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DEFENDANT

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

FEATURING:

BLUE SMOKE, MIRRORS AND PARTIAL CONTRACTUAL INDEMNIFICATION: DUTTON v. PANKOW

ALSO IN THIS ISSUE:

TOURE CASES CLARIFY ISSUES IN NO FAULT LAW

WORTHY OF NOTE

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President's Column

As we look back on the events of the past year, we are prompted by the phrase "return to normal daily life".

We as defendants and those involved in the defense industry ask "just what is life as normal?"

It is nothing more nor less than the representation of clients and carriers with the utmost honesty, diligence and integrity.

Toward that end, DANY promotes that ideal (1) by providing us with an organization that serves as a clearinghouse for the free and open exchange of ideas and information that is both topical and necessary to best service our clients and principals; and (2) by elevating the status, knowledge and skills of our membership on an individual basis through the work of our educational and informational endeavors.

This year, as part of our educational program, DANY will present seminars on written indemnification as it relates to "grave injury" following the Dutton case and on toxic tort issues involving mold.

From the information gathering front, DANY continues to monitor legislative proposals and developments in Albany as they affect the substantive practice of law from the defendant's perspective. Currently pending are proposed measures that seek change in the Labor Law. Article 50 relating to the calculation of annuity payments on judgments, the types of damages that may be awarded in wrongful death actions, contingent fees in medical malpractice actions and pre-judgment interest.

Our organization will monitor developments, keep our members informed and, where appropriate, offer constructive input and suggestions on those proposals that have a direct impact on the defense practice.

In so doing, we return to our "normal lives" as we endeavor to inform and educate, our stated mission.

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Blue Smoke, Mirrors and Partial Contractual Indemnification: Dutton v. Pankow

Thirteen years ago, the First Department held:

> ... a general contractor who is 1% responsible for an accident is, by reason of the GOL § 5-322.1, barred from enforcing an indemnification agreement with a subcontractor/indemnitor and is limited instead to 99% contribution from his cotortfeasors...

Brown v. Two Exchange Plaza Partners, 146 A.D.2d 129, 539 N.Y.S.2d 889, 894 (1st Dept. 1989), aff'd, 76 N.Y.2d 172, 556 N.E.2d 430 (1990).

Recently, when a general contractor was found 20% liable to the plaintiff, the same court allowed the general contractor to receive "partial contractual indemnification." Dutton v. Charles Pankow Builders, Ltd., 296 A.D.2d 321, 745 N.Y.S.2d 520 (1st Dept. 2002). How did the First Department go from prohibiting contractual indemnification to an indemnitee who was partially at fault in Brown to allowing partial contractual indemnification in Dutton? A close examination of prior decisions by the First Department indicates that the answer may have more to do with providing insulation to workers compensation insurers than adherence to principles of *stare decisis.*

Since the decision in Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288 (1972), and the codification of the apportionment doctrine into Article 14 of the CPLR, the employer of an injured plaintiff has been subject to

Continued on page 2

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Blue Smoke, Mirrors and Partial Contractual Indemnification: Dutton v. Pankow

Continued from page 1

impleader for negligence based claims and contractual indemnification. The standard ISO commercial general liability policy contains an exclusion for any liability that may attach to the insured as an employer of an injured employee for job-related accidents. This exclusion covers the negligence-based claims of contribution and common-law indemnification. This same policy contains an exception to the exclusion that restores coverage to the insured/employer for liability assumed in "insured contracts." This exception to the employee exclusion provides coverage for liability assumed in a contractual indemnification clause.

Overreaching in the negotiation of construction contracts was recognized by the New York Legislature almost three decades ago as harmful to New York consumers. This resulted in the passage of Section 5-322.1 of the General Obligations Law, which now reads as follows:

> §5-322.1. Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases
>
> 1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promissee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promissee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

The First Department has taken a dim view of attempts to circumvent §5-322.1. In Hassett v. Trump Village Construction Corp, 177 A.D.2d 258, 575 N.Y.S.2d 843 (1st Dept. 1991), the court found that, based on verbiage alone, without regard to the liability of the indemnitee, a contractual indemnification clause is void if it purports to require the indemnitor to indemnify the indemnitee without regard to the latter's negligence. The contractual indemnification clause in Hassett, found in a standard AIA101 (American Institute of Architects) contract, reads as follows:

> To the fullest extent permitted by law, The Subcontractor shall indemnify and hold harmless the Owner, The Architect and The Contractor and all of their agents and employees from and against all claims, damages, costs and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease, or death or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, to the extent caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or any for whose acts he may be liable, *regardless of whether it is caused in part by a party indemnified thereunder.*

The First Department in Hassett saw no redeeming value to the purported limitation on indemnification in the first sentence ("To the fullest extent permitted by law"...), but instead focused on that part of the section requiring indemnification "regardless of whether it [the loss] is caused in part by a party indemnified thereunder." Such language, the court said, rendered the clause "unenforceable as a matter of public policy." *Supra* at 845.

On September 10, 1996, Governor Pataki signed into law the Omnibus Workers' Compensation Reform Act ("the Act") of 1996. Two of the expressed purposes of the Act were (1) legislative repeal of Dole as it applied to the impleader of employers for contribution and (2) restoration of workers' compensation as the exclusive remedy of an employee as against an employer.

In Dole, the New York State Court of Appeals examined the shares of liability to be apportioned between joint tortfeasors. Notwithstanding which tortfeasor was sued by an injured plaintiff the Court of Appeals concluded that the defendant, if found liable, could recover a proportionate share from a joint tortfeasor. As the Court stated, "where a third party is found to have been responsible for a part, but

Continued from page 4

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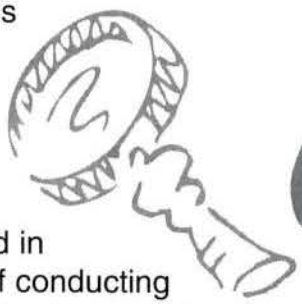

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Continued from page 2

not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third-party," Dole at 148-149. This apportionment of liability against the employer for negligence-based claims is generally covered by the employer's 1b portion of its workers'compensation policy and is the subject of an exclusion in most commercial general liability policies.

In 1997, the Court of Appeals decided Itri Brick & Concrete Corp. v. Aetna Casualty and Surety Co., 89 N.Y.2d 786, 680 N.E.2d 1200 (1997), in which the court upheld the applicability of § 5-322.1 of the General Obligations Law to situations in which the indemnitee was found partially negligent and the indemnitor was required to contractually indemnify the indemnitee without regard to the latter's conduct. Itri was comprised of two cases, each involving a contractual indemnification clause. The clause between the general contractor ("MNT") and the sub-contractor (Itri) reads as follows:

> The second party [Itri] shall hold the first party [MNT] harmless from all liability, loss, cost or damage from claims for injuries or death from any cause, while on or near the project, of its employees or the employees of its subcontractors, or by reason or claims of any person or persons for injuries to person or property, from any cause occasioned in whole or in part by any act or omissions of the second party, its representatives, employees, subcontractors or suppliers and whether or not it is contended the first party contributed thereto in whole or in part, or was responsible therefor by reason of non-delegable duty." Itri, *supra* 790 n.1

The contractual indemnification clause in Stottlar v. Ginsburg Development Corp., 89 N.Y.2d 807, 677 N.E.2d 289 (1997) the second case that comprises the Itri matter, reads as follows:

> "GINSBURG DEVELOPMENT CORP. and the owner of the property***shall be indemnified and held harmless from any and all liability, action or claims (just or unjust) and from any and all resulting damages, expenses, costs or fees (including attorney's fees), made by any person, whether employees of the Subcontractor or otherwise, (including death resulting therefrom) and on account of injuries and damages to all property or violations of statutes and ordinances or municipal rules and regulations, in connection with or resulting from the work or by reason of the operations performed on behalf of or on the property of GINSBURG DEVELOPMENT CORP. by the named insured Subcontractor, his agents, servants or employees." Itri, *supra* 791 n.3

The Court of Appeals held that each one of these clauses required full, rather than "partial indemnification" a term not defined in any prior caselaw. Each clause clearly broadened the indemnification obligation of each indemnitor; "from any cause while on or near the project (Itri), and "in connection with or resulting from the work" (Stottlar). Each clause imposed an indemnification obligation on the subcontractors without limitation in terms of the negligence of the general contractor/owner. In voiding the indemnity agreements the court relied on its prior decision in Brown, supra, wherein it held that §5-322.1 was amended in 1981 "to prohibit indemnity agreements in which owners or contracts sought to pass along the risks for their own negligent actions to other contractors or subcontractors, even if the accident was caused only in part by the owner's or contractor's negligence." In rejecting the argument of each indemnitee to be indemnified only for that portion of plaintiff's damages for which each was not culpable, the Itri court noted that "Section 5-322.1 makes no attempt to salvage that part of an indemnification contract that would require a subcontractor to indemnify a general for the subcontractors negligence only." Id. at 908.

