaged piece of tile in an inteiror hallway was trivial.34 The Court held that the evidence submitted by the defendants in support of their motion including photographs of the alleged defective condition as identified by the plaintiff, a damaged piece of tile, as well as measurements placing the depression at the damaged tile to be, at most, one-eighth of an inch, along with the plaintiff's description of the time, place, and circumstance of the injury, established, prima facie, that the alleged defect was trivial as a matter of law, and therefore, not actionable.35 The plaintiff, in opposition, failed to raise a material issue of fact.36 A photograph of the alleged defect obtained from the Supreme Court, Westchester County file, Index No. 61002/2014, is reproduced below:

In Melia v. 50 Court Street Associates, et al., the Appellate Division, Second Department reversed the Supreme Court's denial of defendants' motion for Summary Judgment finding that a gap between sidewalk flags was trivial.37 According to the plaintiff's deposition testimony, he tripped and fell on a sidewalk abutting a store located at 50 Court Street in Brooklyn in an area where the caulk between two sidewalk slabs was missing and there was a gap that was approximately one inch wide.38 The plaintiff further testified that he regularly visited this store, and he never noticed this gap.39 According to the defendants, there were no prior incidents involving the gap, and they had not received any prior complaints about the gap.40 The Court held that the evidence submitted by the defendants in support of their motion for summary judgment, including the deposition testimony of the plaintiff and photographs of the accident site, was sufficient to establish, prima facie, that, given the characteristics of

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the defect and the surrounding circumstances, the gap at issue was trivial, and therefore, not actionable.41 A photograph of the trivial defect obtained from the Supreme Court Kings County file, Index No. 507654/2014, is reproduced below:

In Easley v. U Haul et al, the Appellate Division, Second Department, once again, reversed the lower court's denial of defendant's motion for Summary Judgment finding that a metal protrusion in a parking lot was trivial.42 The Court relied upon the defendants' evidence that the alleged defect was an inch or less in size, the incident occurred in the daytime hours under clear conditions, and the area immediately surrounding the alleged defect was clear of debris and not dangerous or trap-like.43 The Court held that the plaintiff's opposition, which relied upon plaintiff's deposition testimony and photographs of the defect, failed to raise a triable issue of fact as it relied upon conclusory allegations.44 A photograph obtained from the Supreme Court, Queens County file, Index No. 707778/15, is reproduced below:

Defense Strategy in Cases Involving Potentially Trivial Defectss

While it remains an uphill battle to establish that a defect is trivial given the totality of the circumstances standard, timely investigation can be critical to maximize the chances of success on a motion for Summary Judgment. Investigation of the nature of the defect and surrounding circumstances should begin at the outset of the case. In a vast majority of cases, the Complaint will not provide any significant details concerning the time of the accident, the nature of the alleged defect, its precise location or any relevant surrounding circumstances. To the extent the lawsuit is first notice of the accident, it would be prudent to informally contact your adversary (in addition to your client) to obtain additional information regarding the defect and the circumstances surrounding the accident. Once the location is known, an investigator should be sent to the premises to photograph and measure any potential defects within the general accident location to increase the chances that the photographs fairly and accurately depict the defect as it existed on the date of the accident and effectively preserve evidence in the event repairs are made or the condition changes over time. In addition, all documentation regarding inspections and maintenance of the accident location and any prior accidents should be obtained from the client to bolster the defense and to support potential notice defenses. Depositions of the plaintiff and eyewitnesses should be used to obtain evidence regarding the precise location of the defect and the relevant circumstances surrounding the accident (e.g. weather, lighting, pedestrian traffic, other objects in the vicinity etc.). Thereafter, an expert engineer should be retained to inspect the purported defect to provide exact dimensions of the defect, assess any applicable statutes, codes, regulations or industry standards (e.g. American Society for Testing and Materials) and provide an affidavit in support of any motion for Summary Judgment. In conclusion, as the Court will evaluate the totality of the circumstances regarding a trip and fall accident in determining if the defect is trivial, efforts to investigate and preserve evidence regarding the nature and size of the defect and all surrounding circumstances is essential to support a potential motion for Summary Judgment.

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Trivial Pursuit of the Trivial Defect Defense

1 *Beltz v. City of Yonkers*, 148 N.Y. 67, 70 (1895).
2 Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d 66 (2015) (internal citations omitted).
3 *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977 (1997).
4 *Id.* at 978.
5 *Hutchinson*, 26 N.Y.3d at 72.
6 *Id.* at 72
7 *Id.* at 78.
8 *Id.* at 72.
9 *Id.*
10 *Id.*, at 72-73.
11 *Id.*
12 *Id.* at 79.
13 *Id.* at 79-81.
14 *Id.* at 80.
15 *Id.*
16 *Id.* at 73-74.
17 *Id.* at 74.
18 *Id.*
19 *Id.*
20 *Id.* at 75.
21 *Id.* quoting (*Zelichenko v. 301 Oriental Boulevard, LLC*, 986 N.Y.S.2d 615, 617 (2d Dept. 2014).
22 *Id.* at 81.
23 *Id.* at 82.
24 *Id.* at 76.
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.* at 82.
29 *Id.* at 82-83.
30 *Id.* at 84.
31 *Garcia v. 549 Inwood Associates LLC*, 25 N.Y.S.3d 182 (1st Dep't 2016).
32 *Id.* at 183.
33 *Id.*
34 *Kavanagh v. Archdiocese of City of New York et al.*, 58 N.Y.S.3d 579 (2d Dept. 2017).
35 *Id.* at 581.
36 *Id.*
37 *Melia v. 50 Court Street Associates, et al.*, 60 N.Y.S.3d 331 (2d Dept. 2017).
38 *Id.* at 333.
39 *Id.*
40 *Id.*
41 *Id.*
42 *Easley v. U Haul et al.*, 88 N.Y.S.3d 447, 448 (2d Dept. 2018).
43 *Id.*
44 *Id.* at 449

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Defending Vertical Transportation Cases- A General Overview

BY: JOHN A. ANSELMO*

Much like the majority of premises liability cases, property owners have "a nondelegable duty to maintain and repair" elevators on a premises.1 According the New York City Building Code, elevators and conveying systems (escalators) are required to undergo inspection and testing twice a year2. There are three specific categories of testing: Category 1, Category 3 and Category 5 tests.3 All testing is performed on behalf of the owner "by an approved agency," and is to be witnesses by a second approved agency "not affiliated with the agency performing the tests."4 Escalators are only required to undergo Category 1 testing.

Category 1 testing is to be conducted once a year. Category 3 testing only applies to roped water hydraulic elevators, and is performed every 36 months. Category 5 testing is conducted every 60 months. However, Category 5 testing does not apply to escalators or moving walkways. Upon the completion of required testing, the inspecting agent or witnessing agent must submit an inspection report within 30 days of the inspection to the building owner. The inspection report – an ELV3 form – must contain all violating conditions for each device testing. Submission of the inspection report to the Department of Buildings is to be completed within 60 days of completing the inspection.5 Any defects identified during the inspections and contained in the inspection reports must be corrected within 120 days after the date of the inspection.6 An Affirmation of Correction – form ELV29 – must then be submitted to the Department of Buildings. However, if an inspection reveals an unsafe or hazardous condition, the elevator or conveying system must be taken out of service and the building owner notified immediately. The Department of Buildings must also be notified within twenty-four hours.7

In premises liability cases, the inspection reports and reporting forms can establish whether a building owner was on notice of a defective or dangerous condition. However, most buildings, if not all, will retain an elevator/escalator mechanic to perform all repair work. Occasionally, especially in larger buildings, the mechanic will be "in-house." However, just because a building employs an elevator mechanic does not mean the building will be free from liability if an accident occurs. Where a building has contracted with an elevator maintenance company, "liability can be found against [the owner] if they received notice of a defect and failed to notify the elevator company about it."8 Some buildings may retain security logbooks, separate from any elevator repair records, which may detail any complaints received about defective elevators or escalators. Again, the logbooks will be important to establish a building had no notice of a defective elevator or escalator.

Regarding elevator/escalator companies and the mechanics in their employ, a company "which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found."9 This theory has been applied to escalator companies as well10. Elevator/escalator companies may also face a finding of liability based upon the theory of negligent inspection and repair. An inference of such theory may be drawn from evidence the elevator/escalator previously malfunctioned as contained in the company's repair records.11 The repair records are maintained by the elevator company and may not be shared with a building owner. However, where a building has an in-house mechanic, it is more than likely the mechanic will interact with the building manager daily to discuss any on-going issues related to the operation

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of the vertical transportation systems.

