DEFENDANT

THE DEFENSE ASSOCIATION OF NEW YORK July, 1990

PRESIDENT'S MESSAGE

President Roger P. McTiernan

On June 15, 1990 the annual dinner dance of DANY was held at the Downtown Athletic Club. The incoming officers, as well as myself, were sworn into their respective offices with DANY. The swearing in ceremony was to have been performed by Mr. Justice Robert White, of the Supreme Court of the State of New York, however, due to a personal problem he was unable to attend. The ceremonies of swearing in as well as Master of Ceremonies were presided by John J. Moore. John did his usual fine job in making the ceremonies move along quickly and with a great deal of dignity and importance.

Past President, Robert E. Quirk, gave the presentation to the Villanova Moot Court Team for having an outstanding Moot Court Program. The recipients of the awards were Cathy Walto and Kathleen Sweet. The school was represented by Professor Doris Brogan, Esq., who had some kind words to say about our organization and what the award means to Villanova Law School.

Special commendation should be given to Anthony Celentano who, without his efforts, this program would not have been a success. The function was well attended and each and every one appeared to have an enjoyable time.

(continued on page 7)

PRESIDENT'S FAREWELL MESSAGE

President Robert E. Quirk

When I assumed the office of the President of DANY last year, I set as my singular goal a continuation of the legal education program for our young and developing counsel which was begun some years ago by my predecessors. In that connection, I am pleased to report that during the year our seminars were many, varied and well attended. All subjects were topical and our guest lecturers knowledgeable in their chosen disciplines. The success of these programs was achieved primarily because of the continuing efforts of our seminar chairmen, Kevin Kelly in New York, Ben Purvin in Long Island and John Boeggeman in Westchester.

Many thanks also to Eileen Hawkins, Peter Madison and Sam Simone who have reported to us during the year on proposed legislation likely to affect our interests as defense counsel.

Our gratitude is also extended to our membership chairperson Susan Clearwater for her efforts in securing and processing applications for new members, 25 of which were proposed and accepted and are now participating members in DANY.

John Moore, the editor of "Defendant" and his staff and contributing writers, John McDonough, Bill Fay, Susan Halbardier, Ralph Alio, Ed Hayes, Jim Galvin, Kevin Kelly, Ken Dalton, John Uejio,

(continued on page 7)

WORTHY OF NOTE

Compiled by
John J. Moore

INDEMNIFICATION—Scope. In **Kilfeather v. Astoria 31st Street Associates** (____ A.D.2d ____, 548 N.Y.S.2d 545), the Second Department indicated that the section of the General Obligations Law prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence. The statute, however, was not intended to preclude a promisee from requiring indemnification or damages caused by, or resulting from, the negligence of a party other than the promisee. Indemnification for negligence of another party is not prohibited because the indemnification runs to that party rather than the promisee.

A provision of a contract for renovation and expansion, which required the contractor to indemnify and hold harmless the company which acted as a construction manager from claims and damages for bodily injuries resulting from work on the project, unless caused solely by the manager's negligence, did not violate the section of the General Obligations Law prohibiting and rendering unenforceable any promise to hold harmless or indemnify a promisee who is a construction contractor or a landowner against its own negligence.

PLEADINGS—Bill of Particulars-Limiting. In **Ciriello v. Virgues** (____ A.D.2d ____, 548 N.Y.S.2d 538), the Second Department ruled that a failure to include in a Bill of Particulars the claim for loss of services regarding the business of the victim's husband barred the claim. The Bill of Particulars responded to the demands for information regarding the victim's employment in business by indicating that the questions were not applicable. Where there is a variance between the Bill of Particulars and the proof adduced at the trial, the adversary has the right to insist upon the primacy of the Bill of Particulars if it misled the adversary and precluded adequate preparation.

DISCOVERY—Testing to Destruction Elements. It was recently held by the Second Department that the Court did not improvidently exercise its discretion in granting a medical malpractice and prod-

(continued on page 12)

DRI CORNER

By:
Ralph V. Alio*

The national conference of Defense Counsel was held on May 30, 31 and June 1 at Salishan Lodge in Oregon. The meeting was hosted by DRI and attended by representatives of local defense associations from virtually every state. D.A.N.Y. was represented by president Robert Quirk and president elect Roger McTiernan.

The focus of this year's meeting was identifying areas of concern to local defense associations. Once identified, DRI officers discussed with local representatives ways DRI could assist in resolving the problems. DRI resources were discussed in detail as was a mechanism for greater utilization of same on a local level. It became clear during the course of the meeting that, though needs were diverse, there existed a commonality which could be addressed. It was the consensus of the attendees that, while local associations were vital, a strong national organization was requisite to the continuing success of the defense bar. With increasing frequency, legislation which directly affects our practice finds its impetus at the Federal level and to function effectively in this arena requires a national organization in order to insure meaningful input. The media is increasingly national and attention is garnered by numbers a particular organization represents. Clearly, unless there exists a national presence possessing a significant membership, expendable dollars and varied resources ATLA will go unchallenged as the voice of our profession. DRI is the only national organization which has in place the numerous resources required to represent the defense bar. While DRI currently has a membership of 17,000 defense lawyers, this number must increase significantly to effectively accomplish our goals.

The issue of networking, if not the interlocking of local associations with DRI, was the subject of much discussion. It was noted that, to a great extent, the board of DRI consists of individuals who had gone through the chairs of their local associations. The importance of this progression can not be over emphasized as it forms the foundation

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(continued on page 7)

FAULTLESS INDEMNITY: Brown v. Two Exchange Plaza

By:
John J. McDonough*

Perhaps the most important case on indemnification to be decided by the Court of Appeals since the 1981 amendments to the General Obligations Law subsection 5-322.1 occurred recently (June 7, 1990) in the case of **Brown v. Two Exchange Plaza.**[1]

The amendment of subsection 5-322.1 attempted to enlarge the scope of indemnification agreements that would be void under the statute by proscribing these agreements that indemnified the owner or general contractor if they were negligent "in whole or in part" (the former section voided only those indemnification agreements running to an owner or general contractor who was "solely" responsible for the happening of a particular accident).

The most troubling part of the amendments to subsection 5-322.1, as those who have been forced to grapple with its inherent confusion know all too well, is the final sentence of section 1 of the statute, which reads as follows:

> 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 promisee is partially negligent.

The sentence appears to give back to owners and contractors the ability to successfully require indemnification for their own negligence, the very principle the first portion of the statute proscribes. The verbal acrobatics by the judiciary in attempting to interpret this section, with the final sentence, makes interesting, if not confusing reading. The unintended, perhaps sometimes intended, side-effect of these decisions has been an erosion of the distinction between indemnification and contribution. Such was the result of the opinion by the

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[1]New York Law Journal, June 8, 1990, pg. 1.

(continued on page 10)

ASBESTOS UPDATE: JUNE 1990

By:
Suzanne M. Halbardier*

In recent months, the asbestos litigants have focused on resolving the Brooklyn Navy Yard cases. Judge Weinstein set a tight schedule for settling all the cases which involve exposure at the Brooklyn Navy Yard. At last count, the number of cases exceeds 450. The parties are expected to settle the cases by June 1 or face a September consolidated trial.

The special master appointed by Judge Weinstein has survived a recent motion by Owens-Illinois to disqualify him. Mr. Feinberg and his firm Kaye, Scholer did lobbying work on behalf of various asbestos manufacturers, including Owens-Illinois. At a joint state-federal meeting held in Judge Helen Freedman's courtroom, the two judges found there was no conflict of interest and denied O-I's motion.

At the same meeting, the Judges ordered the Manville Trust to return on June 1 and explain why the Trust is not paying claims until 2004; they asked for financial information on where the Trust funds have been spent.

A status conference will be held at the same time to determine which parties have settled. Since more than half the cases have little if no discovery, it seems unlikely that many cases will settle by that date.

The Second Circuit has recently issued the first decision on product nexus in an asbestos case. **Johnson v. Celotex,** ____ F.2d ____ (March 20, 1990). The Court affirmed a jury's verdict for plaintiff where the evidence was circumstantial. Plaintiff was unable to identify products to which he was exposed. Separate proof from coworkers (unknown to plaintiff) testified to the manufacturers whose products they generally used on ships. Even though some of the proof was vague as to years and specific ships, the Court held that there was sufficient evidence for the jury to find proximate cause. The Court also affirmed the jury

*Ms. Halbardier is an associate of the firm of Barry, McTiernan & Moore, located in Manhattan.

(continued on page 8)

HOUSE COUNSEL—AN ANALYSIS

By: Richard Tarangelo*

The inexorable increase in the cost of outside counsel has led many Property and Casualty Insurance Companies to create or expand House Counsel staffs. These have often been ill-conceived and poorly implemented.

The fixed executive conclusion that such activity is beneficial to the corporation is accepted as a given. The expected cost saving aspects create an aura which sometimes results in a kind of decision making, based on improper analysis, which would not be tolerated in any other area.

It seems clear that whether a House Counsel is to be set up or expanded certain tangible factors should be considered and in a restricted sense they regularly are. However, the intangible factors are very rarely analyzed as effectively as they can be. An analysis without consideration of these may be faulty to a degree which is self-defeating.

It is absolutely imperative to review the intangible factors first and then analyze the tangibles.