Recently, in Dutton, supra, the First Department considered the following contractual indemnification provision:

> To the fullest extent permitted by applicable law, Subcontractor agrees to indemnify, hold harmless and defend Contractor, Owner and their respective directors, officers, agents and employees from and against all claims, damages, demands, losses, expenses, causes of action, suits or other liabilities (including all costs and reasonable attorney's fees), of every kind and character arising, or alleged to arise, on account of bodily injuries, personal injuries, death suffered by any persons (whether they be third persons, Subcontractor, or employees of either of the parties hereto or any Sub sub-contractor or sub-supplier at any tier) or damage to property in any way occurring, incidental to, arising out of, or in connection with the Subcontract Work performed or to be performed by Subcontractor or any sub-contractors or sub-suppliers of any tier, all regardless of whether Owner, Contractor or their respective directors, officers employees or agents are partially negligent. The Subcontractor's obligation under this paragraph excludes only liability created by the sole and exclusive negligence of the Contractor of the Owner. This indemnification is in addition to any indemnification

requirements imposed on the Subcontractor as a result of the Contract Documents, which requirements are expressly incorporated herein. This indemnification shall not be limited as to the amount of types of damages, including, without limitation, compensation or benefits payable by or for Subcontractor or under any worker's compensation acts, disability or benefits acts, or other employee benefit acts. Subcontractor expressly acknowledges that it has received from Contract or One Hundred Dollars ($100.00) and other fair, adequate and separate consideration in return for its agreement to provide indemnification as provided herein.

(Record on Appeal, Dutton).

Although very similar to the indemnification clause in Hassett, that the court nullified several years earlier, the court upheld this indemnification clause. The court's reasoned that its holding warranted by the language contained in the first sentence of the indemnity clause that purports to limit the subcontractor's obligations to that permitted by law. The court also found as decisive the fact that the clause excluded indemnity where the liability was created by the general contractor's sole negligence.

As to the first point, regarding the limitation on indemnity to that permitted by law, the same limitation was contained in the contractual indemnification clause in Hassett, supra. In Bright v. Tishman Construction Corporation of New York, 1998 WL 63403 (S.D.N.Y.), the United States District Court for the Southern District of New York considered a nearly identical indemnification clause. One of the two clauses at issue in that matter reads in pertinent part as follows:

> To the fullest extent permitted by law, the contractor [Aabco] shall indemnify and hold harmless the Owner, Indemnitees [the defendants]...from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal costs and expenses, arising out of or resulting from the performance of the work, or the contractor's operations, or the condition of the site...including...any claim or dispute of any person or entity for damages from any cause directly or indirectly related to any breach of statutory duty or to any willful or negligent act or failure to act by the contractor...whether or not it is alleged that the Owner, Indemnitees or [sic] in any way contributed to the alleged wrongdoing. Bright at *3.

In denying a request for partial indemnification of costs and attorney's fees based on the foregoing clause, the court held:

> First, the phrase "to the fullest extent permitted by law" is an insufficient limitation on the indemnification provision to remove the contract from the proscriptive scope of Section 5-322.1. To be effective, the saving language must indicate with sufficient clarity that the indemnification does not run to the negligent conduct of the indemnitee.

Bright at *4.

In Dutton, the First Department seems to have overlooked the 1981amendments to §5-322.1, which prohibited indemnity agreements in which owners or contractors sought to pass along the risks for their own negligence to subcontractors even if the accident was caused only in part by the owner's or contractor's negligence.

The Dutton decision coins a new term in New York law, "Partial Contractual Indemnification." Before this decision, such a division of liability was called apportionment, which when applied to a defendant employer, was not covered by a general liability policy Now, under Dutton, such apportionment will be called "partial contractual indemnification." The result of such semantics is that plaintiff's employer's commercial general liability policy will be impacted with much more frequency, while the 1b portion of its workers compensation policy will no longer be implicated.

Because the Dutton decision significantly increases the exposure of general liability carriers, future related cases should be closely monitored.

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WORTHY OF NOTE

PRODUCTS LIABILITY - ELEMENTS - PROXIMATE CAUSE -

It was recently indicated in Ramirez v. Sears Robuck & Co., (_____ A.D.2d_____, 729 N.Y.S.2d 503), by the Second Department that to establish a prima facie case in a strict products liability action predicated on design defect, the plaintiff must show that the manufacturer marketed a product which was not reasonably safe in its design, that it was feasible to design the product in a safer manner, and that the defective design was a substantial factor in causing the plaintiff's injury.

An alleged design defect of a table saw, failure to tether removable safety guard to the saw, was not a proximate cause of the injuries sustained by the saw's operator when making a "thru cut" without the safety guard in place. The saw in question was never used for "non-thru cutting" which required the removal of the safety guard, and the operator failed to prove that the removal of the guard was an inadvertent occurrence rather than an intentional act that would have been prevented by the design change.

ACCOUNTANT'S MALPRACTICE - ELEMENTS

It was recently indicated by the First Department that to impose negligence liability on an accountant for injury to a non contracting third party resulting from the accountant's advice or services, the third party must establish, (1) that the accountant's awareness that financial reports were to be used for a particular purpose or purposes, (2) there was reliance on the reports by a known party or parties, and (3) some linking conduct on the part of the accountant which evinced the accountant's understanding regarding the third party's reliance. (LaSalle v. National Bank v. Ernst & Young, LLP, ____ A.D.2d ____, 729 N.Y.S.2d 671).

NOTARIZATION -SCOPE

In Chianese v. Meier, (____ A.D.2d _____, 729 N.Y.S.2d 460), the First Department ruled that where a document on its face is properly subscribed and bears the acknowledgement of a notary public, there is a presumption of due execution, which may be rebutted only upon a showing of clear and convincing evidence to the contrary.

HOSPITALS - INSURANCE ASSUMPTION OF CONTRACTUAL LIABILITY

In Caledonian Hosp. V. Medical Malpractice Ins. Ass'n., (___ A.D.2d _____, 729 N.Y.S.2d 517), the Second Department ruled that a hospital was not covered under the plain language of its liability policy for the contractual liability it assumed by entering into the service agreements with physicians who were defined in the agreements as independent contractors.

The hospital could potentially be held vicariously liable for the actions of physicians it employed as independent contractors, and thus, a medical malpractice action based on the conduct of physicians came within the scope of the hospital's liability policy that the hospital was not covered for contractual liability it incurred by entering into service agreements that physicians performed services under the hospital's control and supervision, and the plaintiff in the medical malpractice matter was a patient of the hospital and not of the individual physicians.

MALICIOUS PROSECUTION - ELEMENTS - SCOPE

In Cantalino v. Danner, (96 N.Y.2d 391, 729 N.Y.S.2d 405), the Court of Appeals ruled that where a criminal prosecution fails to go forward because of misconduct by the accused preventing a proper trial, determination cannot be considered favorable to the accused and thus may riot support a malicious prosecution claim.

Where criminal charges are dismissed out of mercy which pre-supposes the guilty of the accused, determination is not favorable to the accused and thus may not support a malicious prosecution claim.

Any termination of the criminal prosecution, such that the criminal charges may not be brought again, qualifies as a favorable termination which may support a malicious prosecution action so long as the

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circumstances surrounding the termination are not inconsistent with the innocents of the accused.