Liability for an elevator company will also depend on the type of contract it entered into with the building. Said differently, a finding of liability against an elevator company is limited "to cases where, pursuant to contract, the elevator company has assumed 'exclusive control' of the elevator at the time of the accident."12 In Ileiwat v. PS Marcato El. Co., Inc., 178 A.D.3d 517 (1st Dept. 2019), even though the elevator company previously inspected and repaired the elevator which injured plaintiff, the elevator company was still granted summary judgment. The elevator company in Ileiwat did not have a full-service contract in which it was obligated to perform "all inspection maintenance" of the building's elevators.13 Rather, the contract limited the elevator company's obligations to inspection and maintaining only "certain components and aspects of the elevator."14

Besides owners and elevator/escalator companies, plaintiffs may seek to recover damages from elevator/escalator consultants. Generally, consultants perform no type of physical repair work on elevators or escalators. Rather, they may be contracted to witness the New York City required testing described earlier. Consultants may also be contracted to perform semi-annual visual maintenance evaluations of the vertical transportation system, designs of new systems, modernization proposals and project management. Most contracts consultants enter into with building owners are "not comprehensive and exclusive property maintenance agreements intended to displace" either the owner's or elevator company's "general duty to keep the premises in a safe condition."15

Further, as consultants do not have an ownership interest in buildings where vertical transportation systems are location, liability will need to be established under the principles of Espinal16. However, where a consultant undertakes no maintenance or repair work, it will be difficult to establish the consultant "launched a force of harm."17 Further, where a consultant's duties are visual inspections and witnessing of City-mandated testing, it cannot be said consultant displaced the owner's common law duty to maintain its premises and elevators, let alone "entirely displaced"18 it. Even if a consultant failed to take notice or report a defect during the witnessing of testing or a visual maintenance evaluation, it can still be argued a consultant did not launce a force or instrument of harm. In Bauerlein v Salvation Army, 74 A.D.3d 851, 856 (2nd Dept. 2010), the Appellate Division held a consulting company demonstrated its prima facie entitlement to judgment as a matter of law by submitting evidence it owed no duty of care to the Plaintiff and reasoned the consulting company may have merely failed to become "an instrument for good" which cannot impose a duty of care upon a party not in privity of contract with the injured party.

Another theory plaintiff may use to establish negligence is the doctrine of res ipsa loquitur. To establish a cause of action under res ipsa loquitur, three elements must be met: (1) the event must be of a kind which rarely occurs absent someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.19

Court have applied the doctrine where an elevator company had exclusive control of the inspection and maintenance of an injury-causing elevator.20 "Courts consistently have applied the doctrine of res ipsa loquitur in cases where the subject elevator is alleged to have dropped, overshot floors, misleveled or otherwise demonstrated erratic functioning."21

However, establishing the exclusivity of control, or lack thereof, will be critical. "The second prong of the test requires 'that the evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it.'"22 "In other words, the likelihood of other causes 'must be so reduced that the greater probability lies at defendant's door.'"23 Mainly, this will be determined by whether the specific failing component is "relatively inaccessible to the general public," or whether the component is "designed to come into contact with the public and, thus, subject to potentially damaging misuse or vandalism."24

Courts have also addressed the application of res ipsa loquitur in escalator accidents. In Ebanks v. New York City Transit Authority, 70 N.Y.2d 621 (1987), plaintiff was injured when his left foot became caught in a gap between the escalator step and the sidewalk. Once he reached the top, he was thrown

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Has Plaintiff Assumed or Not Assumed the Risk, That is the Question

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and unenforceable because this facility is recreational in nature]; Serin v. Soulcycle Holdings, LLC, 145 AD3d 468, 469 (1st Dep't, 2016) [same result for the owner of a spin cycle facility]; Vanderbrook v. Emerald Springs Ranch, 109 AD3d 1113 (4th Dep't, 2013) [same result for owner of a ranch where plaintiff was injured while riding a horse on a guided trail – horse riding lessons were ancillary to the recreational activity of horseback riding]; Debell v. Wellbridge Club Management, Inc., 40 AD3d 248 (1st Dep't, 2007) [same result for defendant spa where plaintiff was seriously injured while participating in a one-hour training session]; and Miranda v. Hampton Auto Raceway, Inc., 130 AD2d 558 (2nd Dep't, 1987) [same for defendant owner of an auto racing facility where plaintiff paid a fee and signed the release to use the facility for that recreational activity].

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Defending Vertical Transportation Cases-A General Overview

onto his left hip and suffered a fracture. While the trial Court charged the doctrine of res ipsa loquitur, the Court of Appeals felt the second requirement – exclusive control – was "critically lacking." Id at 623. The Court felt because of the extensive public use of the escalators, "plaintiff failed to establish control by defendant 'of sufficient exclusivity to fairly rule out the chance that [the defects were] caused by some agency other than defendant's negligence.'" Id.

However, the court in Wen-Yu Chang v. F.W. Woolworth Co., 196 A.D.2d 708 (1st Dept. 1993) distinguished the holding in Ebanks. Even though the escalators in Wen-Yu and Ebanks were both subjected to substantial public access, testimony established the escalator mechanic shut down the escalator hours prior to the accident for an inspection and repair. As such, plaintiff demonstrated "an unambiguous exercise of control greatly diminishing the possibility of vandalism as a causal factor." Id at 709. Moreover, in Nesbit v. New York City Transit Auth., 170 A.D.2d 92 (1st Dept. 1991), plaintiff was able to rely on the theory by establishing the area where mechanical piece failed could only be opened by using tools, thus eliminating the possibility of vandalism.

In practice, it will be important to obtain all contracts between entities, all maintenance records of the involved elevator or escalator, and any publicly available violations and affirmations of correction to establish the lack of notice or the repair of a defective condition. Further, in some instances, buildings may hold weekly or monthly meetings with the mechanic and consultant to discuss any underlying issues with the operation of the elevators or escalators. If possible, obtaining the meeting minutes will further demonstrate there was no knowledge of a prior defective condition, or that any previously existing conditions had been repaired.

1 *Oxenfeldt v 22 N. Forest Ave.* Corp., 30 A.D.3d 391, 392 (2nd Dept. 2006).
2 NYC Building Code 3014.1.
3 NYC Administrative Code § 28-304.6.1.
4 *Id.*
5 NYC Administrative Code § 28-304.6.5.
6 NYC Administrative Code § 28-304.6.6.
7 NYC Administrative Code § 28-304.6.3.
8 *Oxenfeldt*, 30 A.D.3d at 391.
9 *Rogers v Dorchester Assoc.,* 32 NY2d 553, 559 (1973).
10 *Narainasami v. City of New York*, 2018 N.Y. Misc. LEXIS 3792 (Queens Co. Sup. Ct. 2018).
11 *See e.g., Fanelli v. Otis Elevator Co.*, 278 A.D.2d 362 (2nd Dept. 2000).
12 *Casey v. New York El. & Elec. Corp.*, 82 A.D.3d 639, 640.
13 *Id* at 519.
14 *Id.*
15 *Castillo v. Port Auth. Of N.Y. & N.J.*, 159 A.D.3d 792, 794 (2nd Dept. 2018).
16 *Espinal v. Melville Snow Contractors*, 95 N.Y.2d 136 (2002).
17 *Id.*
18 *Id.*
19 *Dermatossian v. NYC Transit Auth.*, 67 N.Y.2d 219, 226 (1986).
20 *See e.g. Burgess v. Otis Elevator Co.*, 114 A.D.2d 784 (1st Dept. 1985); *Weeden v. Armor Elevator Co.*, 97 A.D.2d 197 (2nd Dept. 1983).
21 *Gaillard v Centennial El. Indus., Inc.*, 2005 N.Y. Misc. LEXIS 3522, at *7-8 (Sup Ct, Kings County 2005) (internal citations omitted).
22 *Douglas v. Kingston Income Partners '87*, 2 A.D.3d 1079 (3rd Dept. 2003).
23 *Id.*
24 *De Sanctis v. Montgomery Elevator Co.*, 304 A.D.2d 936 (3rd Dept. 2003); see also *Thermidor v. Pinnacle Uptown, LLC*, 46 Misc.3d 1208(A) (Civil Court NY County 2014). * Mr. Anselmo is a partner in the New York office of Lewis Brisbois Bisgaard & Smith LLP

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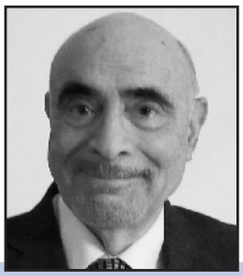
Causation and Mitigation: Legal and Dental Perspectives



BY: ALEXANDER J. CORSAIR, D.M.D.* and BRADLEY J. CORSAIR**

In personal injury cases, a critical issue is whether any claimed injuries were not truly caused by the underlying incident. In the premises liability sphere, a common scenario is a forward-leaning slip or trip and fall, in which the plaintiff's mouth, jaw or another body part has contacted a floor, sidewalk, or another surface or thing. Other matters have plaintiffs who are struck by falling objects, thrown objects, or human attack, as in construction site accidents, sporting activity, and altercations. Injuries such as lost teeth and fractured limbs are sometimes immediately apparent with such events, and injury causation is not in dispute.