Among these illusive intangibles the following must be considered:

1) Is the organization dedicated to creating a professional staff for the long term; that is to say, is it prepared to expand the salary and other expenses in keeping with or in proportion to outside firms? The staff must be kept up to high professional levels which means that salary and promotions must almost be sacrosanct. This must be so in both high profit and low profit years. If there is a goal to reduce salary expense by lower percentage increases in other areas, it cannot apply to Legal. This is a tough pill to swallow in lean year cycles. If this rule is not followed, staff skill will deteriorate and Claims will lose confidence. What is more important is that loss payments can increase in multiples far exceeding expense savings very rapidly. This clearly requires the CEO's complete understanding and backing.

2) Can it definitely be concluded that the Claim Department will refer cases to staff to the degree included in the cost benefit analysis? More often than not the local claim people have confidence and relationships with outside counsel which would

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(continued on page 8)

CARE AND FEEDING OF A DEFENSE EXPERT PART TWO

By:
Andrew LaVoott
Bluestone*

In part two of this article we will complete the discussion of pretrial preparation as well as discuss the preparation of the expert witness for direct and cross.

By the time of the trial the expert will have been provided with all discovery materials available. You should not limit these materials, so that the expert will be able to recite an impressive list of documents he has reviewed, and may also convince the jury that he has been given an even-handed view of the evidence. This material will include:

1. Plaintiff's verified bill of particulars

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MEMBERSHIP APPLICATIONS for The Defense Association of New York may be obtained from John J. Moore c/o the Defense Association of New York—22 Cortlandt Street, New York, New York 10007. Our members are asked to encourage their colleagues to join our Association. Use form in this issue.

CARE AND FEEDING OF A DEFENSE EXPERT PART TWO [Con't.]

2. Response to demand for documents
3. Response to notice to admit
4. Plaintiff's MV104
5. Other similar documents, and accident reports
6. Copies of all depositions, edited if necessary
7. Transcripts of earlier testimony (as it develops at trial)
8. A copy of the curriculum vitae of the plaintiff's expert
9. A copy of the expert reports of the plaintiff
10. A list of the publications of the plaintiff's expert
11. Copies of the articles, texts and publications used as a foundation for the plaintiff expert's testimony
12. Copies of the texts used by you to impeach the plaintiff's expert
13. Visual aids for your expert
14. Copies of the appropriate medical records

Several days before the expert's testimony meet with him to go over the material. Prepare copies of exhibits or important documents and indicate the positive and negative aspects of them. Allow the expert time to review the material for more meaningful conversation. At this time explain the personalities of the parties and the Court, as this might influence the study of the materials. Explain the positive and negative points of the depositions and the testimony taken. Areas to cover in this discussion include:

1. Plaintiff's allegations of fact
2. Plaintiff's allegation of negligence
3. Defendant's allegations of fact
4. Defendant's allegations of Co-defendant's negligence
5. Areas of comparative negligence
6. Those facts necessary as a basis for the defendant expert's opinion
7. Their expert, and his report
8. The proposed testimony of the defendant
9. Your proposed defense
10. Your attack on Co-defendants
11. Use of visual aids in the Courtroom

At the time of this discussion, several days before the trial you will have already picked the jury, and taken a measure of the plaintiff's attorney. Prepare the expert for the direct examination, but do not forget to prepare him for the cross-examination.

Preparation for the direct examination will start with the introduction and qualifications of the expert. Prepare him to testify with modesty and forthrightness It is universally accepted that the most obvious quality of an expert is the fact that his credentials will dazzle the jury, inure to the benefit of his proponent and add credibility to the case. It is necessary to make the jury hear and appreciate his qualifications. A thorough review of his education and writings, his projects and academic achievements should be gone through slowly, and spoken of in everyday language to the jury. A simple straight forward explanation of the academic project is acceptable. The following areas should be covered:

1. College, Professional School, Post Graduate work
2. Seminars, lectures attended
3. Employment history
4. Publications
5. Professional Memberships (not simply social)
6. Board Certifications, licenses obtained
7. Previous testimony as an expert (if fairly divided between Plaintiff and Defendant)
8. Discussion of his present projects
9. A typical day in his work life
10. A list of the materials that he reviewed
11. The circumstances under which you met
12. What you asked him to do
13. What testimony he has observe in court (if any)
14. Viewings of the person of the plaintiff
15. Viewings of the product/place of the accident

This portion of his testimony should be timed to last about 15 minutes, out of a proposed testimonial time of about 40 minutes. This is usually a sufficient time in which almost any expert can ingratiate himself with the Jury, and tell his story, give answers to hypothetical questions and his opinion. The forty minute time period is based upon juror attention. It is usually said that after about 40 minutes there is a sharp drop off of interest and attention, and that material presented in excess of that 40 minute period is wasted. Consideration must also be given to the timing of the testimony with regard to Court practice. It is best to leave enough time for cross examination before lunch or the evening break so that the Plaintiff must get up and complete his cross examination without resort to an overnight adjournment. However, it is also acceptable to go overnight with cross-examination coming in the morning. Although the attention span of the jury will have been sharpened, the effect of primacy will be in your favor. First impressions last, and they will be of foremost recall in the minds of the jurors.

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CARE AND FEEDING OF A DEFENSE EXPERT PART TWO [Con't.]

The most important part of his preparation is making sure that he is able to communicate with the jury. Respect and attention must be paid to the Judge, and it must seem clear that the expert witness has regard for the Judge and Court. However, the selling job is done to the jury and to no one else. They must be convinced; once they are, your job is well on its way.

To accomplish that objective, the witness must be drilled in that difficult task—listening to and answering questions. Beware the garrulous witness. Beware the reticent witness. Help your witness to be well versed in his field, a good listener and succinct.

At every opportunity use the expert's title without being obsequious. Early on ask the expert what he expected his task to be when you met and discussed the case. Prepare him to answer that he expected to review the evidence, obtain descriptions from the plaintiff and the defendant as to how the accident occurred, view the premises or machinery or object of the accident (to the extent that it was actually viewed) and render an opinion with a reasonable degree of (scientific, engineering, medical, etc.) certainty as to how the accident occurred. It must be an evenhanded recitation of his task. He should be prepared to give a long recitation of the facts upon which he based his opinion (in cross-examination)—long enough to avoid giving plaintiff an argument that he overlooked certain important facts.

Your witness must be prepared to answer the predicate question. That predicate will lead to the hypothetical question which is the central focus of his testimony. His answer must come unhesitatingly, and it will come forth with clarity only if you have drilled him on the question and answer. Take time to explain the importance of the predicate and the hypothetical. The expert must know that it is the entire reason for his testimony. The predicate question will be:

> "_____, do you have an opinion, with a reasonable degree of (scientific, engineering, medical) probability (certainty) whether there was a departure from accepted (scientific, engineering, medical) practice?"

The expert should be prepared to answer the predicate question with a simple "yes." This simple "yes" will later allow him to go through the predicate for his opinion at length.

Care must also be given to orient the expert to the Courtroom. Eye contact is paramount and must be maintained. He must avoid appearing to speak exclusively to you, and should target those jurors who have not been reacting well to you. Next, you will prepare the expert to go through the facts of your case, and the evidence, and to apply those facts and evidence to the standards upon which he bases his opinion. You should have appropriate photocopies of the statutes, or rules or professional writings or literature available for the expert to refer to, or to have to offer as evidence, and the expert must be drilled to give the rules or standards in an agreed order so that you will be prepared to offer the evidence. He must be given a list to refer to so that no material is left out, and taught how to ask to refer to the list.

Preparing your expert for cross means going through all the usual methods of cross examination. There will be obvious detriments to your expert's presentation. They may include:

1. Examining the plaintiff only once or twice
2. Examining the premises only once or twice
3. The expert's history of testimony in previous litigation
4. Being a professional witness
5. Impeachment by authoritative texts
6. Impeachment by the testimony of the plaintiff's or other experts

The expert must be prepared to deal with these problems. When the expert has not examined the plaintiff's person, or the premises as often as has the plaintiff's expert, a straightforward explanation, disarming in its delivery must be given. That explanation must be that the expert made an examination sufficient to come to an opinion, and while more viewings could have been made, they were not necessary, and would be merely surplus.

Previous testimony only for defendants is a more difficult problem. If the expert has testified only for defendants he must answer that it was not out of prejudice against plaintiffs, or because his fixed opinions disfavor plaintiffs but rather because he has responded to attorney requests as they came to him. He would gladly investigate any situation within his realm, even for Mr. Plaintiff's attorney.

Being a professional witness is easier. The witness should answer that he is paid for his knowledge of professional literature, and his education. He will state that he is paid for his time, as are all professionals. He should not be allowed, and cautioned not to respond to the attorney by asking how much the attorney makes for processing the case.

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CARE AND FEEDING OF A DEFENSE EXPERT PART TWO [Con't.]

Impeachment by authoritative texts is very difficult when the expert denies that the text is authoritative. If pressed, there might be a concession that it is a very nice text, and the author a professional, but that on this issue with regard to this case it is not authoritative. It is unlikely that the plaintiff will then call an expert (at a significant cost) to attempt to impeach the defense expert. It is collateral, and the plaintiff's reply expert might be prevented from testifying.

The expert should also disagree (of course) with the conclusion of the plaintiff's expert, and be ready to give convincing reasons as to their different conclusions from the "same" observations. He must point out the differences between their observations of the same facts, and the differing conclusions that flow. Here the expert will be more helpful in structuring the narrative when you go over all of the facts in earlier preparation.

Teach the witness to listen to the questions carefully, and to answer carefully and directly. A quiet and confident demeanor, eye contact with the jury, and good preparation will allow the expert to withstand all but the most withering cross-examination.