INSURANCE - SCOPE OF COVERAGE

In Wilson v. Commercial Envelope Manufacturing Co., Inc., (___ A.D.2d _____, 730 N.Y.S.2d 352), the Second Department held that an insurance contract between a property lessee and an insurer requiring the insurer to defend and indemnify "any ... organization with whom (lessee) agreed, because of a written contract or agreement or permit to provide insurance," obligated the insurer to defendant and indemnify the property owner in a personal injury suit.

VENUE - CONSOLIDATION

In Nationwide Associates, Inc. v. Targee Street Internal Medical Group, P.C., ____ A.D.2d ____, 730 N.Y.S.2d 349), the Second Department submitted that were actions commenced in different counties are consolidated for trial, the venue should be placed in the county where the first action was commenced unless special circumstances exist.

PROCESS - SUBSTITUTED SERVICE - PROCEDURE

In Arvantis v. Banker's Trust Co., ____ A.D.2d ____, 729 N.Y.S.2d 706), the First Department indicated that service of process by leaving papers with a woman behind a window in the basement of a building where the defendant worked was valid since it was reasonable for the process server to rely upon the claim of authority made by the woman behind the window to whom he had been directed.

AUTOMOBILE - USE AND OPERATION - INSURANCE

It was recently held by the Appellate Division, Second Department in the case of Cohan v. Nationwide Mut. Ins. Co., (____ A.D.2d ____, 730 N.Y.S.2d 152).

The taxi cab passenger's act of opening the taxi cab door into the path of a, bicyclist when attempting to exit the vehicle constituted "use and operation" of the vehicle pursuant to a section of the vehicle and traffic law rendering the vehicle owners liable for the negligent use and operation by permissive users, and thus, the owner of the cab would be liable for the bicyclist's injuries provided that the passengers use an operation of the taxi cab was negligent, in which event the owner's insurer would be required to provide coverage to the owner.

AUTOMOBILE - NO-FAULT - DISC INJURY

In Uber v. Heffron, (____ A.D.2d ___, 730 N.Y.S.2d 174), the Second Department ruled that evidence of a disc herniation alone does not constitute proof of a "serious injury" v within the meaning of the no-fault statute provision governing the threshold for tort recovery.

It would appear that the cases frequently differs as to the significance of a disc herniation and whether it satisfies the criterion of a "serious injury".

INSURANCE - DISCLAIMER - ELEMENTS LIMITATIONS

In Hazen v. Otsego Mut. Fire Ins. Co., (___ A.D.2d ____, 730 N.Y.S.2d 156), the Second Department submitted that when an insurer disclaims coverage, the notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds which the disclaim is predicated.

The disclaimer which was based only on the insured's failure to notify it of the claim was not effective against the injured parties, who gave notice of the claim. Therefore, the insurer was estopped from raising the injured party notice as a ground for disclaiming coverage.

PRODUCTS LIABILITY SUBSEQUENT MODIFICATION

The Second Department in Fraser v. Stihl, Inc., (___ A.D.2d ___, 730 N.Y.S.2d 124 ruled that in a strict products liability situation, the manufacturer may not be found at fault, where after the product leaves its possession and control, there is a subsequent modification which substantially alters the product and is the proximate cause of the plaintiff's injuries.

INSURANCE - BAD FAITH BY INSURER - ELEMENTS

In Acquista v. New York Life Ins. Co. (___ A.D.2d ____, 730 N.Y.S.2d 272), the First Department submitted that damages recoverable for an insurers breach of duty to investigate, bargain and settle claims in good faith are not limited to the amount specified in the insurance policy, and while the policy limits define the amount for which the insurer may be held responsible in performing the contract, they do not define the amount for which it may be liable upon a breach.

The insured's physician's allegations that the insurer which had issued disability insurance policies had acted in bad faith by undertaking a conscious campaign calculated to delay and avoid payment on his claims, after having determined at the outset that it would deny coverage, while not actionable as a distinct tort claim, were sufficient to state a claim for consequential damages beyond the limits of the policy for the insured's alleged breach of contract.

EVIDENCE - UNAVAILABLE PLAINTIFF

In Johnson v. Goldberger, (____ A.D.2d ___, 730 N.Y.S.2d 309), the First Department ruled that where an injured plaintiff in a negligent matter is unavailable to give his account of the facts, a reduced standard of proof is applicable.

Continued on page 8

Continued from page 7

DAMAGES - LOSS OF BUSINESS

It was recently indicated by the Court of Appeals in 532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc., (96 N.Y.2d 280, 727 N.Y.S.2d 49), that in a situation wherein a party is deprived of proceeding with business ventures and is obliged to close his premises thereby sustaining a loss of business without personal injury or property damage, no actionable cause of action exist. Economic loss of itself without something else is not actionable.

In the cited case, there was a construction collapse necessitating the extensive closing of streets in or about the area. As a result, many of the plaintiffs in the lawsuit sustained an economic loss by virtue of the closing. No property damage or personal injuries were incurred. The actions were commenced predicated upon negligence and nuisance. In neither action, did the Court permit a recovery.

INSURANCE - ADDITIONAL INSURED - SCOPE

In Belcasteo v.- Hewlett-Woodmere Union Free School Dist. No. 14., (____ A.D.2d ___, 730 N.Y.S.2d 535), the Second Department ruled that a contractual provision which requires that a party be named as an additional insured in a liability policy means that the additional insured is insured for all liability arising out of the activities covered by the agreement.

MALPRACTICE - ELEMENTS - DELIVERY

The Second Department recently indicated that to establish liability that a physician negligently gave advice to his or her patient as to what course of treatment to pursue, it must be proved that the doctor's advise was, in fact, incorrect, that the issuance of such advice constituted professional malpractice, that it was foreseeable that the patient would rely on such advice, and that the patient did, in fact, rely on such advice to her detriment.

There was no evidence that the physician committed malpractice in advising a patient pregnant with triplets, one of whom sustained injuries at some point after the demise of another, despite the claim that it was necessary to perform a procedure called a selective reduction to remove the demised fetus while it was still viable, and that they should have been advised of that necessity. The physician informed the patient that the selective reduction was a risky procedure, and moreover, there was no indication that the patient relied on the physician's advice, but rather, the uncontroverted evidence indicated that the patient was strongly against the procedure.

NEGLIGENCE - SNOW REMOVAL - DUTY

In Palmer v. City of New York, (____ A.D.2d ___, 731, N.Y.S.2d 483), the Second Department held that a property owner is under no duty to pedestrians to remove snow and ice that naturally accumulates upon the sidewalk in front of the premises unless a statute specifically imposes tort liability for failing to clear the sidewalk.

The adjoining property owners, who had no statutory duty to remove the snow and ice from the sidewalk, could not be held liable to a slip and fall victim for negligence, absent showing the owner's conduct made the sidewalk more hazardous.

NEGLIGENCE - CONTRIBUTORY

in Marin v. San Martin Restaurant, (____ A.D.2d ____, 731 N.Y.S.2d 70), the Second Department held that when a worker confronts an ordinary obvious hazard or hazards of his employment, and has at his disposal time and other resources to enable him to proceed safely, he may not hold others responsible if he elects to perform his job so incautiously as to injure himself.

A property owner does not owe a duty to protect contractor's employee from hazards resulting from the contractor's methods over which the owner exercises no supervisory control.

INSURANCE - PROCUREMENT IMMEDIATE DETERMINATION

In Ribadeneya v. Gap, Inc., (_____ A.D.2d ___, 731 N.Y.S.2d 441), the First Department ruled that because the insurance procurement clause requiring the general contractor to purchase liability insurance naming the premises occupant as an additional insured for any losses connected with the work under construction contract was entirely independent of the indemnification provision in the parties' contract, a final determination of the contractor's liability on the issue of the contractor's obligation to indemnify the occupant did not have to await a factual determination as to whose negligence, if anyone's caused the laborer's injuries.

The patient failed to prove that the physician was negligent in failing to perform a cesarian section three days earlier than when it was performed, so as to support a medical malpractice claim. The sole evidence was a conclusory affidavit of the patient's expert, who failed to refer to specific acts in the record that would indicate that harm had occurred to the infant during the three days prior to delivery, and the patient failed to rebut evidence that the injury had occurred prior to the physician's care of the infant (Healy v. Winthrop University Hosp., (____ A.D.2d ____, 731 N.Y.S.2d 478).