In other cases, however, claimed injuries are not demonstrated by health care records or other evidence on the accident date or in following days. Instead, it is not until one or more weeks later that there is an initial written indication that, for example, teeth are loose and cannot be saved or have just been extracted. Health care records will not necessarily contain opinion about the purported origin of present medical or dental difficulties. When such patients are plaintiffs in personal injury lawsuits, the issue of causation is a genuine controversy.

This article is addressed to the context where the proximal connection between a premises occurrence and alleged injuries is debatable. Also considered is mitigation of damages. There is a focus on dental problems here, but concepts may apply to numerous injury situations. Initially is a dentist's perspective, followed by an attorney contribution.

The Differences Between Tooth Loss Caused By Accidental Trauma Versus Tooth Loss Caused By Dental Disease

There are differences in appearance between teeth with a history of dental disease and teeth that have been broken by mechanical trauma. These differences are seen radiographically and clinically. The dental diseases that may cause tooth loss are extensive decay, advanced periodontal disease, and infection of the jaw bone. Teeth lost by mechanical trauma are fractured or avulsed.

The radiographic or X ray images of teeth with a history of dental disease differ from images of teeth after traumatic injury. X rays of teeth having dental disease show decay (known in dentistry as "caries"), loss of supporting bone from periodontal disease, or generalized bone loss from infection. Decay or bone loss is seen as dark gray or black areas where the normal dense structure has been lost. Normal healthy tooth structure or bone is white or light gray. X rays of post traumatic tooth injury show dark vertical or horizontal lines through the crown or root of the tooth. If teeth are avulsed, empty sockets would be seen. In a setting of preexisting disease, examination of the plaintiff's dental records, including X rays, should reveal notes regarding previous treatment or recommendation of treatment for severe decay, periodontal disease, bone infections related to pulpal disease, osteomyelitis, or osteo necrosis of the jaw. If the plaintiff has been seen by a periodontist, expect potential reasons for the visits to include treatment of periodontal disease or other oral inflammation which is not traumatic in origin. The plaintiff may also see a periodontist or other dentist for dental implants, discussed below, which may or may not relate to a traumatic event. A plaintiff's visit to an endodontist may reflect oral or facial pain, plausibly traumatic or non-traumatic in origin. One procedure by an endodontist is root canal, which removes tooth nerve and pulp that is irritated, inflamed or infected from trauma or disease.

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Causation and Mitigation: Legal and Dental Perspectives

Figure 1 (above) - Panoramic X ray image of normal healthy teeth free from decay or bone loss

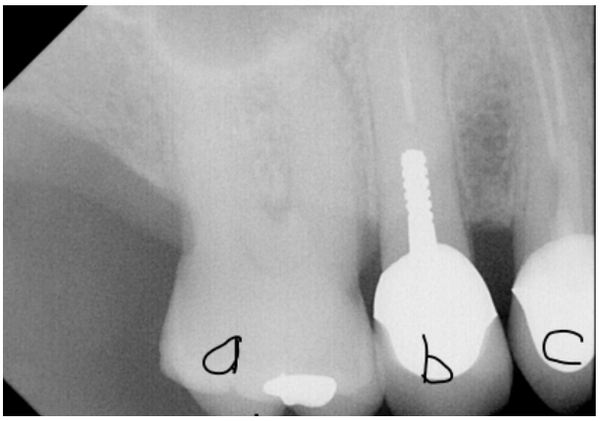

Figure 2 - X ray image; "a" shows normal tooth structure; "b" and "c" show crowns ("b" with a post as well) after endodontic treatment

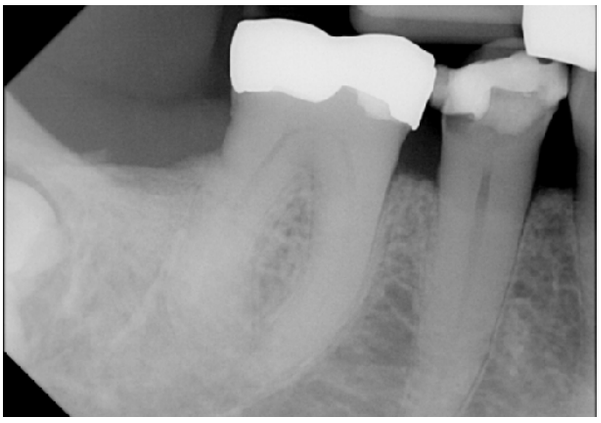

Figure 3 - X ray image showing dental disease i.e. decay; regarding the tooth on the right, decay appears as dark gray beneath a silver amalgam restoration which appears white

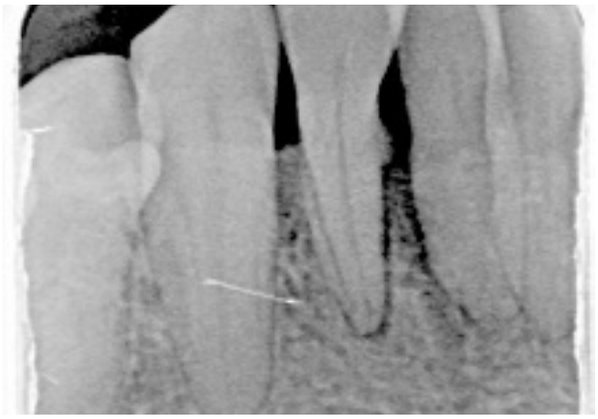

Figure 4 - X ray image showing extensive bone loss due to severe periodontal disease; bone loss appears black, whereas remaining bone is light gray

Mitigation of Damages

Aside from the issue of accident causation, an important question is whether the plaintiff has mitigated damages by pursuing an appropriate course of treatment. Teeth that have been damaged, lost or scheduled for extraction can be restored or replaced in several ways. The visible part of the tooth (above the gum line) is the crown, and the remainder beneath is the root. If the crown of the tooth is partially fractured but adequate tooth structure remains, then a replacement crown or cap may be fabricated. If little of the crown remains or if the root is fractured, then extraction of the tooth is indicated.

The tooth or teeth may be replaced with a bridge or with one or more dental implants. The former has that name since it bridges a gap between teeth. A bridge may be removable or fixed. A removable bridge is also called a denture if all the teeth are replaced, or a partial denture if one or several teeth are replaced.

A fixed bridge or fixed partial denture is supported by two or more natural teeth. Those teeth are prepared or cut down to accommodate crowns which are the abutments for the bridge. A "pontic" is a false tooth (without a root) typically made of porcelain fused to metal. Pontics are soldered or attached to surrounding bridge abutment crowns, also typically made of porcelain fused to metal. The fixed bridge is then permanently cemented to the prepared teeth. Fixed bridges are preferred to removable bridges because they are more comfortable, more functional

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and do not harm the adjacent teeth and other tissues.

The dental implant remedy replaces a tooth's root as well as its crown. The new root is chiefly a fixture beneath the gum line, known as an implant, which is typically a titanium screw. The implant / screw is surgically inserted into the jawbone. This is usually followed by a healing time of three months, allowing the implant to become attached or osseo integrated so that it is chemically bonded to the bone. At that point, commonly a middle component i.e. an abutment post is attached to the implant, and a prosthetic crown or cap is attached to the abutment post. However, in some patients, two implants may serve to support three or four crowns.