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PRESIDENT'S FAREWELL MESSAGE [Con't.]

Kris Shea, John Dupee and Bill Nairs are indispensable to our organization and merit a note of thanks for their contribution to our continuing legal education.

Finally, recognition must be accorded to our recording secretary, Tony Celentano, for his constant and untiring efforts in the organization and arrangement of literally all our functions. Tony is truly the glue that holds our organization together, and a person without whom no president could function effectively.

My congratulations to Roger McTiernan, our incoming President, and the new Officers and Board of Governors of DANY whom I am confident will continue to pursue our goal to make DANY the best regional defense organization in the country.

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DRI CORNER [Con't.]

upon which a national organization can be truly responsive to its membership. So vital is this link that, in many instances, significant effort has been spent in striving to have state and area chairs who serve on the boards of local defense associations. I am pleased to inform you that in the Atlantic Region every state and area chair has strong ties with the state association. DRI doesn't seek to enhance its national presence at the expense of local associations but rather as a result of their continued involvement. DRI prides itself on being a need driven organization reacting to input received from local and state associations.

The attendees left Oregon with food for thought and fond memories.

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PRESIDENT'S MESSAGE [Con't.]

To more serious matters, it is a difficult task I undertake to improve upon the performance of past President Robert E. Quirk and the various Committee Chairmen in the fine work that they have done in directing DANY for the past year. I have asked these Committee Chairmen to continue their efforts as I ask the General Assembly to participate more fully in helping the Committee Chairmen to maintain their level of expertise and indeed to improve upon the presentations, etc.

I pledge to the organization that if I were to accomplish two goals during my tenure as President I would feel that I had accomplished much. The first goal was to increase the female membership. Of 631 members of the organization only 32 are women. This organization has opened its doors to the female attorneys and have encouraged their participation to the extent that out of the 32 female members 4 are currently on the Board of Directors and we have had 1 female past President and Chairman of the Board, Maureen Sullivan. 32 members out of a total membership of 631 is not impressive. We must encourage female attorneys to participate by informing them as to the benefits that DANY can provide to them, not only from a professional standpoint, but from a standpoint creating camaraderie with their fellow attorneys, both male and female.

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ASBESTOS UPDATE: [Con't.]

verdict in a similar circumstantial product identification case. **LaDuca v. Armstrong World Industries** (unpublished opinion).

Two recent decisions by state court judges may influence the developing law in this area. In **Rivers v. AT&T Technologies** (N.Y.L.J. 4/18/90), Judge Freedman held that DuPont, a bulk supplier of dimethyflormanide (DMF), had no duty to warn plaintiff of the toxicological characteristics of DMF since she was too remote in the chain of distribution; further, DuPont provided extensive instructions and warnings to its immediate distributees who were responsible intermediaries. DuPont had sold DMF to Sangamo which manufactured a capacitor, which contained a chemical compound which included DMF. The capacitor leaked, causing injury to plaintiff. In granting summary judgment, Judge Freedman noted that it would be onerous to require DuPont to place warnings on the DMF, particularly where it had no control over the use of DMF once its form was altered by the intermediaries.

Judge Gammerman has issued a decision further clarifying GOL 15-108 in multi-party litigation. In **Williams v. Niske,** ____ N.Y.S.2d ____ (N.Y.L.J. 10/19/89), Judge Gammerman held that the non-settling defendants were entitled to the benefit of either the settlement or verdict amount **per defendant**, whichever is higher. Where several parties settle prior to verdict, this decision gives the non-settling defendant the opportunity to deduct either the verdict or settlement amount of each settling defendant.

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HOUSE COUNSEL—AN ANALYSIS [Con't.]

tend to obstruct the avowed intent of the arrangement. Thus, human psychology becomes a factor.

3) Though the Claim Department would function with purity of intention, would it refer the larger cases to staff? This is a very serious problem because it has roots in the erroneous assumption that "insurance company attorneys" do not have the skill or aggressiveness that outside counsel do. This may be countered in part by treating staff just as you would outside counsel but this is not enough. The corporate culture must be redirected to develop a positive attitude. This is difficult at best and without a full scale understanding and effort on the part of the Senior Executives, it will fail.

4) In companies which write retrospective risks, will charge backs be accepted? Are they legal?

4A) In companies which provide claim service for self-insured's can legal staff be used at all?

5) If established, can the attorneys effectively balance the needs of their client (the insured) against the claims analysis of value? Conflicts can readily arise and cause unacceptable internal pressures. These can only be avoided by the slow development of mutual respect. This generally is not possible unless the House Counsel staff is reasonably close geographically to the Claim Department. Further it takes time. The commitment must be for the long haul.

6) When implemented, will House Counsel become the tail that wags the dog? With the skill and expertise required by law, will House Counsel effectively control the ultimate settlement value? This is of course an untenable result.

7) By law a corporation other than a legal corporation cannot practice law. House Counsel has been regarded as an exception in most states but in some states it is not and is prohibited. With the proliferation of staff attorneys can it be predicted, with certainty, that with pressure from the powerful outside counsel and plaintiff's bar, whether the number of states prohibiting House Counsel will increase? Consider a monolithic staff add on to the company's expenses being created and suddenly disbanded. The chaos and additional costs later could reach proportions that could threaten the vitality of the organization itself.

8) Mandatory **pro bono** and continued legal education exist in some states and those states will grow. Will the company pay for these? What will these expenses be? Can the corporation be liable for **pro bono** work and/or must it supply malpractice coverage?

9) Consider also the time required to be spent by the Senior Executives and all subordinates in creating an entirely new wing of

(continued on next page)

HOUSE COUNSEL—AN ANALYSIS [Con't.]

staff on the corporate edifice. As indicated they must be deeply involved.

10) Innumerable problems have risen in connection with report relationships and obligations of House Counsel. Lawsuits have been initiated with respect to these problems. Most major companies now have attorneys only reporting to attorneys and a separate up-the-line relationship equivalent to the Vice President of Claims. Some have House Counsel reporting to General Counsel.

This approach is necessary entirely apart from legal issues, because this individual would be responsible for insuring high professional standards by establishing guidelines, audits, and continued education. These high professional standards must be maintained. An ill-conceived and improperly executed House Counsel can push a company to the brink of insolvency. Comparatively small expense savings can result in loss payments far exceeding reserves. While it is difficult for laymen to understand, claims professionals uniformly agree that the competence of assigned counsel on trial and in settlement negotiations can result in an enormous differentiation in loss payments.

Consider this, the intrinsic adaptability of our common law system based on precedent has never been so sorely tested as it has been in the three decades. There has been an explosion of tort liability cases. The mores, customs and value systems of the community at large have outpaced statutory enactments and created a void. Judges all across the land have been required to break new grounds and to expand judicial concepts and, for all practical purposes established new duties, new procedures and new forms of legal liability.

The effect on those involved in tort law has been, to a large extent, as if they had been set adrift and can sense only a general direction while fixed legal landmarks explode like so many ethereal myths all around them. The highest degree of professional competence becomes a categorical imperative. This can only be accomplished when control is in the hands of a Senior Executive with direct access to the C.E.O.

Assuming **arguendo** that finely tuned legal skill should be the primary objective, expense savings, which are often regarded as a priority must become secondary for the practical reasons previously enumerated. Further the practice of law through staff attorneys, as we have seen, is an exception to the rule that none but a professional corporation can act in this capacity. If the highest standards are not maintained this exception could be eliminated. The Canons of Ethics promulgated by the American Bar Association require that the attorney owes his first duty to his client, regardless of who pays him. If the carriers do not maintain this standard this canon is violated.

Too often companies begin their analysis with the tangible factors. This as we have seen, can be a serious error. The intangibles ultimately have superseding importance.

After due consideration is given to the foregoing, the tangible factors based upon a cost-benefit analysis must be considered. Each organization will have its own method of making this analysis. However, the following guidelines would seem to apply:

1) What geographic area can each House Counsel handle (a) in terms of pleadings; (b) in terms of outside activity?

2) What is the current cost for the foregoing within those areas? Include in this all expenses; i.e., salaries, rent, telephone, library, legal services, bar associations, malpractice insurance, benefits and regional and corporate overhead.

3) The cost per hour of each attorney should be computed based on the total number of hours divided into the total expense. Considering certain other advantages of outside counsel the company should determine where House Counsel becomes impracticable. This could be 60, 70 or 80% of the outside cost. It would depend on many factors including a consideration of how much more staff would assist in settling cases and providing education and training.

4) How many cases will Claims refer to House Counsel if they make the referrals? How long will it take to gain confidence?

5) Generally if $200,000 to $250,000 is billed by outside attorneys in a given area the utilization of staff should be considered. The next question is: Does the company have the processing capability to determine the specific cost in a given geographic area that can be handled by House Counsel? If this determination is not made with accuracy the analysis is faulty. If the costs cannot presently be determined what would the EDP costs be to develop same?

6) If a new office is to be established it must begin with two attorneys, minimum. As it is

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HOUSE COUNSEL—AN ANALYSIS [Con't.]

phasing in, what will be the start up costs and the period of time necessary to become expense reducing?

7) Within the stated area in a specific way is it expected that writings will increase? Is the regulatory environment changing? The law? The costs of claim handling? What are the possibilities that Underwriting's posture on new business in the area will change? Is there a long enough history in the locale to make reasonable assumptions? Again the Senior Executives must be involved.

It seems clear from the foregoing, that the decision to implement a staff approach must be initiated at the highest level and utilize top people to set up a comprehensive plan which would include organizational charts, with consistent report relationships, a careful expense and underwriting analysis and a review of all long range factors.

