DEFENDANT

The Journal of the Defense Association of New York, Inc.

THE DEFENSE ASSOCIATION OF NEW YORK — September, 1993

PRESIDENT'S MESSAGE

By: James G. Barron

For three days in the middle of last March I had the pleasure of attending the 26th National Conference of Defense Bar Leaders. This year the conference was held in San Francisco. I attended the Conference as the President of the Defense Association of New York. The conference was held under the auspices of The Defense Research Institute (DRI).

DANY was well represented at the meeting. Also in attendance were our Chairman of the Board - Kevin Kelly, President Elect - Eileen Hawkins, Ralph Alio - former president of DANY and member of the Board of Directors of DRI and DANY, and John McDonough, member of Board of Directors of DANY and State Chairman of DRI.

Quite naturally, the overall theme of the conference was "A Bridge To The Future" with the Golden Gate Bridge in the background.

The conference consisted essentially of two parts. The first part was a general meeting of all those in attendance. The second part included breakout meetings which consisted of smaller groupings of a dozen or so attorneys from all parts of the country. These meetings had such titles as: "Today and Tomorrow's World for the Defense Bar - The Insurers' Views"; "Long Range Role of the Defense Bar - There is Still a Future"; "Professional Responsibility"; and "The Future of Litigation."

Yet despite these high minded titles, certain themes and concerns kept recurring at all of the meetings.

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NOTITIA

By: John J. McDonough*

Homeowners Policy, Business Pursuit Exclusion

United Food Service, Inc. v. Fidelity & Casualty Co., ____ A.D.2d ____, 594 N.Y.S.2d 887.

The Appellate Division, Third Department, recently held that the "business pursuit" exclusion in a homeowners policy was triggered when an employee/insured who was attending an out-of-town business seminar and who caused property damage at the hotel he was staying at when he raised his garment bag and inadvertently hit a sprinkler head on the hotel room wall, thereby releasing a substantial quantity of water, as that exclusion was found to apply to all activities that are involved in furtherance of any business, trade or occupation.

Summary Judgment, Evidentiary Proof Standard

Rue v. Stokes, ____ A.D.2d ____, 594 N.Y.S.2d 749.

The Appellate Division, First Department, stated the lower court erred in not granting summary judgment to the operator of a motor vehicle who claimed during his deposition that his car was stopped in traffic for three to five seconds when it was hit in the rear by the co-defendant's leased vehicle. The operator of the leased vehicle was not available to be deposed and thus the only rebuttal testimony as to the operator of movant's vehicle was the contents of an MV-104 report

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*Mr. McDonough is a member of the Manhattan law firm of Alio, Caiati & McDonough, and Editor of the Defendant.

GET RID OF THE PLAINTIFF

By: Michael J. Caulfield

The recent New York Court of Appeals decision in **Gonzales v. Armac** (February 11, 1993) 81 N.Y.2d 1, 595 N.Y.S.2d 360, WL 33057 (1993) reminds us of just how important it is for defense counsel to get rid of a plaintiff in serious multi-defendant cases. Various schemes have been tried, all with GOL 15-108 in mind.

GOL 15-108 provides:

> (a) Effect of release of or covenant not to sue tort feasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tort feasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tort feasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tort feasor's equitable share of the damages under Article 14 of the Civil Practice Law and Rules, whichever is the greatest.
>
> (b) Release of tort feasor. A release given in good faith by the injured person to one tort feasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in Article 14 of the CPLR.
>
> (c) Waiver of contribution. A tort feasor who has obtained his own release from liability shall not be entitled to contribution from any other person.

In **Gonzales** the New York Court of Appeals was asked to consider the following certified question from the U.S. Court of Appeals for the Second Circuit: does a defendant's pre-trial agreement, admitting liability for 2% of any damages a Jury might award and enjoining plaintiff from enforcing any judgment in excess of two percent of plaintiff's total damages, constitute a release from liability within the meaning of GOL 15-108? The New York Court of Appeals in **Gonzales** answered that question "yes". The plaintiff had sued Armac in Federal Court as manufacturer of a machine on which he was injured in the course of his employment with GTC, the third party defendant. Before trial plaintiff and Armac agreed to Armac's 2% liability. GTC moved to dismiss the third party claims for contribution and indemnity against it. The lower court granted the motion as to contribution, but not indemnity. Plaintiff and Armac then settled for $500,000. GTC appealed the lower court's ruling. The Federal Appellate Court certified the above question to the New York Court of Appeals. The indemnity claim was held in abeyance pending an answer to the certified question.