PLEADINGS -VERIFICATION -WAIVER

A personal injury plaintiff's acceptance of the late, unverified answer without objection constituted a waiver of those defects, so indicated the Second Department in Liqotti v. Wilson, (____ A.D.2d ___, 731 N.Y.S.2d 473).

EVIDENCE - INFORMED RISK

The First Department recently indicated in Cioffi v. Lenox Hill Hosp. (____ A.D.2d ___, 731 N.Y.S.2d. 169), that the evidence which included expert testimony that the condition sustained by the patient as a result of cosmetic surgery on her eyelids was a known complication that did not present a departure from good medical practice and the physician's deposition testimony that he informed the patient of the risks, was sufficient to sustain a verdict in favor of the physician in a malpractice claim, notwithstanding other testimony to the contrary and an inability of the jury to observe the demeanor of the physician who died before trial.

RES IPSA LOQUITUR - ELEMENTS

It was recently indicated by the Appellate Division, Second Department in Criales v. Two Penn Plaza Associates, (____ A.D.2d ____, 731 N.Y.S.2d 236), that the submission of a negligence action to a jury to a theory of res ipsa loquitur is warranted only when a plaintiff can establish that (1) the accident is of a kind that ordinarily does not occur in the absence of negligence (2) the agency or instrumentality causing the accident was in the exclusive control of the defendant, and (3) the accident was not due to any voluntary action or contribution by the plaintiff.

A worker who was injured while cleaning a leased office when bookshelves collapsed failed to show that the sublessor of the office had exclusive control of the bookshelves, as would support the instruction under the theory of res ipsa loquitur in a negligent matter against the sublessor. The evidence did not fairly rule out the chance that the accident was caused by some means other than the negligence of the sublessor, who sublet offices in the building to various businesses.

INSURANCE - INDEMNIFICATION - CAR RENTAL AGENCY - NON AUTHORIZED DRIVER

In A.I.U. Ins. Co. v. ELRAC, Inc., (____ A.D.2d ____, 732 N.Y.S.2d 105), the Second Department ruled that a car rental company was entitled to full contractual indemnification from the renters and their insurer -for damages resulting from an accident, notwithstanding its statutory obligation to provide primary insurance to the renters, where the rental vehicle was being operated by an unauthorized driver at the time of the accident in violation of the rental agreement.

ELEVATOR - SCAFFOLDING LAWS SECTION 240 - LIABILITY OF OWNER

The First Department recently held that a building owner, whose failure to provide an elevator repairman with any safety device was the cause of an injury suffered when the repairman fell into the elevator shaft, and was liable pursuant to the Scaffolding Law. (Barwicki v. Friars 50th Street Garage, Inc., (____ A.D.2d ___, 732 N.Y.S.2d 8).

SCHOOLS - LIABILITY OF

In Watkins Glenn Central School Dist. v. The National Union Fire Insurance Co. of Pittsburgh, Pa., (____ A.D.2d ___, 732 N.Y.S.2d 70), the Second Department submitted that while they are not insurers of the safety of their students, schools, acting in loco parentis, are charged with the duty of adequately supervising their students. Schools may held liable for the foreseeable injuries proximately caused by a failure to provide adequate supervision.

INSURANCE - ACCIDENTAL - DEFINITION

In Bresky v. Ace Ina Holdings, Inc., (_____ A.D.2d ____, 731 N.Y.S.2d 791), the Third Department submitted that the term, "accidental," is used in a sudden and accidental exception to Pollution exclusion clause in a liability insurance policy, includes not only an unintended event but also one occurring unexpectedly or by chance.

A "sudden discharge of a pollutant, for purposes of sudden and accidental exception to the Pollution exclusion clause in a liability policy, is one that occurs abruptly, precipitantly, or is brought about in a short time.

An alleged pollution of a site, by the deposit of on-site hazardous materials and disposal of off-site hazardous materials by agreement or contract over a long period of time, did not fall within the sudden or accidental exception to the pollution exclusion in the liability policy.

DISCLOSURE - NON-PARTY ELEMENTS

In Lanzello v. Lakritz, (____ A.D.2d ___, 731 N.Y.S.2d 763), the Second Department submitted that a party seeking discovery from a non-party witness must show special circumstances.

The existence of special circumstances warranting discovery from a nonparty witness is not established merely upon a showing that the information sought is relevant. Special circumstances must be shown by establishing that the information sought cannot be obtained from other sources.

Defendants in the wrongful death action failed to show special circumstances warranting discovery from a non party-treating physician of plaintiffs decedent.

Continued on page 10

Continued from page 9

INN-KEEPER'S LIABILITY - DUTY OF GUEST

The First Department recently held that a hotel patron's failure to double lock and chain her room's door was not an intervening or superseding act severing the causal nexus between any negligence on the hotel's part and the patron's injury, for purposes of the patron's negligence action against the hotel, seeking to recover damages for her injury resulting from an intruder's entrance to her room (Bloch v. Hilton Hotel Corp., (____ A.D.2d ____, 732 N.Y.S.2d 401).

INSURANCE - AUTOMOBILE POLICY AND HOMEOWNER'S POLICY

The Fourth Department recently indicated in Progressive Ins. Co. v. Zurich Ins., (_____ A.D.2d ___, 732 N.Y.S.2d 495), that an action for wrongful death against their grandfather whose granddaughter was killed while crossing a street after leaving the grandfather's car alleged both that the accident arose from the grandfather's use of the car and from his negligent supervision, and thus, both the automobile and homeowner's policy had the duty to defend.

ANIMALS - OWNER'S LIABILITY

In Goldberg v. LoRusso, (____ A.D.2d _____, 733 N.Y.S.2d 117), the Second Department indicated that generally even in cases where people are not bitten, but are injured by being jumped upon by a rambunctious dog, the owner thereof will not be subject to negligent liability for failing to restrain the dog unless there was some prior notice of the particular behavior in question.

A known tendency to attack others, even in playfulness, as in the case of an overly friendly large dog with propensity and for enthusiastic jumping up on visitors, will be enough to make the animal's owner liable for damages resulting from such act.

STRIKING ANSWER - DESTRUCTION OF EVIDENCE

In Cabasso v. Goldberg, (____ A.D.2d ____, 733 N.Y.S.2d 47), the Second Department indicated that a rental truck owner's destruction of evidence warranted the striking of its answer as a sanction in a personal injury action alleging a defective or malfunction in braking system. The owner's experts had inspected the braking system immediately after, the service of the summons and complaint, but had denied other litigants the opportunity to inspect, despite repeated court orders to do so, and had ultimately revealed that the system had been irretrievably dismantled.

GENERAL MUNICIPAL LAW - ATHLETIC FIELD LIABILITY OF MUNICIPALITY DUTY OF THE BOARD OF EDUCATION

In Cruz v. City of New York, (____ A.D.2d ___, 733 N.Y.S.2d 112), the Second Department ruled that the City could not be held liable for a high school football player's injury as a result of running into a push sled that was left on the sidelines during practice. The City could not be held liable for the football player's injuries since it did not operate, maintain or control the field where the accident occurred.

It is to be noted however, that the evidence was sufficient to find that the Board of Education liable for the football player's injuries as a result of the push sled being left on the sidelines. The football player did not assume the risk of the injury caused by the collision with the sled since its location created a dangerous condition over and above the usual dangers involved in the sport of football thereby resulting in liability.

JURISDICTION - LONG ARM SINGLE TRANSACTION - CPLR 302

In Wright v. 299 Union Avenue Corp., (___ A.D.2d ___, 733 N.Y.S.2d 223), the Second Department ruled that the Long-arm Statute providing for personal jurisdiction for non-residences, is a single act statute and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities in New York are purposeful and there is a substantial relationship between the transaction and the claim asserted.

INSURANCE - PROCUREMENT OF INSURANCE

It was recently held by the Second Department that absent a specific request for coverage not already provided in a client's policy, there is no common-law duty of an insurer or its agency to advise a client to procure additional insurance.