It is not something to be undertaken lightly. ◉

FAULTLESS INDEMNITY: Brown v. Two Exchange Plaza [Con't.]

Appellate Division of the Second Department in **DeFilippis v. Joannco Contracting Corp.**, 132 AD 2d 517, 517 NYS 2d 259.

In **DeFilippis** the defendant leased a crane from the plaintiff, incidental to a subcontract the defendant had at a construction job. The rental agreement contained an indemnification clause which held the lessor harmless for any loss, damage, expense and penalty arising from any action on account of personal injury or damage to property occasioned by the handling of the crane during the rental period. The crane was damaged during the course of construction work which was overseen by third-party defendant, a general contractor.

The defendant moved to invalidate the indemnification agreement by way of summary judgment. In reversing the lower court and upholding the validity of the clause under subsection 5-322.1, the court relied on the last sentence of the amended statute which provides that a promisee shall not be precluded from enforcing an indemnification agreement for damages caused by the negligence of another party irrespective of whether the promisee is partially negligent. In attempting to "clarify" its ruling the court recited traditional common law doctrine regarding contribution:

> While the defendant may not be compelled to indemnify the plaintiff for damages from any negligent acts on the part of the plaintiff . . . , the defendant should be required to honor its contractual obligations **to the extent** that its contract requires indemnification for damages caused by or resulting from the negligence of a party other than the promisee.

DeFilippis, supra at NYS 2d 261, emphasis supplied.

Another recent opinion which converts the contractual indemnification referred to in subsection 5-322.1 into contribution rights is that of Judge Myriam Altman's in **Dempsey v. Pierson**, Index No. 26415/85, slip opinion (Altman, J. April 13, 1988). Mr. Dempsey was injured on a construction site owned by defendant. The defendant brought a third-party action against plaintiff's employer, the general contractor, relying on an indemnification agreement which held defendant harmless for any injuries on the job site. That agreement provided full indemnification to the owner regardless of the owner's negligence, as long as some negligence on the part of the general contractor could be shown.[2]

In denying the defendant's motion for summary judgment Judge Altman ruled that the agreement was valid under subsection 5-322.1 to the extent that it indemnified the owner for the negligence of others. However, Judge Altman also ruled that "[t]o the extent that the indemnification clause requires [contractor] to indemnify [owner] for [owner's] own negligence, it is unenforceable."

At least one commentator has attempted to reconcile the apparent disparity in the statute by offering an analysis that would validate only those

[2]The indemnity clause of the construction contract in **Dempsey** is part of a standard form agreement which has been approved and endorsed by the The Associated General Contractors of America. The clause reads as follows:

> "To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorneys fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense. . . . (2) is caused in whole or part by **any negligent act** or **omission** of the Contractor, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose such acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

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FAULTLESS INDEMNITY: Brown v. Two Exchange Plaza [Con't.]

indemnification agreements which take effect upon a finding of negligence on the part of the indemnitor or other party associated with the indemnitor . . .[3] Complete contractual indemnification (as opposed to the watered-down contribution-like principle put forth in **Dempsey** and **DeFilippis, supra**) would be permitted, the argument goes, upon a finding of negligence on the part of the indemnitor or other party subject to the indemnification agreement. Were the statute to be construed thusly, indemnitors who are free of negligence would not be forced into bearing full responsibility for an accident. This argument, as well as several other more traditional notions regarding indemnification were rejected by the Court of Appeals and the Appellate Division, First Department in **Brown v. Two Exchange Plaza.**[4]

The significance of **Brown** cannot be understated both from a legal standpoint, almost 1.5 million was paid to the plaintiff in this case by a third-party defendant with a finding of no-negligence on behalf of any of the parties, and from the standpoint of an insurance company underwriting and evaluating the risk a potential insured may be, the contract the indemnitor entered into with the general contractor became the sole source of that party's obligation to indemnify, irrespective of fault.

Mr. Brown was working on a scaffold in the lobby of a building under construction when the scaffold collapsed. The scaffold was erected by defendant Heydt Contracting Corporation pursuant to a subcontract with Fuller Company, the general contractor. Another subcontractor, A & M Wallboard Company was hired by Fuller to erect walls and ceilings. A & M in turn subcontracted the ceiling work to Central Furring and Drywall Company, plaintiff's employer. During trial none of the parties were able to show why the scaffold collapsed. Judge Shainswit directed a verdict in favor of the plaintiff and against Fuller pursuant to Labor Law subsection 240(1). The court further ruled that there was insufficient evidence of negligence against A & M and Central Furring and dismissed all contribution claims against them. Heydt's liability was submitted to the jury with a charge that instructed them to find whether Fuller had established Heydt was solely responsible for the accident. When the jury questioned whether it could apportion culpability between Heydt and Fuller the court repeated the all-or-nothing charge. Implicit in this aspect of the case was Judge Altman's belief that negligence was not involved in Fuller's liability to the plaintiff and that Fuller's only possible means of recovery from Heydt, if at all, was through indemnification. The jury found the scaffold erector not liable to Fuller.

The contract between A & M and its subcontractor Central Furring, contains an indemnification clause which required the subcontractor to indemnify A & M against injuries "arising out of or resulting from the performance of the subcontractor's work . . . . to the extent caused in whole or in part by any negligent act or omission of the subcontractor . . . regardless of whether it is caused in part by [A & M]."

The contract between Fuller and A & M requires the latter to indemnify Fuller against, among other things, personal injury to any person "arising out of, in connection with or as a consequence of the performance of the [subcontractor's] Work and/or any act or omission of the Subcontractor or any of its subcontractors . . . . as it relates to the scope of this contract."

In regard to the above contracts and the above quoted indemnification agreements Judge Wallach stated:

> In the construction industry, agreements purporting to indemnify a party against liability for damage caused by his own negligence are void as against public policy (GOL subsection 5-322.1). Aside from this statutory prohibition, such agreements—"which are usually 'negotiated at arm's length between . . . . sophisticated business entities' and which can be viewed as merely 'allocating the risk of liability to third parties between them, essentially through the employment of insurance' "—are not subject to any heightened level of scrutiny. It is no more suspect for such an agreement to require indemnification in circumstances not involving negligence by the indemnitor than it is for it not to require indemnification except in circumstances that do involve negligence by the indemnitor. Whether negligence by the indemnitor is required or not is a question without policy significance to be resolved by the parties themselves as a bargaining issue at the time of contract formation.

Brown, NYS2d at 891. In finding that A & M was to fully indemnify Fuller the Court noted that Judge Shainswit's emphasis on conditioning the answer to that question on first determining whether the indemnitor was negligent was misplaced. "And, contrary to the reading given the clause by A & M

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[3]Komitor, "Construction Contracts: Are Indemnification Clauses Still Enforceable?" New York State Bar Journal at p. 50 (October 1989).

[4]The Appellate Division's opinion, written by Judge Wallach, is at 539 NYS2d 889.

FAULTLESS INDEMNITY: Brown v. Two Exchange Plaza [Con't.]

and the trial court, we do not construe it as conditioning the right to indemnification upon a showing that A & M was in some way negligent."

In broadening the liability of the indemnitor, based strictly on the indemnity agreement without regard to traditional notions of fault or negligence the Court went on to say of A & M's indemnification clause:

> Clearly the "and/or" syntax of the clause indicates a purpose to broaden the basis of liability beyond negligence. Indeed, the major function of an indemnification clause such as this would seem to be elimination of negligence as a prerequisite to indemnification. . . .

Brown, supra at NYS2d 893. The court dismissed a challenge to the clause under subsection 5-322.1 by stating that such an analysis must begin with an assessment as to what degree the indemnitor was negligent, not whether the indemnitor was not negligent. The bar of subsection 5-322.1 applies only if the indemnitee was in some degree negligent. The Court refused to apply the bar of the statute to the indemnity clause as they found that Fuller's liability under Labor Law 240(1) was **not** the equivalence of negligence.

The Court then turned to the question of whether A & M was entitled to be indemnified under its contract with Central Furring. While the Court found the last portion of the indemnification clause an attempt to circumvent the common law rule barring indemnification of a party whose active negligence partially contributes to an accident (a valid purpose prior to the 1981 amendment of GOL 5-322.1) the Court refused to give effect to the clause on a wholly different basis. The Court found the clause in the A & M Central Furring contract to require a finding of negligence by the indemnitor as a precondition to the promisee's right to indemnification.

The lessons of **Brown** are legion and will increase with time but it appears the Court of Appeals will not allow responsibility of payment of the plaintiff's damages in a construction site accident to be negotiated risk at the time of contract inception, regardless of traditional notions of fault. How the insurance industry can evaluate the potential risks of loss in such circumstances is a policy question not addressed, or apparently considered, by the Court of Appeals. ◉

WORTHY OF NOTE [Con't.]

ucts liability plaintiff the opportunity to perform destructive testing of a Jewitt nail, which was alleged to be defective and to have caused injuries to the plaintiff, but the medical center and the alleged manufacturer of the nail were entitled to have a representative present when the inspection and testing were conducted (**Dina v. Lutheran Medical Center,** ____ A.D.2d ____, 548 N.Y.S.2d 541).

DISCOVERY—Examination of Plaintiff-Absence of Counsel. In **Barrazza v. 55 West 47th St. Co.** (____ A.D.2d ____, 548 N.Y.S.2d 660), the First Department ruled that in a negligence action arising out of rape and sodomization of an infant, an Order granting the defendant's Motion to conduct a psychiatric examination of the victim, who was then approximately 19 years of age, without the presence of her counsel, but allowing an audiotaping of such examination, was proper.