In deciding that the percentage arrangement did constitute a release barring contribution, the court relied on **Lettiere v. Martin Elevator**, 62 A.D.2d 810, 406 N.Y.S.2d 510 (1978), aff'd 48 N.Y.2d, 662, 421 N.Y.S.2d 879 (1979). **Lettiere** involved a pre-judgment settlement disguised as a post-judgment settlement. The only distinction between **Lettiere** and **Gonzales** was **Lettiere** involved dollar amounts and **Gonzales** involved percentages. However, this made no difference to the Court.

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MORK vs. THE LABOR LAW

By: Dennis A. Breen

When the egg landed in a field somewhere in Colorado, Mork stepped out into the "land of plenty", or the good old US of A. Having left Ork, Mork was hardly prepared for what he would find on our shores; he did not even know enough to ask for political asylum. It's a safe bet that Mork lacked a green card!

Fortunately for Mork he had Mindy and the never ending generosity of the McConnell family to see him though every meal, every new pair of sneakers and every shirt he needed. Alf, surprisingly, was equally as lucky when he landed in the laps of the Tanner family. (Although Alf generally stayed home without clothing whereby cutting down his basic needs expense.)

As a recent landing on the shores of the Rockaways has shown, many more earthly aliens are not quite as lucky. Most aliens arriving on our shores are going to have to work to earn their way, to pay for their meals, their sneakers, their shirts. Hopefully most aliens arrive under better circumstances than those who landed in the Rockaways. However, one thing is clear; many aliens are arriving on our shores under questionable circumstances and under less than optimal conditions.

The question becomes: what happens when an illegal alien gets a job in the construction industry and gets injured on the job? This article hopes to point out and explore some of the problems confronted in labor law - illegal alien cases.

THE LABOR LAW

Labor Law §200 is the basic foundation upon which the remainder of the labor law is built. The language of Labor Law §200 provides, in relevant part, that "(a)ll places to which this chapter applies shall be so constructed . . . as to provide adequate protection to the lives . . . of all persons employed therein or lawfully frequenting such places."

An employee cannot be a person who is merely in the premises to inspect the premises for the

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"ADMISSABILITY OF CRIMINAL CONVICTIONS AT CIVIL TRIAL"

By: Marian Polovy

Dr. Robert Reza is the reknown pulmonologist in Long Island, who was convicted of second degree murder for the death of his wife, on the eve of his trial for an unrelated matter for medical malpractice.

On the eve of trial my firm was called into the case for the very first time, to defend his interests in the action for medical malpractice, wherein the plaintiff sustained serious brain damage and seizure disorder.

The compelling issues requiring immediate resolution, prior to jury selection, involved the admissibility of the murder 2 conviction and venue transfer due to pre trial publicity. Through a series of fast paced immediate order to Show Causes, motions to Renew and Reargue, Stays in the lower Court and the Appellate Division and eventually intervention to the Court of Appeals of the State of New York, the burning question remained, CPLR 4513, permitting the admissibility of the conviction of any crime at any time, in a civil litigation context without judicial discretion, is unconstitutional on its face. Moreover, the lower court's ruling that a murder 2 conviction was admissible for credibility and to establish a cause of action for medical malpractice, was an insidious extension of CPLR 4513, thereby further infringing upon the constitutional rights of Dr. Reza to a fair trial by impartial jury.

Ultimately, the court's unusual ruling is in actuality the insidious effect of the statute itself. As borne out by empirical data in my multiple motions, the moment a civil case juror hears murder 2, it is automatically equated with establishing liability for the civil cause of action, no matter how unrelated.

Amidst the Herculean efforts on the eve of trial of pursuing the above motions, we were also in the position of dealing with the prison system, gaining access to our client and the limitations therein, which were overcome. Further, over 30 hours of Court T.V. coverage of the murder trial needed to be analyzed, given the court's ruling of admissibility. As a consequence of said ruling, one needed to be prepared for the medical malpractice action and murder, since anything concerning the crime and underlying events was fair game at trial. The plaintiff could in essence re-try the murder trial during the medical malpractice trial. Therefore, one had to prepare for two trials, not one, murder and malpractice.