As a general rule, insurance agents and brokers have a common-law duty to obtain the requested coverage for their clients within a reasonable time, or to inform the client of their inability to do so. A broker may be held liable for neglect in failing to procure the requested insurance.

The insureds' failure, despite ample time before the loss, to read the policy to ascertain the actual limits payable was not a superseding cause that precluded liability as a matter of law on the claim that the broker was negligent in procuring coverage, where the insureds specifically requested $40,000 in coverage for loss of a restored vehicle (Reilly v. Progressive Insurance Co., _____A.D.2d ___, 733 N.Y.S.2d 220).

AUTOMOBILES - DOUBLE YELLOW LINE

In Browne v. Castillo, (____ A.D.2d ___, 733 N.Y.S.2d 494), the Second Department ruled that a vehicle crossing over a double yellow line constituted negligence as a matter of law.

JURY -WITHDRAWAL OF

The First Department recently held that a plaintiff's demand for a jury trial on all issues in his note of issue could not subsequently withdraw the demand without consent of the defendant, unless the withdrawal would cause no undue prejudice with the defendant (Muhl v. Vesta Fire Ins. Corp., (____ A.D.2d. ___, 733 N.Y.S.2d 163).

INSURANCE - LATE NOTICE - EXCUSABLE

In Agado Realty Corp. v. United International Ins. Co., (____ A.D.2d ___, 733 N.Y.S.2d 407), the First Department submitted that the evidence that an insured landlord was not aware that the tenant's death had been the result of an intruder's criminal activity, and that his inquiry respecting the circumstances of the tenant's death had been rebuffed by the deceased family, was sufficient to support a finding that the landlord's delay in notifying his liability insurer of the occurrence was reasonable under the circumstances, in determining whether the insurer could disclaim responsibility for the insured's defense in a negligence action based on the insured's alleged failure to maintain building security systems.

The landlord's former counsel and agent for the receipt of service stated that he did not receive the summons and complaint and related correspondence, and a return receipt card for the summons and complaint was signed by the party whom former counsel was unable to identify.

RESTORATION - ELEMENTS - LEGISLATIVE INTENT

In Leonardelli v. Presbyterian Hosp. in the City of New York, (____ A.D.2d ___, 733N.Y.S.2d 391), the First Department ruled that a party may restore a matter to the trial calendar after it was dismissed as abandoned upon the showing of: (1) a meritorious claim, (2) a reasonable excuse for the delay, (3) absence of prejudice to the adverse party, and (4) lack of intent to abandon the case.

The underlying legislative intent of the statute allowing for the dismissal of the presumably abandoned case was to strike actually dead cases, and thus, the court, on motion to restore the matter to the trial calendar, looks not to the technicalities but rather to the totality of the circumstances.

A plaintiff whose suit was dismissed was presumptively abandoned was entitled to have the action restored to the trial calendar. A meritorious claim was asserted, discovery had been completed, plaintiff was unaware of and had no reason to know that the case had been marked off the calendar and dismissed, and there was no evidence that the defendant would be prejudice by the restoration.

NEW TRIAL - JURY INSTRUCTION - CLARITY

If a jury instruction is ambiguous, and inconsistent, erroneous, confusing, one sided, incomplete, or overly technical, a new trial will be ordered if prejudice has resulted to any party, so indicated the Second Department in Smith v. Midwood Realty Associates, (___ A.D.2d ____, 734 N.Y.S.2d 237).

PRIVILEGED COMMUNICATION - EXCEPTION

In Robert V. Straus Productions, Inc. v. Pollard, (____ A.D.2d. ____, 734 N.Y.S.2d 170), the First Department ruled that while communications made between a defendant and counsel in the known presence of a third party generally are not protected by attorney-client privilege, an exception exists for one serving as an agent of either the attorney or the client.

EMPLOYER'S LIABILITY - VICARIOUS ACTS - ELEMENTS

In Vega v. Northland Marketing Corp., (____ A.D.2d ____, 735 N.Y.S.2d 213), the Second Department submitted that an employer is vicariously liable for the torts of its employee, even when the employee's actions are intentional, if the actions were done while the employee was acting within the scope of his or her employment.

The employer was not liable for actions of the employee in striking and pushing a victim. The actions of the employee, a gasoline attendant, in striking and pushing a victim when she inquired about the gasoline pump's meter while purchasing gasoline from the employer were not incidental to the furtherance of the employer's business and fell outside the scope of the employee's employment and employee's intentional conduct could not have been reasonably expected by his employer.

The court ruled that there was no vicarious liability on the part of the employer committed by the employee solely for the personal motives unrelated to the furtherance of the employer's business.

NEGLIGENCE - ELEVATED SIDEWALK

The Second Department recently held that he abutting property owners did not create the elevated sidewalk panel on which the pedestrian tripped through the owner's use of the sidewalk or through negligent repair, and they did not make a special use of the sidewalk. Thus, the abutting property owners were not liable for the pedestrian's injuries. (Sverdlin v. Gruber, (_____ A.D.2d _____, 735 N.Y.S.2d 166).

Continued on page 12

Continued from page 11

Generally the municipality and not the abutting owner is responsible for maintaining the public sidewalk in repair unless it is shown that the sidewalk was constructed in a special manner for the benefit of the abutting owner, that the abutting owner affirmatively caused the defect or negligently constructed or repaired the sidewalk, or where the statute, ordinance or municipal charter specifically charges the abutting owner with a duty to maintain and repair the public sidewalk and provide that the breach of that duty will result in liability.

SPOLIATION OF EVIDENCE ELEMENTS

In McLaughlin v. Erouillet, (____ A.D.2d ___, 735 N.Y.S.2d 154), the Second Department ruled that a vehicle passenger who was asserting a defective seatbelt claim against the vehicle's manufacturer, should not have been sanctioned for spoliation of evidence in connection with the vehicle owner's destruction of the vehicle. The passenger was prejudiced along with the manufacture by the vehicle's destruction and was riot responsible for the spoliation. Sanctions may be imposed for negligent and intentional destruction of evidence.

EVIDENCE - EXPERT OPINION

In Homsey v. Castellana, _____ A.D.2d ___, 733 N.Y.S.2d 719), the Second Department held that before a witness can testify as to matters contained in medical records, but not personally known to the expert, such records must be received in evidence.

INSURANCE - PROCUREMENT - FAILURE

In Sheppard v. Blitman/Atlas Building Corp., (___ A.D.2d ___, 734 N.Y.S.2d 1), the First Department indicated that where it was undisputed that the contractor was covered by its own insurance covering the risk for which the subcontractor was suppose to obtain insurance, the proper measure of the contractor's recovery from the subcontractor, in a third party complaint filed in connection with the injured construction worker's personal injury action against the contractor would be the full cost of insurance to the contractor, including, to the extent pertinent, premiums paid for its own insurance, any out of pocket cost incurred incidental to 'the policy, and any increase in its future insurance premiums resulting from the present liability claimed.

EVIDENCE - INFERENCES

An unfavorable inference may be drawn where a party fails to produce evidence which is within its control and which it is naturally expected to produce, so indicated that First Department in Seward Park Housing Corp. v. Cohen, ____ A.D.2d ____, 734 N.Y.S.2d 4.

EVIDENCE - INTERPRETATION OF CONTRACT

In Lamont v. Stony Brook Homes, Inc., the Second Department ruled that the interpretation of an ambiguous contract provision is a function for the court, and matters extrinsic to the agreement may not be considered when the intent of the parties can be gleamed from the face of the instrument (____ A.D.2d ___, 734 N.Y.S.2d 94).

MOTIONS - LEAVE TO RENEW - ELEMENTS

The Second Department recently indicated that a motion for leave to renew must be based on additional material facts, which existed at the time the prior motion was made but were not then known to the parties seeking leave to renew, and therefore not made known tot e court.

The motion for renewal should have been denied where a party failed to offer a valid excuse for not submitting the additional information in the original application. Citing a statute as "new evidence" did not warrant a grant of the motion for leave to renew. The statute did not constitute the facts or any change in the law, nor did the petitioners provide reasonable justification for their failure to present the statute in support of the original petition (Angiolillo v. The Town of Greenburg, _____ A.D.2d ___,735 N.Y.S.2d 66).