MALPRACTICE—Duty of Care-Forseeability. It was recently ruled by the First Department that a Hospital violated its duty to protect its patients from injury and could be properly held responsible for an injury sustained while the patient was raped by another patient while she was in multiple restraints and unsupervised in an Emergency Room. The hospital was on notice that the other patient was aggressive and might cause trouble.

The hospital is under the duty to take reasonable care to protect its patients from injury; the degree of care is consummate with patient's capacity to provide for his or her own safety. The exact extent of the injury need not be foreseeable for the hospital to have the duty to take reasonable care to protect the patients from injuries; so long as some kind of injury may be reasonably anticipated (**Freeman v St. Clare's Hosp. and Health Center,** ____ A.D.2d ____, 548 N.Y.S.2d 686).

INDEMNIFACTION—Common Law. In **Menorah Nursing Home, Inc. v. Zukov** (____ A.D.2d ____, 548 N.Y.S.2d 702), the Second Department ruled that, generally, a defendant whose liability to injured plaintiff is merely secondary or vicarious, is entitled to Common Law indemnification from the actual wrongdoer, who by his actual misconduct caused the plaintiff's injury, and whose liability to the plaintiff is, therefore, primary.

PROCESS—Leaving Summons with Another. In **Cohen v. Shure** (____ A.D.2d ____, 548 N.Y.S.2d 696), the Second Department that a medical mal-

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WORTHY OF NOTE [Con't.]

practice plaintiff's attorney obtained sufficient service of process upon the defendant when he personally delivered the process to the doorman of the defendant's apartment building, though the doorman denied receiving same. It is to be noted that in addition to delivery to the doorman, a copy of the process had been mailed to the defendant's last-known residence by Certified Mail-Return Receipt Requested.

POOL MANUFACTURER—Liability-Duty. An above-ground swimming pool, which was partially sunk into the ground, contrary to the manufacturer's specifications, was not defective due to the absence of markings on the liner and pool decking, where a depth of the pool would have been obvious had it been installed entirely above ground, in accordance with the manufacturer's specifications, so indicated the Appellate Division, Second Department.

The Court further submitted that there was not a duty to warn users of the obvious dangers of diving into such pools, since a cursory, visual inspection would have revealed the depth of the water. The manufacturer did not have the duty to insure that the pool was not installed below the ground level, even if the in-ground installation of such pools was commonplace (**Amatulli v. Delhi Const. Corp.**, ____ A.D.2d ____, 548 N.Y.S.2d 774).

TRIAL—Missing Witness Charge-Elements. In **Felder v. Carolina Freight Carriers** (____ A.D.2d ____, 548 N.Y.S.2d 809), the Second Department ruled that a missing witness charge was warranted in an action arising out of a motor vehicle accident where the missing witness was the driver of one vehicle involved in the accident, was the brother-in-law of the owner, and thus, would have been considered as being available to the owner.

DAMAGES—Inadequate-Loss of Leg. In **Camacho v. ConRail** (____ A.D.2d ____, 549 N.Y.S.2d 15), the First Department ruled that the Trial Court did not abuse its discretion in setting aside, as inadequate, a jury award of damages for pain and suffering in the amount of $451,500 to a child who suffered a traumatic amputation of the leg, in view of the medical evidence that the child would suffer constant pain and have difficulty using a prosthetic device since the amputation three inches below the hip left one inch of femur bone with insufficient padding.

DAMAGES—Inadequate-Brain Injury-Four Year Old Child-Fracture of Both Feet of Adult. The Second Department recently held that a verdict awarding $125,000 to a four year-old child who suffered brain injury when dropped from a city-owned apartment building when a fire escape failed to function during a fire, was inadequate to the extent that it was less than $750,000 where the child suffered personality disorder and learning disabilities indicative of organic brain damage, and there was a diagnosis of post-concussion syndrome, and organic personality syndrome secondary to closed-head injury (**Hernandez v. City of New York,** ____ A.D.2d ____, 549 N.Y.S.2d 139).

Similarly, an award of $125,000 to a woman injured in the same occurrence was inadequate to the extent that it was less than $350,000 where she incurred fragmented fracture of weight-bearing bones of both feet, significantly impairing her ability to walk, continued to suffer pain, required a wheelchair, suffered from a depressed, psychotic state, and treatment of the permanent injury by surgery was not appropriate.

LIBEL—Slander-Damages. It was recently indicated by the Second Department that an award of compensation and punitive damages in the amount of $200,000 and $600,000 respectively to a school district's chief negotiator for libel, when a racial slur was falsely attributed to him by a faculty association, during contract negotiations, was excessive, however the evidence supported a compensatory award of $130,000, and an award for punitive damages of $300,000 (**O'Neil v. Peaksville Faculty Assn., Local No. 296,** ____ A.D.2d ____, 549 N.Y.S.2d 41).

PROCESS—Abuse-Elements. The Second Department recently indicated that abuse of process has three essential elements: regularly issued process, intent to harm without excuse or justification, and use of process in a perverted manner to obtain a collateral objective. (**Bernman v. Silver, Forrester and Schisano,** ____ A.D.2d ____, 549 N.Y.S.2d 125).

FORUM NON CONVENIENS—Conditions-Discretion of Court. It was recently indicated by the First Department that the Trial Court abused its discretion in not conditioning a grant of Motion to Dismiss on the grounds of Forum Non Conveniens, on stipulation by defendant to waive any Statute of Limitations defense, and to submit to personal jurisdiction of another state's or country's Court in New York Corporation's action against a New York resident for, **inter alia**, a breach of contract for production services; the failure to ensure the existence of an alternative forum represented a fundamental failure to implement the basic Forum Non Conveniens policy (**Highgate Pictures v. DePaul,** ____ A.D.2d ____, 549 N.Y.S.2d 386).

RELEASE—Elements-Scone. In **Tufail v. Hionas** (____ A.D.2d ____, 549 N.Y.S.2d 436), the Second Department ruled that a Release given to one tort feasor no longer operates to discharge any other tortfeasor liable for the same injury unless the

(continued on next page)

WORTHY OF NOTE [Con't.]

terms of the Release expressly so provide, regardless whether the tortfeasors are joint, successive, or vicarious. A Release given to an owner of an automobile by an injured passenger did not operate to discharge the driver for the passenger's injuries sustained in the automobile accident.

DISCLOSURE—Deposition-Direction to Answer Questions-Appealability. The Third Department recently ruled that an Order directing a witness to answer questions propounded at an Examination Before Trial is not appealable without permission of either the Court issuing the Order, or the Appellate Court (**Pinkans v. Hulett,** ____ A.D.2d ____, 549 N.Y.S.2d 863).

COMPROMISE—Necessity of Writing. It was recently held by the First Department that the assertion of an oral settlement made over a telephone was inadequate to constitute a binding agreement. The purported agreement was not made in open Court, subscribed by the party to be bound or his attorney, or reduced to a form of Order and entered.

The assertion of a settlement based on a written communication was inadequate to constitute a binding agreement, in that the substantive terms of the agreement were to take effect only upon the execution of the agreement, and the only signed writing attached was a cover letter which clearly characterized the substantive terms as a mere draft (Application of U. S. Surgical Corp., ____ A.D.2d ____, 549 N.Y.S.2d 732).

DISMISSAL—Failure to Enter Default-CPLR 3215. A personal injury defendant's insurer waived the plaintiff's failure to take the proceedings for entry of judgment within one year of defendant's default, where the insurer repeatedly represented that it would file an Answer on defendant's behalf waiving the jurisdictional defenses, and in reliance upon such representations, plaintiff refrained from serving new process upon the defendant prior to the expiration of the applicable limitations, so indicated the Second Department in **Cutrone v. General Motors Corp.** (____ A.D. ____, 549 N.Y.S.2d 747).

PRODUCTS LIABILITY—Compliance with Regulations. In **Feiner v. Calvin Klein, Ltd.** (____ A.D.2d ____, 549 N.Y.S.2d 692). The First Department held that a blouse manufacturer's compliance with certain Federal fabric flammability regulations did not absolve it, as a matter of law, from any liability in a suit brought by a person whose blouse caught fire, and caused her to sustain injuries. While compliance with a Statute may constitute some evidence of due care, it does not preclude a finding of negligence.

TRIAL—Bifurcation. The Second Department recently ruled, in **Jochsberger v. Morandi** (____ A.D.2d ____, 549 N.Y.S.2d 806), that Judges are encouraged to conduct bifurcated trials in a personal injury action where it appears that the bifurcation may assist in a clarification or simplification of issues, and a fair and more expeditious resolution of the matter. A Trial Court erred in granting plaintiff's motion for a unified trial of the issues of liability and damages in a personal injury suit where the defendants could suffer prejudice if the jury were informed of the infant plaintiff's grave condition when determining liability, and where the defendants had agreed to stipulate that plaintiff's were to be held to a lesser degree of proof by virtue of the infant plaintiff's comatose condition.

EVIDENCE—Criminal Charge-Negligent Action. In **Allen v. Harrington** (____ A.D.2d ____, 550 N.Y.S.2d 79), the Third Department ruled that although the mere fact of an arrest is inadmissible as a basis for inferring negligence, evidence that the defendant pleaded guilty to criminal charges may be introduced in a subsequent negligence trial.