Figure 5 - Model showing a dental implant (a titanium screw), a titanium abutment (the cone shape above the implant), and a crown or cap

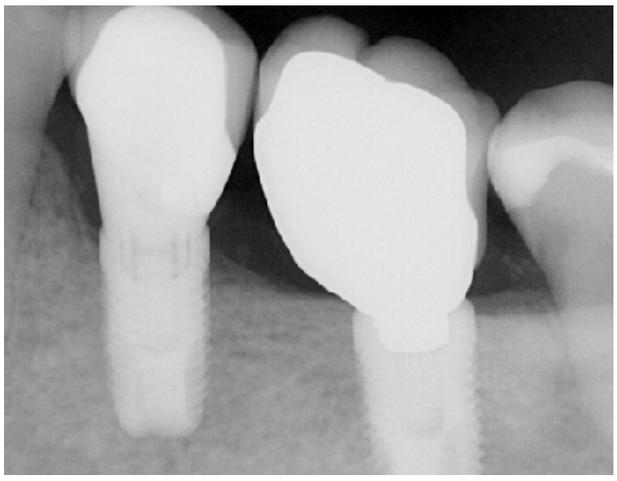

Figure 6 - X ray image showing two implants with abutments and crowns, surrounded by natural teeth

The choice of a bridge or implant is made based on several factors. The factors include the health and dental status of the adjacent teeth, the number of missing teeth, and the quantity of remaining bone available for dental implants. The general health of the patient is also a consideration. Fixed bridges or implant supported bridges are more costly than removable dentures. Implants, with or without fixed bridges, are more costly than fixed bridges alone.

Summary of the Dental Perspective

After an alleged traumatic injury to the mouth, a plaintiff may claim that the accident was responsible for damage or loss of one or more teeth. Examination of the plaintiff's dental records, especially all dental X rays, should reveal the condition of the teeth prior to the injury. A clinical examination and current X rays of the plaintiff will demonstrate the condition of the teeth that are present, as well as the condition of the remaining bone. Clinical evidence of scar tissue may also be present if a traumatic injury occurred.

An expert witness, after reviewing the records, may offer an opinion as to whether the teeth in question were damaged by dental disease rather than mechanical trauma from an accident. By keeping the above considerations in mind, an attorney can refine expectations about how issues of accident causation and consequences may play out.

Law for Injury Causation Contests

The Court of Appeals has observed that causation issues are often relevant both to liability and to damages.[1] In accord, the Appellate Division has stressed that "even when negligence and injury are both properly found, the negligent party may be held liable only where the alleged negligence is found to be a proximate cause of the injury."[2]

In litigating a lawsuit where causation of bodily injuries is contested, it is worth knowing the plaintiff's burden of proof and surrounding details. This section of this article will consider two pattern jury instructions and case law which speak to this, irrespective of what kind of injury is alleged. Following that is a review of principles from matters involving dental problems and/or other injuries. This article also includes with a case study, regarding an appellate opinion which thoroughly embodies several issues of interest relative

Continued on next page

to causation.[3] Discussion of PJI and case law as to mitigation of damages is provided as well.

NY PJI 2:70, titled Proximate Cause - In General,[4] is addressed to whether an alleged act or omission is to be regarded as a cause of an injury to a plaintiff. Its import is that a defendant's act or omission must have been a "substantial factor" in bringing about a claimed injury, for that injury to potentially support an award against that defendant. In full, PJI 2:70 states as follows:

> 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.

The PJI 2:70 Comment notes that the issue of whether negligence is a substantial cause of injury is for the factfinder to decide. It further indicates that the "proximate cause" phrase is deliberately unsaid in the current charge, as it was frequently confusing to lay jurors in the past. Instead, a jury is typically asked to decide whether a claimed act, omission and/or event was a "substantial factor" in causing injuries of the plaintiff,[5] i.e. "had such an effect in producing the injury that reasonable people would regard it as a cause of the injury."[6] "Substantial factor" is a hybrid of two phrases which are also longstanding and still seen in case law, i.e. "substantial cause"[7] and "substantial causative factor."[8]

A jury's determination of the issue of causation, e.g. that a purported accident was or was not a "substantial factor" in causing a plaintiff's injury, will be sustained on appeal unless it is not supported by any fair interpretation of the evidence,[9] and thus contrary to the weight of the evidence.[10] This is so long as the record "does not reflect any confusion on the jury's part with respect to that issue."[11] This issue can be presented on appeal from decision of a post-trial motion to set aside a jury verdict, and in view of directed verdicts[12] and decisions of summary judgment motions.[13]

It can be properly found that a defendant was negligent or violated a statute, but did not cause any injury, unless both issues are so interwoven that it would be illogical to find liability without a resulting injury.[14]

The PJI 2:70 Comment addresses what "substantial" means, stating as follows:

> "Substantial" is defined by Restatement, Second, Torts, § 431, Comment a, as "conduct (which) has such an effect in producing the harm as to lead reasonable [people] to regard it as a cause," and that definition has been approved in Ortiz v Kinoshita & Co., 30 AD2d 334, 292 NYS2d 48 (1st Dept 1968), Bacon v Celeste, 30 AD2d 324, 292 NYS2d 54 (1st Dept 1968); see Wild v Catholic Health System, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013) (citing PJI); Derdiarian v Felix Contracting Corp., 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980). Although the pattern charge thus states a correct principle of law, it will be more readily understood by lay jurors if the principle is expanded upon and related to the facts of the particular case.

The other jury instruction to keep in mind is PJI 2:280, titled "Damages – Personal Injury – Injury and Pain and Suffering."[15] This instructs the jury to award fair compensation for any injury caused by a defendant. PJI 2:280 states:

> If you decide that defendant is liable, plaintiff is entitled to recover a sum of money which will justly and fairly compensate (him, her) for any injury, disability and conscious pain and suffering to date caused by defendant. [If there is an issue relative to the level of plaintiff's awareness, the following should be charged.] Conscious pain and suffering means pain and suffering of which there was some level of awareness by plaintiff (decedent).

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Following now is a deeper dive into case law which enhances perspective about the substantial factor / cause of injury element, and related evidentiary considerations.

Testimony of the plaintiff and health care professionals may be considered, e.g. concerning issues of whether claimed injuries are not consistent with physical characteristics of a premises and/or the physics of an alleged event. In one case, a plaintiff was aided by his testimony of having experienced twisting of and pressure on the body part in question.[16] An orthopedic surgeon supported that plaintiff's claims with testimony that assuming the absence of any pre-accident problem with that bodily area, the twisting movement was consistent with the injury.[17]

On the other hand, testimony of a defense expert - and even of a plaintiff's health care provider - can sometimes support a finding of insufficient causal connection as between an alleged injury and a claimed event and/or premises condition.[18] In one such case, regarding touch football on an athletic field, the Appellate Division doubted whether the alleged mechanics of an occurrence was realistic, commenting "it is difficult to perceive just how claimant's foot could be so entrapped in the circular depression he described."[19] It was accordingly concluded conclude that the claimant had failed to prove by a preponderance of the record that the ground condition where he fell was a substantial causative factor of his injuries.[20]

In another appeal, summary judgment was warranted from expert medical evidence which was based upon the parties' deposition testimonies and injured plaintiff's medical records; this showed that any alleged negligence by the moving defendant did not proximately cause the plaintiff's alleged injuries, which were naturally occurring and not caused by the fall on the premises.[21]

Evidence of preexisting injury or disease can be relevant to the weight and credibility of testimony, but will not necessarily render it inadmissible.[22] Still, evidence of a plaintiff's "complicated medical history" and "concurrent conditions" can enable a jury to rationally conclude that alleged negligence was not a substantial cause of claimed injuries.[23] Similarly, a jury can consider whether claimed injuries were caused by a subsequent accident rather than the subject occurrence.[24]

A health care expert's opinion can be admissible if based on facts which are "fairly inferable from the evidence."[25] "A treating physician can testify as to the cause of the injuries,"[26] as can a treating dentist.[27]

Analogously, a defense expert can testify as to absence of causation of claimed injuries, considering e.g. preexisting injury.[28] This is so long as notice has been provided as to the intended theory of causation or absence thereof, e.g. through a bill of particulars, expert disclosure notice, and/or records or reporting of the health care professional.[29]

"A dentist or physician's alleged lack of knowledge in a particular area in his or her field does not bar that person's testimony, but is simply a factor to be evaluated by the jury that goes to the weight to be accorded to the testimony and not its admissibility."[30] "Where conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion and to reject that of the other,"[31] particularly where the jury finds the former to be more credible.[32] More broadly, a jury "is entitled to accept, or reject, an expert's testimony in whole or in part."[33]