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They were: (1) auditing of files of insurance companies in the hands of independent counsel; (2) the tendency of some claims departments to intrude upon the handling of files by independent counsel; (3) alternate methods of billing; and (4) the future role of house counsel.

At the main meeting the principal addresses were made by Justice Panelli, Leo Jordan, Michael Mack, and John Holmes.

The comments by Justice Panelli, a Justice of the California Supreme Court, were primarily introductory in nature. However he did point out that there were changes in the legal and business environment and that these would affect the insurance industry. He said the insurance industry had become fair game for politicians, citing Proposition 103. He also said that the days of "business as usual" are gone and that there will be an emphasis in "fast track" litigation and ADR.

Leo Jordan, a vice-president of State Farm Insurance Company, spoke on insurance availability in urban areas, medical fees, and litigation costs. He said that the most striking feature of our various court systems is the sheer volume of the cases that they handle. Litigation costs to State Farm are increasing at the rate of 20% a year and he said that this cannot go unchallenged. They are referring more cases to house counsel in urban areas. However, a substantial number of cases will continue to be sent to outside counsel.

Michael Mack, vice-president of Aetna Life and Casualty Company discussed billing practices, saying that the trend will be away from hourly billing in favor of adequate compensation. He also mentioned the audits of files in the hands of independent counsel and agreed that this was controversial.

John Holmes is a Portland lawyer who concentrates his practice in insurance defense matters. He is the son of a former Oregon governor and spoke from the viewpoint of the independent practitioner. He cited a Brookings Institute report on the civil justice system which concluded that the civil jury system is valuable and works well. He quoted Thomas Jefferson as saying: "The right to trial by jury is more important to Americans than the right to vote." He feels that in civil cases there should be no more than six jurors. He felt that house counsel is less equipped and less experienced than independent counsel and that the use of independent counsel is more efficient for insurers. He also took a dim view of ADR saying that it shortchanged self-insureds and the public.

In the breakout sessions various subjects were discussed and views expressed on those subjects. There seemed to be a general agreement that recent changes are not cyclical and that they are here to stay. Most felt that insurance company staff counsel will be used to a greater degree in urban areas. One attorney, in a moment of wisdom, told his fellow attorneys not to antagonize staff counsel since many of them have referral authority.

There were some attorneys who felt that staff counsel should not be permitted to be members of DRI, although this seemed to be a minority view. At least it was not endorsed by anyone in DRI who had a leadership role.

Archie S. Robinson of San Jose, California, gave the final wrap-up speech. He is Chairman of the DRI Legislative Committee. He said that too often we think of ourselves as the marshal in "High Noon". We are gunslingers. He suggested that there must be attitudinal changes. We should not regard ourselves as being in the litigation business. Rather, we are in the dispute resolution business. If we are to be resolvers of disputes, we must understand the process. This includes mediation, which has been shunned up until now. He said that defense lawyers must learn the art of mediation or they won't survive. Priorities must be understood: some cases do not need soup to nuts discovery. There should be a pursuit of quality: we should know the client's expectations, and then exceed them.

Robinson continued saying that attorneys must make use of the latest technology to become more efficient and cost effective. He said that partners should be accountable to each other and suggested that peer reviews should be conducted to make sure that older partners have not slipped into antithetical modes.

He added that the mind set of some insurance carriers must also change. What was acceptable 10 or 20 years ago is no longer acceptable today. They must realize that it is a relationship that they have with the law firm and they may not intimidate, berate, or bludgeon members of the firm.

He said that audits by insurance companies can be a positive experience and they bring accountability to law firms. The use of house counsel by insurance companies is understandable and their quality is improving constantly. There will be a role for both house counsel and outside counsel.

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He mentioned that some insurance companies issue guidelines to their outside counsel. These guidelines may be used by the insurance company as a way of participating with counsel as a team member; they should not be used to dictate to counsel.

Mr. Robinson concluded by saying that insurance companies and outside counsel should remember that for many years they have had a positive and constructive relationship. They must make this work - don't let it slip away.

The conference concluded with a dinner-dance at which certain awards were made to individuals and groups.

My overall impression of the conference was that it was very well run. Many issues were raised although there were few solutions.

I feel privileged that I was able to attend the conference. It was a memorable experience. This was my first visit to San Francisco and it certainly lived up to its reputation for charm and grace and hospitality. It was, in my opinion, an ideal setting for the conference. Perhaps some day I'll return.