LIBEL—Slander-Opinion. In **Immuno AG v. Moor-Jankowski** (74 N.Y.2d 548, 549 N.Y.S.2d 938), the Court indicated that a commentary or criticism by a newspaper is generally protected as opinion, and thus, cannot support an action for defamation. Speculations as to motivations and potential future consequences of a proposed conduct generally are not verifiable, and therefore, are intrinsically unsuited as a foundation for a liable suit.

An Editor-in-Chief of a scientific journal would not have been shielded from liability for a defamatory statement in a letter to the Editor if the Editor had deliberately incited the author to have the defamatory letter published.

NEGLIGENCE—Notice. The Third Department recently held in the case of **Melton v. Sears Roebuck & Co.** (____ A.D.2d ____, 550 N.Y.S.2d 222), that a plaintiff who slipped and fell in a department store failed to show that the store had actual or constructive notice that the wet condition existed on the floor prior to plaintiff's fall, as was required to make out a prima facie case in a negligence matter.

LIBEL—Slander-Question of Law-Interpretation. In **Weiner v. Doubleday and Co., Inc.,** (74 N.Y.2d 586, 550 N.Y.S.2d 251), the Court ruled that whether contested statements are reasonably susceptible of defamatory connotation is, in the first instance, a legal determination for the Court, and in analyzing the words in order to make that threshold decision, the Trial Court must not isolate them, but must consider them in context and give language a natu-

(continued on next page)

WORTHY OF NOTE [Con't.]

ral reading rather than strain to read it as mildly as possible at one extreme, or to find defamatory innuendo at the other.

A sentence in a non-fiction crime-book indicating that a woman who planned murder "always slept with her shrinks" was reasonably susceptible of a defamatory meaning when viewed with the quoted paragraph as a whole. The focus was not on the woman's promiscuity, in general, or on her relationship with psychiatrists in general, but on the plaintiff's psychiatrist alone, and his relationship with the woman.

NEGLIGENCE—Construction-Liability of Owner-Single Family Residence. In **Edwards v. Ackerman** (____ A.D.2d ____, 550 N.Y.S.2d 375), the Second Department ruled that the owners of a single family residence could not be liable for a worker's injuries sustained by defect in the renovation contractor's tools, even though the owner had requested that no work be performed on the front stoop.

The request by the owner that no work be performed on the front stoop did not constitute sufficient "direction" or "control", for the imposition of liability under the Statutes governing scaffolding and construction, excavation, and demolition work.

APPEALS—Stay. A filing of a Notice of Appeal does not result in a stay, so reflected the Appellate Division, First Department, in **Khanyile v. Roosevelt Hospital** (____ A.D.2d ____, 550 N.Y.S.2d 696).

AUTOMOBILE—Negligence-Liability of Parent. A father could not be held liable pursuant to a negligent entrustment theory for damages resulting from a seventeen year-old son's operation of an automobile which the son himself owned, maintained, and insured, particularly in view of the fact that the father took no part in the purchase of the car, or even had a set of keys (**Camillone v. Popham,** ____ A.D.2d ____, 550 N.Y.S.2d 722, Appellate Dept., Second Department).

NEGLIGENCE—Failure of Illumination-Duty of City-Duty of Contractor. It was recently indicated by the Appellate Division, First Department, that a contractor's failure to replace a burned out street light bulb, in violation of its contract with the city, created no liability on the part of the contractor to a pedestrian who was struck by an automobile when crossing a street at a point where the nearest street light was unlit, especially as contractor explicitly stated that it was intended to benefit the City and not the general public (**Thompson v. City of New York,** ____ A.D.2d ____, 550 N.Y.S.2d 653).

Additionally, the City could not be held liable to the pedestrian as there was no special relationship between the City and the pedestrian, as the street lighting was a governmental function benefiting the general public and the pedestrian failed to introduce any evidence that the city failed to provide lighting to illuminate unusual and dangerous road conditions.

DAMAGES—General-Special-Elements. In **American List Corp. v. U. S. News and World Report, Inc.** (75 N.Y.2d 38, 550 N.Y.S.2d 590), the Court defined "general damages" as those which are natural and probable consequence of a party's breach of contract. "Special damages" were extraordinary, in that they did not flow directly from the party's breach of the contract. Special damages would be recoverable in a breach of contract action only upon a showing that they were foreseeable and within the contemplation of the parties at the time of the contract.

NEGLIGENCE—Swimming Pool-Failure to Warn-Liability of Contractor-Summary Judgment. A companion's negligence in failing to adequately light a pool area and in advising diver that it was safe to dive from the top of the pool slide could not be considered an independent superseding cause as a matter of law, so as to relieve the contractor who installed both the pool and the slide, and the Company which bought the slide from the manufacturer and sold it to the contractor, of any liability. Issues of fact as to the legal cause of the accident precluded summary judgment. Additional issues of fact existed as to whether the allegedly negligent conduct of the pool owners and pool retailer in failing to affix warnings to the poolside or to otherwise warn the swimmer of the dangers of sliding headfirst was a legal cause of injuries the swimmer suffered when she struck her head on the bottom of the above ground pool while performing a belly slide. The swimmer's conduct in sliding down the pool slide was not, as a matter of law, an unforeseeable use of the slide such as to constitute the sole cause of her injuries, particularly where there was evidence that the head-first belly slide was the intended use of the pool slide, and therefore, foreseeable to the owners and retailer (**Kriz v. Schum,** 75 N.Y.2d 25, 550 N.Y.S.2d 584).

TRIAL—Jury-Misconduct. In **Desmond v. Nassau Hosp.** (____ A.D.2d ____, 550 N.Y.S.2d 730), the Second Department ruled that in a medical malpractice action to recover damages for wrongful death based on claim, that the defendant failed to diagnose the condition of bacterial meningitis, a juror's copying of a definition of meningitis from a medical dictionary did not warrant setting aside the verdict in favor of the defendant where the definition of meningitis was not a material issue, and the copied material was not disseminated to the other jurors.

(continued on next page)

WORTHY OF NOTE [Con't.]

DISCLOSURE—Waiver of Privilege. In **Levine v. Morris** (____ A.D.2d ____, 550 N.Y.S.2d 289), the First Department held that in an action to recover damages for psychological injuries, the plaintiff waived the physician-patient privilege by affirmatively placing his psychological condition in issue in a Bill of Particulars. The Court properly directed disclosure of the psychiatric records regarding plaintiff's hospitalization for attempted suicide.

MALPRACTICE—Negligence-Fall from Table. In **Rogers v. Schuyler** (____ A.D.2d ____, 551 N.Y.S.2d 5), the First Department indicated that a patient who sustained severe injuries when she fell from an examining table while giving a blood sample was not entitled to a Medical Malpractice Panel hearing. The acts complained of, if established, would constitute simple negligence and not malpractice requiring a medical expert's opinion.

STIPULATIONS—Vacating-Improper Discretion of Court. In **Carney v. New York Telephone Co.** (____ A.D.2d ____, 551 N.Y.S.2d 43), the Second Department ruled that the Court abused its discretion by directing an employee of the defendant to appear for an Examination Before Trial in contravention of a written Stipulation entered into between the parties whereby the plaintiff agreed to waive all further depositions of the defendant. The record contained no evidence of fraud, collusion, mistake, or other factors which might have warranted the vacatur of the Stipulation.

NEGLIGENCE—Hospital-Fall from Bed. The Second Department recently ruled on a claim that a hospital was negligent in permitting a patient to remain in the hospital bed which lacked proper and adequate side rails, and in failing to supervise the patient properly and/or render him any assistance, sounded in ordinary negligence not in medical malpractice, and thus, the patient was not barred from stating a specific monetary damage in the Ad Damnum clause of the Complaint (**Halas v. Parkway Hosp., Inc.,** ____ A.D.2d ____, 551 N.Y.S. 279).

INSURANCE—Notice-Interfamial. It was recently ruled by the Second Department that the fact that an insured is unaware that an interfamial law suit can be commenced is not legally a cognizable reason to delay notifying the insurer of the accident. The delay of 9 and 1/2 years in notifying the insurer of the accident was inexcusable; thereby, precluding coverage under the comprehensive liability policy, even though the law suit in connection with the accident was not filed until 9 and 1/2 years after the accident. The insured knew at all times that the victim had been seriously injured, on the insured's defective staircase, and a reasonable and prudent insured would have concluded that there was a strong possibility that a liability claim would arise (**Greater New York Mut. Ins. Co. v. Farrauto,** ____ A.D.2d ____, 551 N.Y.S. 277).

DISCLOSURE—Place Of. The First Department recently held that an insured's documents, that were too voluminous to transport, could be produced at the insured's place of business at a date convenient to the insurer (**Yerushalmi v. Hartford Acc. & Indem. Co.,** ____ A.D.2d ____, 551 N.Y.S.2d 242).

INSURANCE—Uninsured Motorist-Failure to Cooperate. It was recently concluded by the Appellate Division, Second Department, that an automobile insurer was entitled to a permanent stay of arbitration on the insured's claim of hit and run accident made under the provisions of the Uninsured Motorists Endorsement of her policy, where the insured failed to file a statement under oath within 90 days of the accident, as required by the endorsement of the policy, and the insured provided no reasonable excuse for a failure to comply with the filing requirements (**Federal Insurance Ins. Co. v. Cata,** ____ A.D.2d ____, 551 N.Y.S.2d 287).