Causally related injury, or absence thereof, can be established by a combination of testimony of a plaintiff and a dental expert as to injury history.[34] A plaintiff who fell from a mechanical scaffold to the ground was aided by his history of first noticing loose teeth following his accident, and relatively soon after that accident, when he was in a hospital.[35]

As with medical expert opinion, a dental expert's opinion as to injury causation or origin should reflect "a degree of confidence in his conclusions sufficient to satisfy accepted standards of reliability."36 It is typically helpful for a dental expert to state that his or her opinion is with "a reasonable degree of dental certainty"[37] - but that statement does not assure evidentiary admission, and absence of that statement does not categorically preclude admission.[38] A dental expert's opinion has a reasonable degree of certainty if "considering the totality of his testimony, rather than focusing narrowly on single answers, the expert conveyed equivalent assurance that his opinion was not based on either supposition or speculation."[39]

In the case just quoted, the plaintiff had fallen on her face after tripping on uneven asphalt at a

Continued on next page

construction site. Her preexisting partial bridge covering six teeth was broken in this event. At trial, both the plaintiff's treating dentist and the defendant's expert testified that the plaintiff had preexisting periodontal disease. The plaintiff testified that because of a lack of funds, she could not replace the bridge for four years. Her treating dentist, although somewhat equivocal at times, testified that the plaintiff's periodontal disease was made worse by this accident and her ensuing inability to receive proper dental attention. One of the consequences of this was necessity of a new bridge covering twelve teeth rather than six. The testimony of the plaintiff and her treating dentist, with respect to causal relationship, was held sufficient to support the jury's verdict in her favor

Case Study: McDermott v. Coffee Beanery, Ltd. [40]

This appellate opinion presents a rather interesting blend of alleged premises and products liability, dental injury with ensuing complications, and proximate cause debate. The lower court had granted the plaintiff's post-trial motion to set aside a defense verdict as against the weight of the evidence, and remanded for a new trial as to proximate cause and damages. The First Department reversed that order and reinstated the verdict. The opinion has a comprehensive recitation of trial testimony, some of which is summarized below.

The plaintiff, while at a Coffee Beanery store at LaGuardia Airport, allegedly bit into a brownie containing the tip of a metal blade, causing injury to a tooth. That "precipitated a cascade of other personal maladies."[41] The plaintiff settled her claims against Coffee Beanery and proceeded to trial against the other defendant, Love and Quiches Desserts, which had supplied the brownie to Coffee Beanery. After testimony concluded, the court granted a directed verdict as to liability. The jury was given a verdict sheet where the question of whether the dessert product was defective was answered "yes" in advance. The jury then found that this product was not a substantial factor in causing the plaintiff's injuries.

The plaintiff's direct testimony included the following. When she bit into the brownie, she felt something sharp, i.e. a one inch metal blade. The plaintiff then flew to South Carolina as planned. Her first health care attention was a week later, when she saw her regular dentist. In that visit, she complained of sharp pain in her next to last molar on the bottom right side (tooth # 30), sensitivity to hot and cold in that tooth, and pain when she bit down to chew. The dentist, believing that perhaps a small piece of enamel had chipped away, did not treat the tooth, thinking the sensitivity might subside in a couple of days. He subsequently put an enamel coating on the tooth, but the sensitivity continued.

The plaintiff then underwent four unsuccessful root canal procedures, after which the tooth was removed by an oral surgeon. She then developed a dry socket, which led to several weeks of very painful treatment. She eventually underwent surgery for a titanium implant in her jaw by another oral surgeon, and a tooth was installed by her regular dentist on that implant.

During these several months of treatment, the plaintiff developed an inflammation of her jaw and serious pain which began in the jaw and radiated over her face, head, neck and shoulder, which she claimed was TMJ. temporomandibular joint disorder (TMJ). Plaintiff sought treatment for this from another dentist, who prepared a bite-plate and prescribed physical therapy, anti-inflammatory medication and muscle relaxants.

The plaintiff also had onset of colitis, attributed to the large amount of antibiotics she had been prescribed. Pain and other symptoms from this led to the plaintiff having endoscopies and colonoscopies.

On cross-examination, the plaintiff acknowledged the following. After she bit into the brownie, she experienced discomfort, but no pain. A filling had been put in the tooth many years earlier, but she was asymptomatic on the accident date. TMJ and colitis was not diagnosed until approximately eight months after the incident.

The plaintiff's regular dentist testified as follows. In the initial post-accident visit, the plaintiff recounted having bitten into a pastry with a metal blade in it. She felt a jolt and had pain in the lower right first molar. That tooth had a silver (amalgam) filling in it for many years with no previous complaints. Post-accident, in this visit, he did not see any external fractures, so he

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recommended that the plaintiff take it easy on the tooth for a week.

The plaintiff returned four weeks later, reporting that the tooth was still painful and sensitive to cold. This dentist removed the filling, and found no decay but he did find a crack in the inner part of the tooth. He opined that this crack was from the trauma from biting down on the piece of metal. He then treated the tooth with a type of filling which contained a medicine designed to sedate the tooth.

About 3-4 weeks later, the plaintiff complained of continuing pain while chewing. This dentist placed a temporary crown. Plaintiff ultimately underwent a root canal procedure over three visits. That was unsuccessful, and so an oral surgeon removed the tooth, which was a difficult extraction due to e.g. fracture fragments.

Additionally, the plaintiff developed post-operative dry socket, requiring four to five weeks of treatment by the oral surgeon, and TMJ as described above. The dentist who treated for TMJ advised that the trauma of biting on the metal blade "was a precipitator of the scenario that subsequently ensued."[42] The plaintiff also had an implant as she described. Her regular dentist opined that the ultimate cause of the loss of the tooth was from plaintiff biting on metal with mistaken force, which resulted in fractures in the tooth.

On cross-examination, the plaintiff's regular dentist acknowledged that the filling in the tooth was there because she had decay long ago, that he saw only one internal crack after removing the filling, and observed no cracks on the outside enamel. He could not see the trunk or root system of this individual tooth.

The defendant's case included testimony of a retained oral surgeon. He testified that he examined the plaintiff about 2½ years after the accident, and also took a history from her. With regard to the plaintiff's jaw and jaw joint, this doctor noted her subjective complaints of pain on both sides of her jaw; but, when he listened as the plaintiff opened and closed her mouth, he could not hear anything audible indicating a rip or tear in the cartilage in the jaw joint, or that the cartilage was in an abnormal position. Also, his pressure and palpitation tests on the muscles indicated no response to pain and normal function. There was normal jaw range of motion, and no abnormality existed with the plaintiff's seventh facial nerve or with the sensory nerves in her face. The plaintiff did not first complain of jaw pain until eight months after the accident.

The defense oral surgeon averred that he reviewed x-rays taken by a number of doctors, including the dentist, oral surgeons, and the TMJ specialist who treated the plaintiff. In his opinion, x-rays taken 4½ months after the accident indicated that the jaw joint was normal, and CT scans 3-4 months later echoed that finding. X-rays taken about five months after the accident showed that the area around the end of the root canal seemingly had change or infection. It was thus his belief that the preexisting cavity had gone through the tooth and into the nerve.

The defense dental expert further opined that "[t]his wasn't a trauma crack. This wasn't a break from biting on something ... the tooth was coming out ... because there was infection in the root canal." He added that the infection came from the mouth and seeped in along the silver filling, and x-rays did not show a crack or break in the tooth. He concluded that the tooth was not trauma-related, but instead was explained by "technique and poor outcome that is a risk of endodontic therapy."

As to the TMJ claim, he opined that there was only subjective proof of TMJ, and no residuals of any intraoral, TM joint or dental injury related to the subject incident.

On cross-examination, this defense expert acknowledged that he did not know what caused the internal crack, but he did have an opinion. Although plaintiff's counsel chose not to inquire, direct and redirect testimony indicated this opinion to be that the crack, the need for root canal therapy, and the eventual removal of the tooth, all stemmed from normal decay resulting from an old, inadequate silver filling.

As for governing law, one principle is that "particular deference is to be accorded a jury verdict in favor of a defendant in a tort action,"[43] and that is "especially if the resolution of the case turns on the evaluation of the conflicting testimony of expert witnesses."[44] As stated above, "the jury is entitled to

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accept, or reject, an expert's testimony in whole or in part."[45]

The appellate jurists then found that there was ample evidence to support the jury's verdict, and discussed why, considering the testimony of the treating regular dentist and the defense dental expert. The jury was entitled to credit the testimony of the latter, as he had examined the plaintiff and reviewed x-rays films taken at various points in time. Moreover, he had opined that the tooth complications were not trauma-related, based on x-rays indicative of infection of the tooth and root rather than cracks or breaks. The tooth fragments ultimately seen were because the tooth came out in pieces when extracted, since it was dead from the root canal. And, a cracked tooth from biting on something hard would result in immediate pain, and the plaintiff merely had discomfort at the time of incident, explainable by decomposition of the filling.