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submitted by the operator of the leased vehicle, which the court found unsworn, self-serving, hearsay and insufficient, as a matter of law, to raise a triable issue of fact. The court went on to state that unsworn reports, letters, transcripts and other documents do not constitute evidentiary proof in admissible form and may not be considered in opposition to a motion for summary judgment.

Discovery, Protective Order

Manning v. Pathmark, Inc., ____ A.D.2d ____, 595 N.Y.S.2d 45.

The Appellate Division, First Department, reversed a lower court's denial of a request for a protective order by the defendant supermarket where the plaintiff claimed to have slipped on a liquid substance on the floor of an aisle where the plaintiff requested copies of all accident reports and incident records for the period of one year prior to the date of accident. The court found the records requested had no probative valve with respect to the alleged transitory hazardous condition.

Animals, Negligent Control

Nilson v. Johnson, ____ A.D.2d ____, 594 N.Y.S.2d 913.

The Appellate Division, Third Department, recently held there was no factual basis for the owners of a dog to be found to be liable for the injuries sustained by plaintiff in a moped crash allegedly caused when defendant's dog passed in front of the moped where there was no showing the defendants knew or should have known that their dog was vicious or had a propensity to interfere with vehicular traffic.

Duty

Franze v. County of Chautaugua, ____ A.D.2d ____, 594 N.Y.S.2d 944.

The Appellate Division, Fourth Department, recently stated that where plaintiff was an independent contractor beautician performing services in a County-operated nursing home, the County owed no duty to protect the plaintiff from injuring her back while performing hair dressing services. Neither was there a duty on the part of the County to equip plaintiff for her task.

Duty, Harm Inflicted

Amica Mutual Ins. Co. v. Town of Vestal, et al., ____ A.D.2d ____, 594 N.Y.S.2d 918.

In granting defendants' motions for summary judgment, the Appellate Division, Third Department, recently stated that as regards negligence, foreseeability is a limit on the duty owed by any defendant to a plaintiff. If the type of harm inflicted on a plaintiff is not foreseeable, a defendant owes no duty to avoid injuring plaintiff in this manner.

Insurance Procurement; Labor Law, Employees at Site

Williamson v. Borg, et al., ____ A.D.2d ____, 594 N.Y.S.2d 778.

The Appellate Division, First Department, stated that a defendant/general contractor who is found to be liable to plaintiff for improperly using sheetrock to guard a trench at the third-party defendant's hospital in the kitchen where plaintiff was required to work and was injured as a result of stepping on same, can be required to pay all of

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plaintiff's damages where the third-party defendant/employer, who was found 40% at fault, is the beneficiary of an insurance policy procured by the defendant/general contractor. Such a procurement clause does not run afoul of §5-322.1 of the General Obligations Law. The Court went on to state that even though the plaintiff, a nurses aide, was an employee of the hospital who was present at the job site, this was sufficient to qualify her as a person employed therein or lawfully frequenting the work site for the purposes of §241(6).

Labor Law, Contractor

Stevonoff v. Boys & Girls Club of East Aurora, ____ A.D.2d ____, 595 N.Y.S.2d 155.

The Appellate Division, Fourth Department, upheld a denial of summary judgment to a plaintiff on allegations that a defendant violated Labor Law §240(1) as fact issues remained as to whether that defendant was a "contractor" for the purposes of §240(1). The conflicting evidence raised a triable issue as to whether the defendant had the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.

Municipality, Notice of Defect

Shapiro v. Tides Inn Realty Corp., ____ A.D.2d ____, 595 N.Y.S.2d 64.

In reversing a denial of a grant of summary judgment for the third-party defendant municipality, The Appellate Division, Second Department, indicated the defendant failed to oppose the motion with any proof to show the third-party defendant village had prior notice of a defect in the sidewalk upon which the injured plaintiff was walking when she fell. Information which the defendant proffered to attempt to connect adjacent street construction to the sidewalk and show an affirmative role by the third-party defendant village in producing the defect was relevant.

Scaffold Law, Height

Manning v. Town of Lewiston, ____ A.D.2d ____, 595 N.Y.S.2d 154.

The Appellate Division, Fourth Department, concluded that §240(1) of New York State Labor Law could apply in favor of a plaintiff who fell while on the roof of a water tower, 35 feet above the ground. In so finding, the Court rejected the defendant's contention that the statute was inapposite because the worker did not fall from the roof.