MALPRACTICE—Diagnosis. In **Tolisano v. Texon** (75 N.Y.2d 732, 551 N.Y.S.2d 197), a physician who gave his opinion that a witness could testify before a grand jury without harm to his health could not be held liable after the witness died, where the witness died without ever appearing before the Grand Jury, and while the Court Order directing him to testify was being appealed.

DAMAGES—Punitive-Elements-Insurance Coverage. In **Home Ins. Co. v. American Home Products Corp.** (75 N.Y.2d 196, 551 N.Y.S.2d 481), it was held that punitive damages are intended to act as a deterrent to the offender, and to serve as a warning to others. They are intended as punishment for the offender's gross misbehavior for the good of the public. An award of punitive damages was permissible in a strict products liability case where the theory of liability was a failure to warn, and where there was evidence that the failure was wanton, or in conscious disregard of the rights of others.

Requiring an insurer to reimburse an insured for punitive damages awarded against the insured in an out-of-state judgment for conduct which, although not intentional, was grossly negligent or wanton or so reckless as to amount to a conscious disregard of the rights of others would be contrary to New York public policy. To determine whether there should be reimbursement in New York for an out-of-state punitive damage award, it was necessary to examine the nature of the claim, including

(continued on next page)

WORTHY OF NOTE [Con't.]

the degree of wrongfulness for which the damages were awarded in the foreign state, as well as that state's law and policy relating to punitive damages.

AUTOMOBILE—No Fault-Use. The Fourth Department recently submitted in the case of **Kessler v. Liberty Mut. Ins. Co.** (____ A.D.2d ____, 551 N.Y.S.2d 722), that an insured who was injured while stacking bales of hay onto a flatbed attached to the insured motor vehicle, which set with its engine off in the farmyard, was injured while "using" a motor vehicle within the meaning of the coverage provision of the No Fault policy. The policy defined use or operation to include loading or unloading.

NEGLIGENCE—Prima Facie Case-Circumstantial Evidence. In **Secof v. Greens Condominium** (____ A.D.2d ____, 551 N.Y.S.2d 563), the Second Department ruled that to establish a prima facie case of negligence, based totally on circumstantial evidence, it is enough that the plaintiff show facts and conditions from which the negligence of the defendant and causation of the accident by that negligence may be reasonably inferred. The law does not require that a plaintiff's proof positively exclude every other possible cause of the accident but defendant's negligence.

PLEADINGS—Amendment-Affidavits. The Third Department recently held that an unsworn letter of a physician stating that "I[t] is highly probable" that stress placed on a mother by her pregnancy and infant's son's death "might be considered as [a] triggering mechanism that lead to her development of overt diabetes mellitus" did not constitute competent medical proof, and failed to draw more than, in a purely conclusionary fashion, any causal connection between the alleged malpractice and the mother's injuries, and therefore, the mother was entitled to leave to amend the pleadings. A motion for leave to amend a Complaint for personal injuries must be supported by competent medical proof showing the causal Nexis between the injury and the alleged malpractice (**Hayes v. Record,** ____ A.D.2d ____, 551 N.Y.S.2d 668).

NEGLIGENCE—Shallow Pool-Prima Facie Case. In **Ziecker v. Town of Orchard Park** (75 N.Y.2d 761, 551 N.Y.S.2d 898), it was concluded that a diver who was rendered a quadriplegic after diving into approximately 2 and 1/2 feet of water, permitted the conclusion that the diver was not aware of the depth of the water at the point he would reach on his dive, so was not reckless in diving into shallow water, and his conduct did not constitute a superseding act absolving the Town from liability for the diver's injuries based upon a failure to warn.

ARBITRATION—Punitive Damages. The Second Department recently held that an arbiter may not award punitive damages (**Diker v. Cathray Const. Corp.,** ____ A.D.2d ____, 552 N.Y.S.2d 37).

APPEAL—Charge Improper. In **McGowan v. James G. Kennedy & Co.** (____ A.D.2d ____, 552 N.Y.S.2d 1), the First Department held that an instruction on a building owner's duty to maintain a ramp was reversible error in a slip and fall action against the builder accused of negligently constructing the ramp. The issue of ramp maintenance had not been advanced by the plaintiff.

LIMITATIONS—Wrongful Death-Tolling. In **Collins v. Jamaica Hospital** (____ A.D.2d ____, 551 N.Y.S.2d 950), the Second Department ruled that the two year period of limitations for bringing a wrongful death action was not tolled in a case brought by the County's Public Administrator as Administrator of patient's Estate. The County Administrator suffered no disabilities and was eligible and able to act as Administrator at the time of the patient's death.

INDEMNIFICATION—Owner. In **Blaskovic v. Penguin House Tenants Corp.** (____ A.D.2d ____, 552 N.Y.S.2d 7), the First Department held that an owner of a building was vicariously liable only for the injury to workmen occurring during the repair of the building, and was, therefore, able to assert an implied indemnity against the contractor in a personal injury action brought by the workmen, despite the claim that the accident was caused by plywood covering a hole in the sidewalk upon which the scaffold was erected, for which the owner was responsible.

INDEMNIFICATION—Owner. The Second Department recently ruled that building owners were not entitled to indemnity from a construction company in a third-party action for the costs of successfully defending an underlying personal injury action. Neither an agreement wherein the construction company agreed to repair brickwork on the building, nor a general comprehensive liability insurance policy, provided for indemnification of the building owners for legal fees, costs and disbursements in defending the main action, to recover damages for personal injuries (**Golaszewski v. Cadman Plaza North, Inc.,** ____ A.D.2d ____, 552 N.Y.S.2d 43).

INSURANCE—Use of Vehicle-Exclusion. A claim based upon an insured's alleged negligent entrustment of a three-wheeled, all-terrain motor vehicle to his son did not fall within the exclusion in the home owner's policy for occurrences "arising out of the ownership, maintenance, or use of" a motor vehicle. The focus of the dispute, negligent entrustment of a dangerous instrumentality, was not di-

(continued on next page)

WORTHY OF NOTE [Con't.]

rectly related to any negligent operation of the vehicle by the insured's son (**Cone v. Nationwide Mut. Fire Ins. Co.**, 75 N.Y.2d 747, 551 N.Y.S.2d 891).

ARBITRATION—Collateral Estopel-Res Judicata-Burden of Proof. In **Dimacopoulos v. Consort Development Corp.** (____ A.D.2d ____, 552 N.Y.S.2d 124), the Second Department held that an owner was barred by the doctrine of Res Judicata and Collateral Estoppel from maintaining an action against the contractor's sureties for failure to honor their obligation as sureties to complete work begun by the contractor, where the previous arbitration between the owner and the contractor resulted in an arbitration award in favor of the contractor. For the purposes of Res Judicata and Collateral Estoppel, the sureties stood in the shoes of the contractor, and their liability was limited to the contractor's liability.

The burden of establishing identity of issue or issues is upon the proponent of the Collateral Estoppel, whereas the burden of establishing the absence of full and fair opportunity to litigate the issue or issues in the prior proceeding is upon the opponent.

APPEALS—Denial of Motion-Precedent. A denial of a Motion for leave to appeal is not equivalent to an affirmance, and has no precedential value (**Brownstone Publishers, Inc. v. New York City Dept. of Finance**, 75 N.Y.2d 791, 552 N.Y.S.2d 92).

EXPLOSIVES—Liability of Owner. In **Whitaker v. Norman** (75 N.Y.2d 779, 552 N.Y.S. 86), it was ruled that property owners were not liable for injuries to employees of an independent contractor hired to do the blasting. There was no evidence of control, actual or constructive, by the property owners over the worksite, for the manner in which the work was performed.

An employer of an independent contractor is not, as a general rule, responsible for the contractor's torts, but may be liable if the work performed is inherently dangerous. Such vicarious liability is designed to protect the members of the public and does not extend to an employee of a contractor hired to do the dangerous work who (unlike members of the public), is ordinarily covered by Worker's Compensation.

PRODUCTS LIABILITY—Burden of Proof-Prima Facie Case. In **Hakim v. Armstrong Rubber Co.** (____ A.D.2d ____, 552 N.Y.S.2d 130), the Second Department held that a products liability plaintiff's bare allegation that a forklift tire which exploded bore the name of one defendant and that the wheel rim which broke into two pieces when the tire exploded bore the first three letters of the second defendant's name, coupled with hearsay statements that the second defendant, in fact, manufactured the wheel rims for the forklifts were not sufficient to overcome the first defendant's engineering evidence that its name did not appear on the tires manufactured for another company, and the second defendant's engineering evidence that it never manufactured a cast rim for use on a forklift, or made the rim for use on the forklift with markings of any kind.

APPEAL—Improper Admission of Video Tape. In **Mercatante v. Hyster Co.** (____ A.D.2d ____, 552 N.Y.S;2d 364), the Second Department held that in an action to recover injuries sustained as a result of the operation of a pallet jack truck manufactured by the defendant, under the theory that the platform of the truck upon which plaintiff stood while riding the machine was too small, and that such defect proximately caused plaintiff's injuries, it was reversible error to allow the jury to view the video tape demonstrating the operational capabilities of the truck. The actual truck involved in the law suit was available for inspection and demonstration at the Courthouse during the pendency of the trial, and while the video tape presentation depicted an operator of the truck "walking" that machine, without incident at the accident in question, occurred while the plaintiff was "riding" the machine on an allegedly defective platform.

ARBITRATION—Waiver. The Second Department recently held that a defendant did not waive arbitration by its vigorous participation in the law suit where immediately upon being sued, it brought on a Motion to compel the arbitration, and interposed an Answer and engaged in discovery only when ordered to do so by the Court (**Ravel v. Dirco Enterprises Inc.**, ____ A.D.2d ____, 552 N.Y.S.2d 426).