Also considered was that the treating regular dentist had not discovered the crack in the tooth until drilling out the old filling, more than a month after the subject incident. He did attribute that crack to the trauma on biting the metal blade. However, "it was unquestionably within the province of the jury to give (the defense expert's) testimony more weight in view of the delay in finding the damage to the tooth, the inconclusive x-rays, and (the regular dentist's) acknowledgment that a root canal specialist could find no fractures in any of the root systems." The jury was also entitled to credit the defense expert's opinion as to whether the TMJ was not causally related to the incident, e.g. since there was not any structural abnormality of relevance.

Mitigation of Damages - Law

There is a New York pattern jury instruction on this subject, i.e. PJI 2:325, titled "Damages – Mitigation – General Principles (Failure to Have an Operation)."[46] This states:

> A person who has been injured is not permitted to recover for damages that could have been avoided by using means which a reasonably prudent person would have used to (cure the injury, alleviate the pain). The defendant claims that if the plaintiff submitted to an operation (his, her) (injury, pain) would be (completely cured, greatly alleviated) and that such an operation is not dangerous The plaintiff claims that (he, she) declined to have the operation because it was (dangerous, too expensive). The burden of proving that the plaintiff failed to avail (himself, herself) of a reasonably safe procedure which would have (completely cured, greatly alleviated) (his, her) injury is on the defendant. If you find that the plaintiff is entitled to recover in this action, then in deciding the nature and permanence of (his, her) injury and what damages (he, she) may recover for the injury, you must decide whether in refusing to have an operation the plaintiff acted as a reasonably prudent person would have acted under the circumstances. In deciding that question you will take into consideration the evidence concerning the nature of the operation, the expense of such an operation and whether the plaintiff had sufficient funds or had insurance to meet that expense, the extent to which such an operation involves danger to the plaintiff, and the results to be expected from it.
>
> If you find that in deciding not to have an operation the plaintiff acted as a reasonably prudent person would have acted then the plaintiff is entitled to recover for (his, her) injuries, as you find them to be, without regard to the possibility of an operation. If, however, you find that the operation is one that a reasonably prudent person would submit to and that the operation would (cure the injury, relieve the pain), you will take that fact into consideration in arriving at the amount of damages that you award.

As the Comment of this PJI expresses, this charge is but one illustration of the general rule that the plaintiff is required to keep loss to a minimum. This longstanding principle has been described as "the active duty of making reasonable exertions to render the injury as light as possible"[47] i.e. a duty of "reasonable effort to avoid consequences of the act complained of."[48] There is to be no recovery for losses which might have been prevented by reasonable efforts and expenditures[49]

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In a case involving dental or other bodily injury, examples of required mitigating measures might include adhering to prescribed medication and diet,[50] and seeking alternative employment[51] and vocational rehabilitation.[52] There is also a duty is to use ordinary care in following the advice of a health care provider, albeit a plaintiff is not under an absolute obligation to adhere to such advice.[53] The PJI 2:325 Comment indicates that a plaintiff is entitled to rely on such advice.[54] On the other hand, delaying recommended treatment may constitute a failure to mitigate damages that prompts a jury to reduce a pain and suffering award.[55]

In the case just referenced, the plaintiff alleged dental malpractice regarding an ill-fitting temporary bridge which caused persistent pain from irritated and swollen gums. This plaintiff was missing at least 13 teeth, had eroding prior dental work, and decay in at least one tooth. She was advised of the option of a comprehensive restorative plan, which would include implants, caps, and permanent bridgework. Initially, the temporary bridge was provided. Instead of having that replaced as contemplated, the plaintiff terminated her care with these dentists, and kept wearing the "temporary" bridge for three years.

At trial, the jury rendered an award for past pain and suffering which the plaintiff considered too low. On appeal, the majority directed a new trial on this issue, absent a stipulation to an increased award. The dissent would have left that award in place. The dissenting view was that the jury, in making its evaluation, may have credited the argument that the plaintiff had failed to mitigate damages by prematurely abandoning treatment - dental records characterized this plaintiff as having "delayed the placement of the permanent bridge, thereby prolonging her own discomfort."[56]

The PJI 2:325 Comment further notes that it is a defendant's burden to prove that a plaintiff has failed to mitigate damages.[57] This should be pled as an affirmative defense in the answer to the complaint.[58] At trial, a request for a jury charge on mitigation of damages may need to be made prior to summation, to avoid undue prejudice to plaintiff's counsel.[59]

Conclusion

Damages causation is often a contested element of a prima facie personal injury case. To evaluate this, legal practitioners may wish to compile a factual record regarding component considerations, such as the mechanics of the sued-upon incident, and timing of the discovery of injuries versus when that incident occurred. Ideally one would review pre-incident as well as post-incident health care records and diagnostic test films, for possible preexisting versus traumatic conditions. Other investigation tools may include a deposition of the plaintiff, and an examination of the plaintiff by a defense health care expert.

As seen from the foregoing case law and Dr. Corsair's comments, potential indications of non-traumatic dental problems include tooth decay, infection, and periodontal disease. In dental and other injury cases, consider also whether the plaintiff's treatment, testing and self-care represent a reasonable effort to avoid unnecessary pain and disease. We hope our discussion here will prove informative.

1 *Oakes v. Patel*, 20 NY3d 633, 647, 965 NYS2d 752 (2013).

2 P*asquaretto v. Long Island University*, 150 AD3d 1129, 1130, 52 NYS3d 636 (2d Dept 2017) and *Roberson v. Wyckoff Heights Medical Center*, 123 AD3d 791, 792, 999 NYS2d 428 (2d Dept 2014), quoting from *Canonico v. Beechmont Bus Serv., Inc.*, 15 AD3d 327, 328, 790 NYS2d 36 (2d Dept 2005).

3 *McDermott v. Coffee Beanery, Ltd.*, 9 AD3d 195, 777 NYS2d 103 (1st Dept 2004).

4 PJI 2:70 is the lead charge of Chapter F of the Negligence Actions division of the PJI, and is aptly titled "Proximate Cause."

5 *See Salas v. Bellair Laser Center, Inc.*, 185 AD3d 746, 127 NYS3d 133 (2d Dept 2020); *Bida v. Port Authority of New York and New Jersey*, 172 AD3d 601, 102 NYS3d 20 (1st Dept 2019); *Tyrell v. Pollak*, 163 AD3d 1232, 80 NYS3d 706 (3d Dept 2018); *King v. Perrotte*, 50 AD3d 1266, 1269-1270, 855 N.Y.S.2d 706 (3d Dept 2008); accord *Torres v. City of New York*, 179 AD3d 732, 117 NYS3d 82 (2d Dept 2020).

6 *Wild v. Catholic Health System*, 21 NY3d 951, 955, 969 NYS2d 846 (2013).

7 See *Hain v. Jamison*, 28 NY3d 524, 529, 46 NYS3d 502 (2016); *Romanelli v. Jones*, 179 AD3d 851, 117 NYS3d 90 (2d Dept 2020); *Farnham v. MIC Wholesale LTD*, 176 AD3d 1605, 1607, 110 NYS3d 175 (4th Dept 2019); *Genza v. Richardson*, 95 AD3d 704, 945 NYS2d 61 (1st Dept

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2012); *Harrington v. City of New York*, 79 A.D.3d 545, 913 N.Y.S.2d 81 (1st Dept 2010); *Graham v. Weintraub*, 57 AD3d 609, 869 NYS2d 204 (2d Dept 2008); *Elkin v. Goodman*, 24 AD3d 717, 808 NYS2d 405 (2d Dept 2005); *Dellavalle v. E.W. Howell Co., Inc.*, 260 AD2d 194, 688 NYS2d 44 (1st Dept 1999). As illustrated by these cases and others cited here, the issue of whether a defendant's negligence was not a substantial cause of injury can exist where an occurrence is claimed not to have been foreseeable, where an intervening act is alleged, and where injuries are claimed not to have been caused or exacerbated by an actual occurrence, a conjectured occurrence, or alleged professional malpractice.