Duty, Snowball Throwing

Russo v. Leibler, ____ A.D.2d ____, 595 N.Y.S.2d 164.

The Appellate Division, Fourth Department, recently had the opportunity to address the duty owed by a church to a plaintiff struck with a snowball, apparently from snow which descended from the heavens onto church property. In reversing a grant of summary judgment to defendant, Church of Saints Peter and Paul, the Court stated there were issues as to whether church officials had "notice that snowball throwing by students presented a special danger . . ." the Court further stated an issue existed as to whether church officials had notice that large groups of students regularly engaged in snowball fights after Confraternity of Christian Doctrine classes.

Bifurcated Trial

Johnson v. City of New York, ____ A.D.2d ____, 594 N.Y.S.2d 201.

The Appellate Division, First Department, stated that the trial court did not abuse its discretion in directing a bifurcated trial where the plaintiff failed to make a "convincing showing" that the issues of liability and damages were intertwined.

Consolidated Actions

Williams v. City of New York, ____ A.D.2d ____, 594 N.Y.S.2d 200.

The Appellate Division, First Department, affirmed the consolidation of a negligence action with a medical malpractice action, where the malpractice action alleged aggravation of the injury alleged in the negligence action, in Bronx County over the objection of a defendant as the issues of negligence and deviation from proper medical care are not so complex as to be confusing to a jury and no material witnesses will be inconvenienced by a trial in the Bronx.

Default Judgment, Vacation

Forum Insurance Co. v. Judd, ____ A.D.2d ____, 594 N.Y.S.2d 250.

The Appellate Division, First Department, stated that the defendant was not entitled to vacation of a default judgment where a summons and complaint was first served in November of 1988, a default entered against defendant in October of 1990 and defendant did not move to

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vacate the default until September of 1991. On appeal, the defendant's attorney offered the 'law office failure' excuse that all of the papers in defendant's case were "inexplicably" placed in the file by an intern and never brought to his attention. The Court stated the IAS court did not abuse its discretion in finding that a misplaced file did not credibly excuse repeated neglect to respond to process.

Pre-Trial Procedure

De Brino v. Benequista, et ano., ____ A.D.2d ____, 594 N.Y.S.2d 461.

After the defendant/third-party plaintiff was granted summary judgment the now defendant/former third-party defendant moved for summary judgment on the theory that as the third-party action by the defendant/third-party plaintiff provided the sole basis for amendment of the complaint to assert a direct claim against the now defendant, dismissal of the complaint as to the defendant/third-party plaintiff required dismissal of the complaint as to the new defendant. In affirming a denial of summary judgment to the now defendant, the Appellate Division, Third Department, stated their grant of a motion to amend the complaint was predicated upon the fact the complaint and third-party complaint gave the now defendant notice of the liability theory of the amended complaint, thus, the existence of a claim against the defendant/third-party plaintiff to the viability of a claim against the now defendant is irrelevant.

Disclosure, Protective Order

Capital Sources v. Vital Signals, Inc., ____ A.D.2d ____, 594 N.Y.S.2d 221.

The Appellate Division, First Department, affirmed the denial to plaintiff of a request for a protective order where the defendant's demand for a bill of particulars and request for documents sought disclosure which was clearly identified, limited in scope, not burdensome or expensive to produce and which were "material and necessary" in preparation for trial by sharpening the issues, amplifying the pleadings, limiting the proof and preventing surprise at trial.

Evidence, Prior Similar Acts, Impeachment of Own Witness

Kourtalis v. City of New York, ____ A.D.2d ____, 594 N.Y.S.2d 325.

The Appellate Division, Second Department, overturned the verdict of $312,187.19 for the plaintiff which was returned against the city transit authority and one of its police officers for allegations of assault and battery, false arrest and malicious prosecution. The Court stated that the trial court improperly allowed the questioning of the defendant officer by the plaintiff's attorney, on the plaintiff's direct case, into the particulars of five prior unrelated civilian complaints which were never substantiated. To allow same, the Court stated violates the general rule of evidence that it is improper to prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion. The Court also stated that as the plaintiff's attorney used the five prior civilian complaints in such a manner as to attempt to impeach the defendant police officer, this was improper as the officer was called by the plaintiff during her direct case.

Borrowing Statute, Doctrine of Renvoi

Rescildo v. R.H. Macy's, ____ A.D.2d ____, 594 N.Y.S.2d 139.