INSURANCE - DUTY TO DEFEND
DUTY TO INDEMNIFY - ELEMENTS

In New York City Housing Authority the Commercial Insurance Company, (___ A.D. 2d ____, 734 N.Y.S.2d 590), the Second Department ruled where the insurer's duty to defend is based on the allegations of the complaint, the duty to indemnify is based on whether the loss is covered by the insurance policy. The burden is on the insurer to establish that the loss does not fall within the policy.

WITNESSES - SPOUSAL

In Lightman v. Flaum, (97 N.Y.2d 128, 736 N.Y.S.2d 300), the Court of Appeals ruled that the common law insulated certain confidential information from disclosure at trial, such as inter-spousal communications during the course of a marriage, an eventually special categories of confidential communications were deemed by statute to be entitled to a privilege against disclosure.

ARBITRATION - VACATING - ELEMENTS

The Second Department recently indicated in D'Amato v. Affler, (____ A.D.2 ____, 736 N.Y.S.2d 689), that an arbitration award may not be vacated unless it is violative of a strong public policy, is irrational, or clearly exceeds the specific limitation on an arbitrator's power.

A refusal to hear pertinent material evidence may constitute misconduct warranting a vacatur of an arbitrator's award.

LEGAL MALPRACTICE - ELEMENTS

In Between The Bread Realty Corp. v. Salans Hertzfeld Heilbronn Christy & Viener, (____ A.D.2d ____, 736 N.Y.S.2d 666), the Second Department indicated that an action for legal malpractice requires proof of three elements: The negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages. In order to demonstrate the proximate cause, the plaintiff must establish that "but for" the attorney's negligence, the plaintiff would have prevailed in the matter at issue or would not have sustained any damages.

In the cited matter, the client failed to establish that he incurred any damages as a result of the attorney's alleged breach of duty of, care and professional competence owed to the client, by the attorney's alleged failure to properly advise the client in connection with a lease. Although the client asserted that he incurred increased architectural construction cost due to an underlying zoning problem, such cost were the result of unsuitability of the premises for its intended use.

RES IPSA LOQUITUR - INAPPLICABILITY

The Second Department recently submitted that the doctrine of res ipsa loquitur was inapplicable to an action in which an individual sued to recover for personal injuries he allegedly suffered when the school's playground purportedly defective swing collapsed, inasmuch as the school district did not have exclusive control of the accident causing instrumentality, in light of the public's unfettered access to all of the swings at the playground, (Sinto v. City of Long Beach, ____ A.D.2d ____, 736 N.Y.S.2d 700).

STATUTES - INTERPRETATION

The Court of Appeals recently indicated that an analysis of a statute begins with the plain name of the relevant provisions. The meaning of and effect should be given to every word of the statute (Criscione v. City of New York, 97 N.Y.2d 152, 736 N.Y.S.2d 656).

INSURANCE - NOTICE OF DISCLAIMER UNTIMELY

In West 16th Street Tenant's Corp. v. Public Service Mut. Ins. Co., (____ A.D.2d ___, 736 N.Y.S.2d 34), the First Department indicated that an insurers 30 day delay in disclaiming coverage pursuant to a primary and umbrella commercial general liability policy for underlying personal injuries was unreasonable. The insured's delay in notifying the insurer of the occurrence giving rise to the claim, the sole ground on which defendant disclaimed coverage, was obvious from the face of the notice of claim and the accompanying complaint, and the defendant had no need to conduct an investigation before determining whether to disclaim. The 30-day delay was unreasonable as a matter of law.

LIMITATIONS - MUNICIPALITY - INFANCY

In Ravager v. City of Yonkers, (____ A.D.2d ____, 736 N.Y.S.2d 93), the Second Department ruled that infancy will automatically toll the one year 90 day statute of limitations for commencing an action against a municipality. However, standing alone, the infancy of the injured plaintiff does not compel the granting of an application for leave to serve a late notice of claim. It is incumbent upon the plaintiff to show a nexus between the delay and the infancy. In the cited case, the infant failed to demonstrate such a connection.

DAMAGES - HERNIATED DISC

FRACTURE AND SPINAL FUSION

In Diaz v. West 197th Street Realty Corp., (___ A.D.2d ____, 736 N.Y.S.2d 361), the First Department ruled that a jury's awards of $5.5 million dollars for past pain and suffering and $2.75 million dollars for future pain and suffering to an injured postal worker who suffered a herniated disc, a fracture and a spinal fusion surgery with introfixation rods and screws, as well as a bone graft after she slipped and fell in owner's building while delivering mail was grossly disproportionate and was required to be reduced to $900,000 for past pain and suffering and $450,000 for future pain and suffering.

MOTION - CONVERSION TO SUMMARY JUDGMENT

In Morris v. Port Authority and New Jersey, (____ A.D.2d ___, 736 N.Y.S.2d 324), the First Department concluded that a court may not on its own initiative, convert a motion for conjunctive relief into a motion for summary judgment without giving adequate notice to the parties and providing an opportunity for the parties to lay bare their proof.

STATUTE - INTERPRETATION

Words in a statute are to be given their plain meaning without resort from forced or unnatural interpretations so held the Court of Appeals in Castro v. United Container Machiney Group, Inc., (96 N.Y.2d 398, 736 N.Y.S.2d 287).

SERVICE OF 90 DAY NOTICE ORDINARY MAIL

The First Department recently held that the notice provision required pursuant to 3216 of the CPLR though not met, ordinary mail may be acceptable where the plaintiff concedes receipt of the notice, for purposes of the rule that prohibits the dismissal of an action on the ground of a general delay under certain conditions. (Johnson v. Sam Minskoff & Sons, Inc., _____ A.D.2d ____, 735 N.Y.S.2d 503).

Continued on page 14

Worthy of Note

Continued from page 13

FORESEEABILITY - ELEMENTS

The Court of Appeals recently submitted in Tagle v. Jakob, (92 N.Y.S.2d 165, 737 N.Y.S.2d 331), that although a jury determines whether and to what extend a particular duty of care was breached, it is for the court first to determine whether any duty exist, taking into consideration the reasonable expectation of the parties and society in general, and the scope" of any such duty of care varies with the foreseeability of the possible harm. The landowner owes to people on the landowner's property a duty of reasonable care under the circumstances to maintain the property in a safe condition. While the landowner has no duty to warn of an open and obvious danger, a latent hazard may give rise to a duty to protect entrants from that danger.

NEGLIGENCE - RECALCITRANT WORKER - ELEMENTS

The First Department recently concluded that a construction worker was not a recalcitrant worker for failing to wear a hard hat at the time a piece of metal fell from above and struck him in the head, and would relieve the site owner of liability pursuant to the Scaffolding Law, since the hard hat was not a type of safety device enumerated in the Scaffold Law to be constructed, placed and operated, so as to give proper protection from extraordinary elevation related risk to a construction worker (Singh v. 49 East 96th Really Corp., ___ A.D.2d _____, 737 N.Y.S.2d 345).

INSURANCE - INTERPRETATION THEREOF

In Re Estates of Covert (97 N.Y.2d 68, 735 N.Y.S.2d 879), the Court of Appeals indicated that contracts o insurance like other contracts are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous the terms are to be taken and understood, in their plain, ordinary and proper sense.

INSURANCE - DISCLAIMER - UNNECESSARY

In Markevics v. Liberty Mutual Insurance Co., (97 N.Y.2d 646, 735 N.Y.S.2d 865), the Court of appeals stated that pursuant to the Insurance Law a disclaimer of coverage is unnecessary when the claim does not fall within the coverage terms of the insurance policy. A timely disclaimer of insurance coverage pursuant to the insurance law is required when a claim falls within the coverage terms but is denied based upon an insurance policy exclusion.