8 See *Varela v. Rohlf*, 176 A.D.3d 651, 112 N.Y.S.3d 43 (1st Dept 2019); *Fernandez v. City of New York*, 165 AD3d 403, 84 NYS.3d 147 (1st Dept 2018); *Drew v. State*, 146 AD2d 847, 536 NYS2d 252 (3d Dept 1989); *Nallan v. Helmsley–Spear, Inc.*, 50 NY2d 507, 520, 429 NYS2d 606 (1980).

9 See *Crooks v. E. Peters*, LLC, 103 AD3d 828, 830 960 NYS2d 165 (2d Dept 2013); *King v. Perrotte*, 50 AD3d 1266, 1269, 855 N.Y.S.2d 706 (3d Dept 2008); *Steginsky v. Gross*, 46 AD3d 671, 672, 847 NYS2d 59 (2d Dept 2007); *Feliciano v. Ford Motor Credit Co.*, 28 AD3d 221, 222, 812 NYS2d 508 (1st Dept 2006); *McDermott v. Coffee Beanery, Ltd.*, 9 AD3d 195, 206, 777 NYS2d 103 (1st Dept 2004).

10 See CPLR 4404(a); *Crooks v. E. Peters, LLC*, 103 AD3d at 830; *McDermott v. Coffee Beanery, Ltd.*, 9 AD3d at 206; see also *Feliciano v. Ford Motor Credit Co.*, 28 AD3d 221.

11 *Crooks v. E. Peters, LLC*, 103 AD3d at 830.

12 See *Sokolovsky v. Mucip, Inc.*, 32 AD3d 1011, 821 NYS2d 463 (2d Dept 2006).

13 See *Viera v. Khasdan*, 185 AD3d 405, 126 NYS3d 462 (1st Dept 2020).

14 *King v. Perrotte*, 50 AD3d 1266, 1268, 855 N.Y.S.2d 706 (3d Dept 2008); see also *Finnegan v. Peter, Sr. & Mary L. Liberatore Family Limited Partnership*, 90 AD3d 1676, 1677, 936 NYS2d 821 (4th Dept 2011).

15 PJI 2:280 is listed in the "Damages" chapter of the Negligence Actions division of the PJI.

16 *Feliciano v. Ford Motor Credit Co.*, 28 AD3d at 221.

17 *Feliciano v. Ford Motor Credit Co.*, 28 AD3d at 221.

18 *Accord Pasquaretto v. Long Island University*, 150 AD3d 1129, 1131, 52 NYS3d 636 (2d Dept 2017); *Drew v. State*, 146 AD2d 847, 849, 536 NYS2d 252 (3d Dept 1989).

19 *Drew v. State*, 146 AD2d at 849.

20 *Drew v. State*, 146 AD2d at 849.

21 *Roberson v. Wyckoff Heights Medical Center*, 123 AD3d 791, 792, 999 NYS2d 428 (2d Dept 2014).

22 *Feliciano v. Ford Motor Credit Co.*, 28 AD3d at 221.

23 *Genza v. Richardson*, 95 AD3d 704, 945 NYS2d 61 (1st Dept 2012).

24 See *Canonico v. Beechmont Bus Serv., Inc.*, 15 AD3d 327, 790 NYS2d 36 (2d Dept 2005).

25 *Feliciano v. Ford Motor Credit Co.*, 28 AD3d at 221.

26 *Hamer v. City of New York*, 106 AD3d 504, 509, 965 NYS2d 99 (1st Dept 2013).

27 *Stevans v. Consolidated Edison Co. of New York*, 2001 NY Slip Op 40563(U), 2001 WL 1725964 (App Term, 2d Dept 2001).

28 *Accord Genza v. Richardson*, 95 AD3d at 704.

29 See *Hamer v. City of New York*, 106 AD3d at 509; *Genza v. Richardson*, 95 AD3d at 704; *Kabalan v. Hoghooghi*, 77 AD3d 1350, 1352, 908 NYS2d 299 (4th Dept 2010).

30 *Rafaniello v. Gronowitz*, 4 Misc3d 131(A), 791 NYS2d 873 (App Term, 2d Dept 2004), citing *Gordon v. Tishman Constrs. Corp.*, 264 AD2d 499, 694 NYS2d 719 (2d Dept 1999).

31 *Steginsky v. Gross*, 46 AD3d 671, 672, 847 NYS2d 593 (2d Dept 2007).

32 *Wentland v. E.A. Granchelli Developers, Inc.*, 145 AD3d 1623, 1624, 44 NYS3d 655 (4th Dept 2016).

33 *McDermott v. Coffee Beanery, Ltd.*, 9 AD3d 195, 207, 777 NYS2d 103 (1st Dept 2004). Accord *Henry v. New York City Transit Auth.*, 92 A.D.3d 460, 461, 939 N.Y.S.2d 336 (1st Dept 2012).

34 See *Henry*, 92 A.D.3d at 460-461.

35 *Henry*, 92 A.D.3d at 460-461.

36 *Matott v. Ward*, 48 NY2d 455, 459, 423 NYS2d 645 (1979) (medical expert opinion); accord *Stevans v. Consolidated Edison Co. of New York*, 2001 NY Slip Op 40563(U), 2001 WL 1725964 (App Term, 2d Dept 2001) (dental expert opinion).

37 Accord Stevans, 2001 WL 1725964; see also *N.G. v. Harris*, 60 Misc3d 1225(A), 107 NYS3d 818 (Sup Ct, Kings Cty 2018); *Kirschner v. Fulop-Goodling*, 50 Misc3d 1219(A), 36 NYS3d 48 (Sup Ct, Nassau Cty 2016).

38 Accord Stevans, 2001 WL 1725964 at *1; Matott, 48 NY2d at 462-463; *Rodriguez v. New York City Housing Auth.*, 238 AD2d 125, 655 NYS2d 501 (1st Dept 1997).

39 Stevans, 2001 WL 1725964 at *1, citing *Matott v. Ward*, 48 NY2d 455, 462-463, 423 NYS2d 645 (1979).

40 9 AD3d 195, 777 NYS2d 103 (1st Dept 2004).

41 9 AD3d at 197.

42 9 AD3d at 201.

43 9 AD3d at 206, citing *Nicastro v. Park*, 113 AD2d 129, 134, 495 NYS2d 184 (2d Dept 1985).

44 9 AD3d at 207, citing *Fontana v. Kurian*, 214 AD2d 832, 833, 625 NYS2d 677 (3d Dept 1995).

45 9 AD3d at 207.

46 PJI 2:325 is listed in the "Damages" chapter of the Negligence Actions division of the PJI. There is also a supplemental instruction, PJI 2:325.1, titled "Damages – Mitigation – General Principles (Failure to Have an Operation) [Supplemental Instruction]."

47 *Wilmot v. State*, 32 NY2d 164, 168, 344 NYS2d 350 (1973); *Hamilton v. McPherson*, 1 Tiffany 72 (1863).

48 *Wilmot v. State*, 32 NY2d at 168; *Mayes Co. v. State*, 18 NY2d 549, 554, 277 NYS2d 393 (1966).

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Investigation of the Premises Liability Claim and the Potential Problem of Spoliation Sanctions

BY: ROBERT K. BEIDLER AND NICHOLAS M. CARDASCIA

A premises liability claim can arise from many different factual scenarios: trip and fall, assault, robbery, motor-vehicle accident, and failure to maintain security to name a few. Each fact pattern requires its own specialized investigation that will lead to the collection of valuable evidence. This article will provide an overview of what you should generally expect from a premises liability investigation

By the time a defendant receives a claim letter from plaintiff's counsel, you are already late. Proper, accurate assessment of incidents, followed by internal reports and aggressive investigation, is the best way to protect your client's interests. As the cost of static surveillance continues to drop and the hardware becomes smaller and smaller, it is easier to accept as a first step. Once video surveillance is established, there are two paths: monitoring and storage. A person or company can be hired to monitor the video looking for incidents or it can be cataloged and stored against future claims.

While video surveillance may be the best defense to a premises liability claim, the failure to preserve such evidence can often turn into a sword for the benefit of the plaintiff. The issue of spoliation of evidence will be addressed later in this article.

Once an investigation is commenced, the first piece of evidence that we look for is video. Next, the location of loss is examined, photographed, and measured. Pertinent measurements are checked against local building codes. Lighting conditions are noted and checked at the time ofloss. Certified weather reports are obtained. Contracts with any third-party entities are requested. Work orders (internal and external) are requested for any notice defense or subrogation. Police reports, if applicable, are obtained. Surrounding properties and owners are canvassed for pertinent information and additional surveillance.