MALPRACTICE—Failure to File Certificate. A medical malpractice action must be dismissed based on the plaintiff's failure to file a Certificate of Merit, unless the plaintiff can establish a reasonable excuse for the default, or a meritorious cause of action (**Perez v. Lenox Hill Hospital**, ____ A.D.2d ____, 552 N.Y.S.2d 244; Appellate Department, First Department).

DISCLOSURE—Attorney's Work Product. The First Department recently ruled that video taped recordings, photographs, movies, or visual reproductions, or descriptions of employee purported employee's activities, were not attorney's work to depict products,and thus were discoverable (**Marte v. W. O. Hickok Mfg. Co., Inc.**, ____ A.D.2d ____, 552 N.Y.S. 297).

PRODUCT'S LIABILITY—Duty of Seller. In **Marte v. W. O. Hickok Mfg. Co., Inc.** (____ A.D.2d

(continued on next page)

WORTHY OF NOTE [Con't.]

____, 552 N.Y.S. 300), the Appellate Department, First Department, ruled that a casual seller, not engaged in the sale of machinery as a regular part of business, who disposed of a printer in a liquidation sale without guaranties or warranties, had the duty to warn the buyer of known defects only, which were not obvious and readily discernible. The employee injured by the defective printer had knowledge of the defect and the danger posed by the defect, and thus, could not argue that the seller's failure to warn of the danger had a causal relationship to the accident which required a partial amputation of the employee's arm.

SEVERANCE—Improper Discretion of court. The First Department recently held that a sua sponte severance of a third-party action from the main action was not an appropriate response to the third-party plaintiff's motion to strike the Note of Issue on the ground that all pre-trial discovery had been completed. The main action was not ready for trial, contrary to the filing of the Statement of Readiness, and there was not significant delay in the commencement of the third-party action that would warrant a severance (**Jambrone v. A. J. C. Food Market Corp., ____ A.D.2d ____, 552 N.Y.S.2d 576**).

INDEMNITY—Public Policy. An indemnification clause in a lease or property on which a gas station was located, whereby the lessee promised to indemnify and hold the lessor harmless for loss or damages, except that which was caused by the lessor's "sole negligence", to procure insurance coverage in specific amounts, and to name the lessor as an insured, did not violate the statute providing that any agreement to exempt a lessor from liability from his own negligence is void as against public policy, so indicated the Second Department in **Jensen v. Chevron Corp.** (____ A.D.2d ____, 553 N.Y.S.2d 485).

Where sophisticated parties have negotiated at arm's length to enter into a lease containing an indemnification clause, such provision is valid inasmuch as the parties have allegated the risk of liability to third-parties between themselves by requiring one party to procure insurance for their mutual benefit.

INSURANCE—Subrogation-Rights of Parties. In **Federal Ins. Co. v. Arthur Andersen & Co.** (75 N.Y.2d 366, 553 N.Y.S.2d 291), the Court held that unlike contractual subrogation, where the subrogee's rights are defined in an express agreement between the insurer's subrogee and the insured's subrogor, the rights of an insurer against a third-party as an equitable subrogee arises independently of any agreement.

The insurer's rights against the third-party as an equitable subrogee will acquire, upon payment of a loss, and are based upon the principle that in equity an insurer, which has been compelled under its policy to pay the loss, ought in fairness to be reimbursed by the party which caused the loss.

The rights of the insurer, as the equitable subrogee against the third-party, are derivative and are limited to such rights as the insured would have had against the third-party for its default or wrongdoing. The insurer can only recover if the insured could have recovered, and its claim as subrogee is subject to whatever defenses the third-party might have asserted against the insured.

The insurer's failure to fully reimburse its insured for losses resulting from the employee's defalcations did not bar the insurer from seeking to recover the amount of its payment from the insured, whose alleged failure to discover those defalcations allegedly caused the loss.

PUNITIVE DAMAGES—Intoxication-Automobile. The Third Department recently submitted, in the case of **Sweeney v. McCormick** (____ A.D.2d ____, 552 N.Y.S.2d 707), that the evidence that a defendant was driving while intoxicated at the time of the automobile accident is alone insufficient to raise a jury question of punitive damages. There must be a showing of wanton or reckless conduct.

WRONGFUL DEATH—Damages-Heirs. In **Public Adm'r. Kings County v. U.S. Fleet Leasing of New York, Inc.** (____ A.D.2d ____, 552 N.Y.S.2d 608), the First Department held that the father of a decedent had no cognizable claim for compensation in a wrongful death action. The son had no legal obligation to support his father, and there was no evidence that he would have done so of his own free will. The father left the household when the son was five or six years of age, and had lost all contact with his son by the time the son was nineteen. The father and son were reunited on two relatively brief occasions prior to the son's death at age 25, and the father did not learn of his son's death until two years after the fact.

To determine whether a beneficiary may reasonably expect to sustain a pecuniary loss, there is to be showing of whether the decedent had been legally obligated to support the beneficiary, and if not, whether there is evidence that the decedent would have volunteered to do so.

NEGLIGENCE—Construction-Labor Law Sec. 240-Proximate Cause. In **Donahue v. Elite Associates, Inc.** (____ A.D.2d ____, 552 N.Y.S.2d 659), the Second Department ruled that even if a ladder from which a worker fell was not equipped with safety devices, the evidence did not establish as a matter of law that the absence of the devices con-

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WORTHY OF NOTE [Con't.]

stituted the proximate cause of the plaintiff's injuries.

DISCLOSURE—Notice to Admit-Purpose. In **Kalabovic v. Fort Place Cooperative, Inc.** (____ A.D.2d ____, 552 N.Y.S.2d 663), the Second Department ruled that because the purpose of a Notice to Admit was to eliminate from litigation matters which would really not be in dispute at trial, a Notice to Admit which went to the heart of the matter at issue was improper.

DISMISSAL—Verified Complaint. It was recently held by the Appellate Division, Second Department, that a Verified Complaint was insufficient as a Statement of Merits in opposition to a Motion to Dismiss based on delay in placing the action on the Trial Calendar, where the Complaint was verified by a plaintiff's attorney who did not have personal knowledge of the facts (**Roldan v. Potamousis,** ____ A.D.2d ____, 552 N.Y.S.2d 669).

DISCLOSURE—Insurance Documents. In **Paramount Ins. Co. v. Eli Const. General Contractor** (____ A.D.2d ____, 553 N.Y.S.2d 127), the First Department held that documents created by an insurer prior to a Disclaimer of Coverage were subject to discovery.

PRODUCTS LIABILITY—Foreseeability. In Lugo v. Lopez v. LJN Toys, Ltd. (75 N.Y.2d 850, 552 N.Y.S.2d 914), it was indicated that a manufacturer who sells a product in a defective condition is liable for the injury which results to another when the product is used for its intended purpose or for an unintended but reasonably foreseeable purpose. The plaintiff submitted expert evidence that, based on customs and standards in the toy safety community, the part was defective because it was detachable from the doll, and that throwing it was foreseeable because of the extensive television exposure in which Voltran did so.

INDEMNIFICATION—Insurance-Common Law Indemnification. In **Dormitory Authority of the State of New York v. Scott** (____ A.D.2d ____, 553 N.Y.S. 149), the First Department ruled that an indemnification provision in subcontracts in which the subcontractors agreed to hold the general contractor harmless from any liability "due to bodily injury or death of a person or damage to property" caused by their improper performance of the subcontracts did not provide coverage for the property owner's economic loss claim.

The general contractor retained responsibility for the performance of the construction services, along with the subcontractors' participation, to some degree, in the subcontractor's alleged wrongdoing, and could not maintain a cause of action for implied or common law indemnification against the subcontractors when sued by the property owner for its alleged breach of contract in negligence in the performance of such services.

DAMAGES—Bunionectomy. The First Department recently held in the case of **Murphy v. A. Louis Shure, P.C.** (____ A.D.2d ____, 553 N.Y.S.2d 170), that an award of $786,000 to a 24 year-old bunionectomy patient and of $10,480 to her husband, was not so excessive as to shock the conscious of the Court. Though the patient was not totally disabled, and could continue with her occupation as a bookkeeper, the disability and pain resulting from the negligently performed operation precluded her from continuing her normal and active life-style.

DAMAGES—Knee Injury. In **Jurgen v. Linesburgh** (____ A.D.2d ____, 553 N.Y.S.2d 438), the Second Department ruled that an award of $87,500 for past pain and suffering to a 13 year-old child who suffered a knee injury when he was struck by a car was excessive, in view of the extent of the injuries suffered. The child remained at home for about two weeks after the accident, resumed limited exercises at the school gym six weeks following the accident, and full exercises a few weeks thereafter. The Court ruled that a new trial would be in order unless there was a Stipulation to the extent of $50,000.

Similarly, the Court held that an award of $37,500 for future pain and suffering to the child was not unreasonable. The child suffered from a grinding of the knee cap and a physician testified that the condition would continue to cause the child pain for life.

DAMAGES—Injury Foreseeability. It was recently indicated by the First Department, in the case of **Singer v. Jefferies & Co., Inc.** (____ A.D.2d ____, 553 N.Y.S.2d 346), that the element of reasonable foreseeability of harm suffered by a plaintiff did not mean that the exact occurrence or precise injury need be foreseen, but rather that the defendant should have been able to foresee some injury might have resulted from its acts.