NEGLIGENCE - DUTY TO WARN

The appellate Division recently held that there was no duty to warn regarding a certain condition which is readily observable, (Turner v. City of New York, ____ A.D.2d ___, 735 N.Y.S.2d 551)

SEAN R. SMITH *

Toure Cases Clarify Issues in No Fault Law

In July 2002, the New York State Court of Appeals handed down a trio of decisions clarifying some lingering issues relating to the state's No-Fault laws. In ***Toure v. Avis Rent a Car Systems***, 2002 N.Y.Slip Op. 05748, the court addressed standards relating to several categories comprising the "serious injury" standard of the No-Fault Law. The Toure cases collectively place greater reliance on medical doctors' judgment as to injuries sustained by plaintiffs in motor vehicle accidents. In so doing, the court turned slightly away from a recent trend in the Appellate Divisions focusing on the percentage loss of use sustained by plaintiffs, as quantified by objective testing .

In the new trio of cases, specifically ***Toure v. Avis Rent a Car Systems, Inc.***, coupled with the companion actions, Manzano v. O'Neill, _____ N.Y. _____ and ***Nitti v. Clerico***, _____ N.Y. _____ (2002) the Court of Appeals reinstated plaintiff's cases in the first two actions and determined that the plaintiff's met their burdens of proof under Section 5102(d) of the Insurance Law. In Nitti v. Clerico, the Court of Appeals determined that the plaintiff did not meet the burden of proof established under the No-Fault Law. Interestingly, the court reversed lower court rulings in all three cases. These decisions may well highlight the oftentimes confusing nature of the No-Fault Law and the possible lack of clear differentiation between two of the standards listed in the statute. The ***Toure*** and ***Manzano*** cases touch on the two most hotly litigated criteria in the No-Fault Law, "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system". The Nitti case focuses on a different standard, that of the "90/180" standard, the ninth standard listed in the No-Fault Law.

The No-Fault statute, Section 5102(d) of the Insurance Law, currently provides nine criteria for maintaining lawsuits for injuries sustained in motor vehicle accidents in New York State. In New York, a "serious injury" is currently defined as a personal injury which results in "death, dismemberment, significant disfigurement, a fracture, loss of fetus, permanent loss of use of an organ or member, function or system, permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred days immediately following the occurrence of the injury or impairment". While some of these categories are self-explanatory or lend themselves to easily quantified standards, other categories constitute battlegrounds of contested litigation between plaintiff and defendant in this state.

In a recent decision, ***Oberly v. Bangs Ambulance***, 96 N.Y. 295, the Court of Appeals tightened the standards for the sixth category of serious injury, "permanent loss of use of an organ or member, function or system". The ***Oberly*** decision provided some clarity to this standard, asserting that a claim under this specific category had to show a total or complete loss of such body functions or systems. However, the ***Oberly*** decision seems to have little chilling effect on the ability of plaintiff's to file lawsuits in New York State as a result of motor vehicle accidents as several other categories in the statute provide solid, if not confusing, grounds to file claims.

In ***Toure***, the Court of Appeals recognized that the "legislative intent underlying the No-Fault law was to weed out frivolous claims and limit recovery to significant injuries". ***Dufel v. Green***, 84 N.Y.S. 2d 795, 798 (1995); see also ***Licari v. Elliott***, 57 N.Y.S. 2d 230, 234-235 (1982). The court requires objective proof of a plaintiff's injury to satisfy the statutory serious injury threshold. ***Lopez v. Senatore***, 65 N.Y.S. 2d 1017, 1020 (1985). Subjective complaints alone are not enough to meet the threshold. ***Sheer v. Koubek***, 70 N.Y.S. 2d 678, 679 (1987). Id at 3.

Recent cases from the Appellate Divisions focus on the percentage loss of use where plaintiff's claim impairment

Continued on page 16

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Toure Cases Clarify Issues in no Fault Law

Continued from page 15

as a result of a motor vehicle accident. In ***Dileo v. Blumberg***, 672 N.Y.S. 2d 319, the First Department determined that a 30 percent restriction of motion was sufficient to make out a threshold case for serious injury. Conversely, the Third Department in ***Trotter v. Hart***, 728 N.Y.S. 2d 561 (3d Dept.) determined that plaintiff's loss of use of 10 percent for the lumbar spine and 20 percent loss of use for the cervical spine, as attested to in a treating chiropractor's affidavit, did not qualify as a serious injury.

Ahmed Toure commenced an action to recover damages for neck and back injuries allegedly suffered when the vehicle he was driving was struck by an automobile operated by defendant Susan Duncan and owned by defendant Avis Rent a Car Systems, Inc. Plaintiff alleged that he suffered a "permanent consequential limitation of use of a body organ or member" and a "significant limitation of use of a body function or system". Defendants moved for summary judgment on the basis that plaintiff had not sustained a serious injury within the meaning of the No Fault Law. The resolution of defendant's summary judgment motion boiled down to a battle of doctors, the typical fashion in which these cases resolve themselves. Dr Ralph Olson conducted a physical examination of the plaintiff on behalf of the defendant and reviewed plaintiff's medical records, including reports from plaintiff's chiropractor as well as diagnostic tests, including an MRI of plaintiff's back. Olson concluded that a "clinical examination of the central and peripheral nervous system, cervical, dorsal and lumbosacral spine fails to reveal any objective abnormalities to indicate any residual disability "and that" from a neurological standpoint (plaintiff) had recovered from his various injuries". The plaintiff countered with an affirmation from Dr. Joseph Waltz, a neurosurgeon who had treated him for approximately a year and a half prior to defendant's motion. Dr. Waltz had the plaintiff undergo additional diagnostic testing, specifically a CT scan of this cervical spine and an MRI of his lumbar spine. ***Id*** at 4. Dr. Waltz' diagnosis of the CT scan indicated "significantly bulging possibly herniated discs" and the lumbar MRI revealed "significant bulging discs". ***Id.*** Significantly, Dr. Waltz's affirmation does not ascribe a specific percentage to the loss of range of motion in plaintiff's spine. Nonetheless, the Court of Appeals noted that Dr. Waltz's opinion was supported by objective medical evidence, including MRI and CT scan tests and reports, paired with his observations of muscle spasms during his physical examination of plaintiff. The Court of Appeals held that this evidence was sufficient to defeat defendant's motion for summary judgment .

In ***Manzano v. O'Neill***, ___ N.Y.S. ____ , the Court of Appeals reaffirmed some of the logic established in the ***Toure*** decision . The ***Manzano*** case, venued in the Fourth Department, involved a plaintiff who was injured in a rear-end collision. The plaintiff plead that she sustained "a permanent consequential limitation of use of a body organ or member". At trial, the plaintiff put forth significant evidence of injury, including her own testimony enumerating a variety of tasks that she could no longer perform, including her inability to do any heavy lifting of any kind or clean the house. The plaintiff's testimony was supported at trial by Dr. John Cambareri, an orthopedic surgeon who treated the plaintiff on four occasions. He found that plaintiff had tenderness in her neck and lower back as well as "discomfort with extremes of motion of her neck". Based on his review of MRI films that were admitted into evidence, he concluded that plaintiff suffered two herniated discs in her cervical spine. The jury awarded the plaintiff $70,000 at time of trial. However, the Appellate Division, Fourth Department reversed the award, holding that the plaintiff failed to prove serious injury as a matter of law. That decision was in turn reversed by the Court of Appeals, who found the plaintiff's doctor's testimony credible, despite the fact that his examination was conducted more than four years prior to trial. Notably, although Dr. Cambareri did not assign a fixed percentage of loss of use in terms of range of motion for this plaintiff, the court ultimately found that his testimony created a suitable question of fact for the jury to consider, in determining whether the threshold for serious injury was reached in this case.