The claimant's physical/medical history is examined. The driving record is obtained for possible previous accidents and to try to find activities that may lead to injuries (motorcycles, jet skis, etc.) DMV records may also reveal solid leads for future surveillance of the claimant. In addition, DMV records may contain adverse information on the claimant for use as impeachment evidence down the road. The DMV search can be augmented with a criminal background check, as well as a complete prior claim check.

Increasingly, information found in a claimant's on-line presence contradicts their Notice of Claim and Bill of Particulars. Often, claimants are coached to scrub or privatize their accounts. A solid effort by a trained Social Profiling team can pull information from the claimant's ancillary contacts that belie the nature and extent of the claimed injuries.

We have found that results on defending premises liability cases are substantially improved when investigation is conducted shortly after an incident occurs. One potential pitfall for defendants in today's world, however, involves video surveillance. Many retail establishments and commercial properties have active video surveillance systems recording activity in public spaces 24-hours a day, 7-days a week. Even some residential homes have video surveillance through devices such as Nest and other home surveillance systems. The pitfall, as mentioned above, is what happens when the video surveillance is not preserved, as most systems automatically overwrite themselves after a short period of time.

The radiographic or X ray images of teeth with a history of dental disease differ from images of teeth after traumatic injury. X rays of teeth having dental

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disease show decay (known in dentistry as "caries"), loss of supporting bone from periodontal disease, or generalized bone loss from infection. Decay or bone loss is seen as dark gray or black areas where the normal dense structure has been lost. Normal healthy tooth structure or bone is white or light gray. X rays of post traumatic tooth injury show dark vertical or horizontal lines through the crown or root of the tooth. If teeth are avulsed, empty sockets would be seen. In a setting of preexisting disease, examination of the plaintiff's dental records, including X rays, should reveal notes regarding previous treatment or recommendation of treatment for severe decay, periodontal disease, bone infections related to pulpal disease, osteomyelitis, or osteo necrosis of the jaw. If the plaintiff has been seen by a periodontist, expect potential reasons for the visits to include treatment of periodontal disease or other oral inflammation which is not traumatic in origin. The plaintiff may also see a periodontist or other dentist for dental implants, discussed below, which may or may not relate to a traumatic event. A plaintiff's visit to an endodontist may reflect oral or facial pain, plausibly traumatic or non-traumatic in origin. One procedure by an endodontist is root canal, which removes tooth nerve and pulp that is irritated, inflamed or infected from trauma or disease.

Standard for the Imposition of Spoliation Sanctions

According to the Court of Appeals, "[a] party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense."[1]

Obligation to Preserve the Evidence

When does one have an "obligation to preserve" evidence? Courts often look to whether litigation was pending or whether a party had notice of a specific claim at the time evidence was destroyed. Absent pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices.[2]

Once a claimant or an attorney for a claimant places a defendant on notice to preserve video evidence, then that video must be preserved. If, however, the letter requesting preservation was sent after the video had already been deleted or overwritten, then spoliation sanctions should not be imposed upon the defendant. Although this can be used as a general guideline, cases have imposed spoliation sanctions on defendants where letters to preserve were not sent pre-suit and the video was overwritten.

In *SM v Plainedge Union Free School Dist.*[3], the Second Department affirmed the imposition of a negative inference charge on the defendant. In that case, the claim against the defendant was based on negligent supervision of an infant during school recess. Given the nature of the accident, an incident report was completed by the school nurse, notice was given to the school's insurance company, and a report was made directly to the central office. In addition immediately following the accident, the school principal reviewed surveillance footage to determine the cause of the accident.

The defendant only preserved 24 seconds of surveillance footage from the day of the accident. During the litigation, the plaintiffs demanded "the entire footage of the recess period leading up to the time of the accident. In response, the defendant stated that it had saved only that portion of the video which depicted the actual accident and claimed that because it had no prior notice of the need to preserve any additional footage. In keeping with the defendant's usual custom and practice, the remaining footage was automatically erased 30 days after the accident.

The Second Department, in affirming the Supreme Court's order of a negative inference charge, held that the plaintiffs demonstrated that the defendant had an obligation to preserve surveillance footage of the moments leading up to the infant plaintiff's accident at the time of its destruction, but negligently failed to do so. The court continued and held that the defendant was clearly on notice of possible litigation and, thus, under an obligation to preserve any evidence that might be needed for future litigation.

Sometimes, the nature of the plaintiff's injury, coupled with the defendant's immediate investigation into the cause of the accident, should alert the defendant to the possibility of litigation and the

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[49] See *Wilmot v. State*, 32 NY2d at 168; *Mayes Co. v. State*, 18 NY2d at 554.

[50] *Dombrowski v. Moore*, 299 AD2d 949, 951, 752 NYS2d 183 (4th Dept 2002).

[51] See *McLaurin v. Ryder Truck Rental*, 123 AD2d 671, 673, 507 NYS2d 41 (2d Dept 1986); *Miah v. Private One of New York LLC*, 23 Misc3d 1133(A), 2009 WL 1492725 at *6 (Sup Ct, Kings Cty 2009).

[52] See *Bell v. Shopwell, Inc.*, 119 AD2d 715, 716, 501 NYS2d 129 (2d Dept 1986); *Thompson v. Port Authority*, 284 AD2d 232, 233, 728 NYS2d 15 (1st Dept 2001); Miah, 2009 WL 1492725 at *6.

[53] *Dombrowski v. Moore*, 299 AD2d 949 at 951; *Fafard v. Ajamian*, 60 AD2d 853, 400 NYS2d 856 (2d Dept 1978).

[54] Citing *Lyons v. Erie Ry. Co.*, 57 NY 489 (1874), and *Goldman v. State*, 28 AD2d 782, 280 NYS2d 879 (3d Dept 1967).

[55] *Garber v. Lynn*, 79 A.D.3d 401, 406, 913 N.Y.S.2d 175 (1st Dept 2010) (in dissent).

[56] *Garber v. Lynn*, 79 A.D.3d at 404.

[57] Citing *Cornell v. T.V. Development Corp.*, 17 NY2d 69, 268 NYS2d 29 (1966).

[58] See *Wooten v. State*, 302 AD2d 70, 74, 753 NYS2d 266 (4th Dept 2002); *Cody v. State*, 59 Misc3d 302, 68 NYS3d 815 (Ct Clms 2017).

[59] *Kabalan v. Hoghooghi*, 77 AD3d 1350, 1353, 908 NYS2d 299 (4th Dept 2010).

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.

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need to preserve video. And, courts have held, as in SM, that preserving only the video of the accident itself may not satisfy the preservation requirement. Where the events leading up to the accident will be an essential element of the litigation, then the defendant must preserve more than the happening of the accident itself.

These gray areas will continue to be sources of litigation, so it is better to err on the side of preserving more video than less.,

Culpable State of Mind

In 2012, the Appellate Division, First Department held that "a culpable state of mind for purposes of a spoliation sanction includes ordinary negligence."[4] Courts since 2012 have continued to restate this standard.

Destroyed Evidence Must Be Relevant to a Party's Claim or Defense

Where evidence was intentionally or willfully destroyed, its relevance is presumed.[5] Where evidence was negligently destroyed, however, the party seeking sanctions must establish that the destroyed evidence was relevant to the party's claim or defense.[6] Thus, where the absence of the video does not deprive the plaintiff of the ability to prove her case, spoliations sanctions will not be warranted.[7]

The most effective way to defend a premises liability case is to promptly investigate the claim and to preserve all relevant evidence in anticipation of litigation. With the evidence preserved, potential sanctions for spoliation of evidence will be avoided.

[1] *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (2015) (internal quotations omitted)

[2] *Dziadaszek v Legacy Stratford, LLC*, 177 A.D.3d 1276 (4th Dept 2019); *Sanders v 210 N. 12th St.*, LLC, 171 A.D.3d 966 (2d Dept 2019)

[3] 162 A.D.3d 814 (2d Dept 2018)

[4] *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 A.D.3d 33 (1st Dept 2012)

[5] *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (2015)

[6] *Hirschberg v Winthrop-Univ. Hosp.*, 175 A.D.3d 556 (2d Dept 2019)

[7] *Sarris v Fairway Group Plainview, LLC*, 169 A.D.3d 734 (2d Dept 2019)

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