The final piece in the Court of Appeals threshold trilogy is the case of ***Nitti v. Clerico***, ___ N.Y.S. ____ (2002). The plaintiff in ***Nitti*** initially plead several criteria of serious injury under the statute, including "significant limitation of use of a body function or system", and "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety during the one hundred eighty days immediately following the occurrence of the injury or impairment". The plaintiff testified at trial that she was unable to return to work on a consistent basis for approximately six months. The trial jury rejected her claim of "significant limitation", but found that the plaintiff met the threshold under the "90/180" day rule. The plaintiff relied on the testimony of Dr. Daniel Patriarco, a chiropractor who twice examined the plaintiff. He conducted

tests from which he concluded that the plaintiff had restricted range of motion in her back and neck. Although Dr. Patriarco reviewed an MRI of the plaintiff's spine, that diagnostic test was not admitted into evidence. The Appellate Division affirmed the judgment in favor of the plaintiff in the amount of $45,000. The Court of Appeals reversed the order of the Appellate Division, determining that plaintiff failed to offer sufficient objective medical evidence to establish a qualifying injury or impairment. ***Id*** at 7. The Court of Appeals noted that the ***Nitti*** case concerned a different category of serious injury, namely the 90/180 category, the ninth category under the serious injury standard. The court notes that although this category lacks the "significant" or "consequential" terminology of the two categories at issue in ***Toure*** and ***Manzano***, a plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature". Insurance Law 5102(d), see also ***Licari v. Elliott***, 57 N.Y. 2d at 236-239. The ***Nitti*** court, while failing to directly comment on the qualifications of a chiropractor to examine or diagnose the plaintiff, seems to emphasize the plaintiff's need to present objective testing in admissible form.

The real significance of the Court of Appeals decision in ***Toure*** and ***Manzano*** lies in the courts' acceptance of medical testimony of a plaintiff's physician, supported by diagnostic testing. The ***Nitti*** decision highlighted plaintiff's need to present objective testing at time of trial. The plaintiff's physician need not give a specific loss of range of motion for the injured party, but may provide testimony regarding plaintiff's inability to function. Such testimony can provide a question of fact for a jury in threshold cases. The practical effect of this decision is to give plaintiffs slightly easier opportunities to rebut defendants motions for summary judgment. In any case, plaintiffs will need to have objective testing verifying their claims of serious injury. By issuing these decisions, the Court of Appeals veered slightly away from the direct reliance on percentages of loss of motion as indicia of serious injury. The various Appellate Divisions emphasized the "loss of use" standards in recent years. The Toure decisions provides some small element of clarity to several standards of the No Fault law. These standards can be confusing for the average practitioner. Hopefully, distinguishing "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system" will be less of a mind-numbing experience for the practitioner as the case law evolves in this field.

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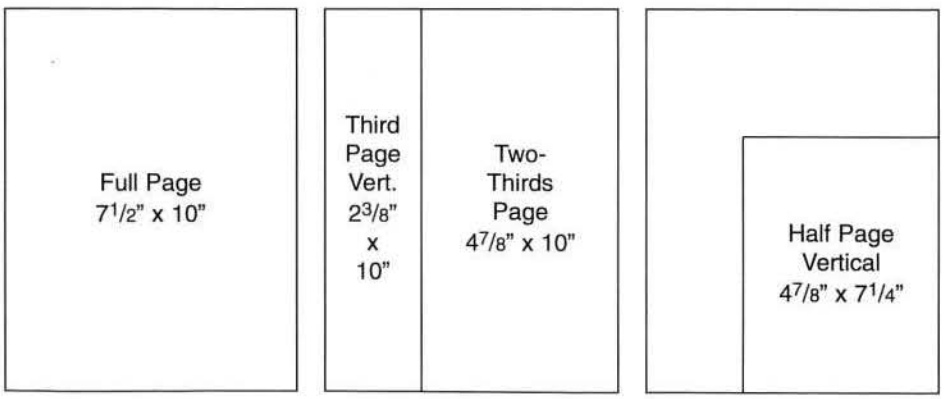

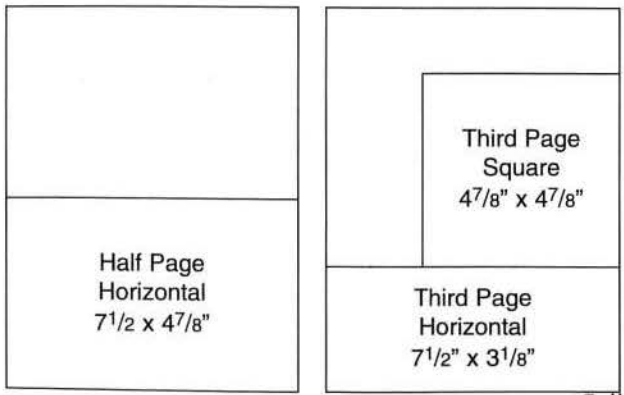

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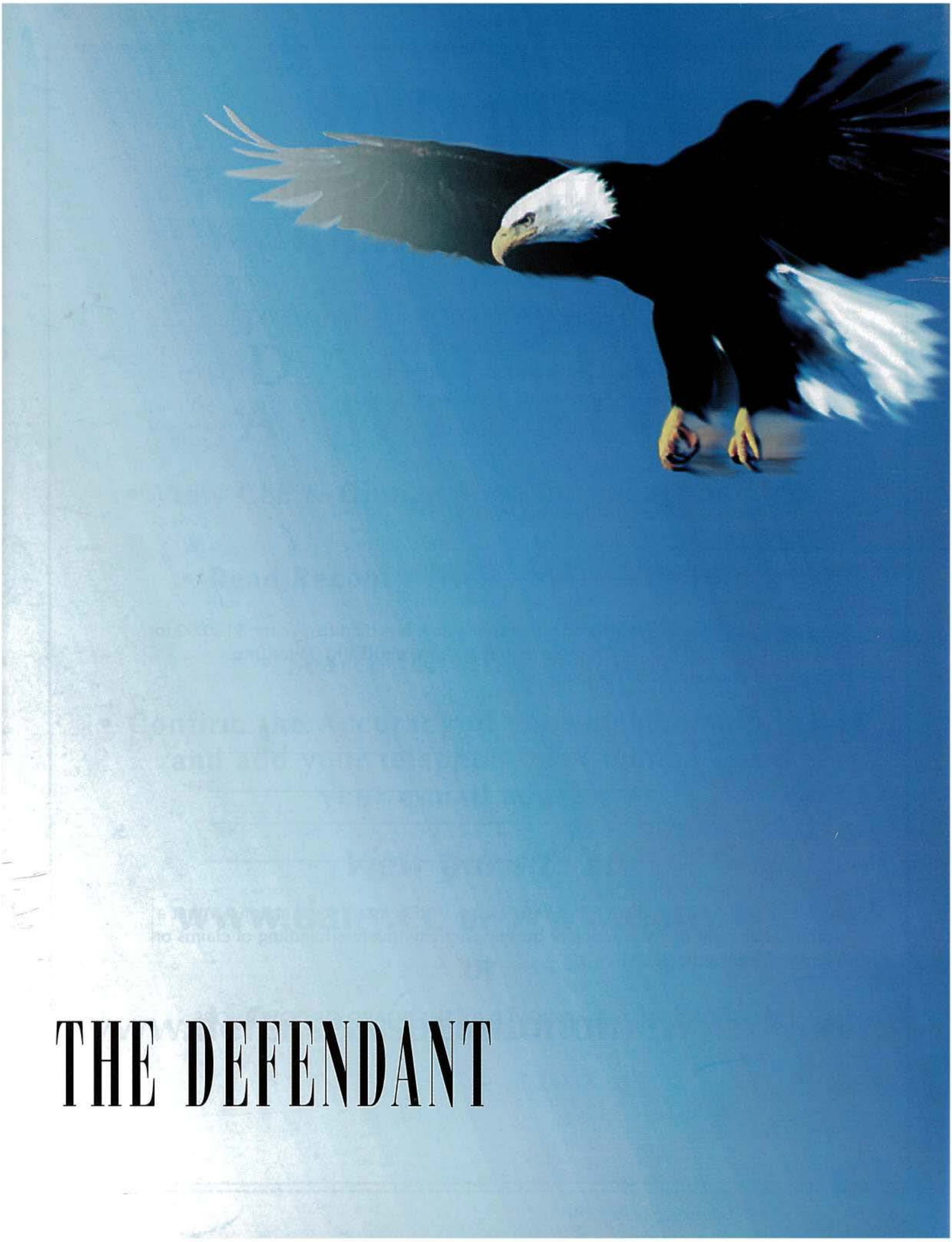

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