The Appellate Division, First Department, stated that use of CPLR 202, New York's "borrowing statute," is conditioned upon a determination that the defendant was amenable to suit in the foreign jurisdiction at the time the cause of action accrued, and for a period thereafter coincidental with the foreign jurisdictions statute of limitations. The Court found two out of three defendants not amenable to suit in the foreign jurisdiction during the appropriate time period and thus, as to these defendants, New York' s borrowing statute could not be used to take advantage of the foreign states' lack of a tolling period for infancy. The use of renvoi, a doctrine requiring the forum state to borrow a foreign jurisdiction's choice-of-law rules, was rejected by the Court as its use was found to defeat the purpose of the borrowing statute and its underlying policy of preventing forum shopping by nonresident plaintiffs seeking a longer statute of limitations.

Evidence, Sufficiency

M.S. Furs v. American Insurance Co., ____ A.D.2d ____, 594 N.Y.S.2d 192. In upholding a denial of summary judgment to the defendant insurer regarding plaintiff's theft claim the Appellate Division, First Department, stated that a "mere scintilla" of evidence sufficient to justify a suspicion is not sufficient to support a finding upon which legal rights and obligations are based.

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NOTITIA [Con't.]

Notice of Claim to Insurer

Urban Resource Institute v. Nationwide Mutual Insurance Co., ____ A.D.2d ____, 594 N.Y.S.2d 261.

The Appellate Division, First Department, affirmed the lower court finding the plaintiff was entitled to be defended and indemnified by the defendant in the underlying personal injury action as notice of the claim was given to the insurer "as soon as practicable" within the meaning of the policy given the minor nature of the injuries allegedly sustained, the manner in which the injury occurred and the medical treatment received.

Pre-indemnification, Contractual Indemnification Coverage

Prince v. City of New York, ____ A.D.2d ____, 594 N.Y.S.2d 235.

The Appellate Division, First Department, stated that as the third-party defendant/contractor procured a policy of insurance for the third-party plaintiff, pursuant to a contractual insurance procurement clause, which was an Owners Protective Liability policy from CNA Insurance Companies and which the attorneys for the promisor argued did not cover the loss, the third-party plaintiff was precluded from making any claims against the third-party defendant as same still amounted to an attempt to subrogate against the insurer's own insured as the third-party plaintiff was also insured under the contractual indemnification provision of the third-party defendant contractors general liability policy with CNA.

Labor Law; §§240(1), 241(6) and 200

Ruiz v. 8600 Roll Road, ____ A.D.2d ____, 594 N.Y.S.2d 474.

The Appellate Division, Fourth Department, upheld the dismissal of alleged violations of §§240(1) and 241(6) of the New York State Labor Law against the owner and general contractor at a construction site in an action that arose when plaintiff's decedent was struck by a steel beam that slipped while being hoisted by a crane operated by a co-worker of the plaintiff. The Court found that the fatal injuries sustained by plaintiff were not the result of a fall from an elevated work site, nor from an object falling from an elevated work surface and dismissed the §240(1) claims. The Court dismissed the §200 claims as neither the owner or general contractor exercised supervision or control over the work being performed by plaintiff and his co-workers. With respect to the 241(6) claims factual issues were raised that precluded a grant of summary judgment as to whether the steel beam that was being raised was "incidental to or associated with demolition work so as to qualify that work as protected activity within §241(6).

Labor Law, Availability of Safety Devices

Howell v. Rochester Institute of Technology, ____ A.D.2d ____, 594 N.Y.S.2d 513.

The Appellate Division, Fourth Department, indicated that as the plaintiff fell from an elevated work site and no safety or protective devices were then in place to give proper protection to him, plaintiff was entitled to summary judgment as to his §240(1) Labor Law claim. The availability of safety devices at the work site is insufficient to defeat plaintiff's entitlement to summary judgment because an owner's statutory duty is not met merely by providing safety instructions or by making other safety devices available, but by furnishing, placing and operating such devices so as to give proper protection. ◘

GET RID OF THE PLAINTIFF [Con't.]

The Court held:

> Agreements such as these violate the quid pro quo system envisioned by the statute and allow a defendant to effectively avoid litigation without making the concomitant sacrifice the statutory scheme contemplates.

It is important to note that GTC in no way stipulated to the settlement agreement. If GTC had been so inclined as to get rid of the plaintiff, it could have stipulated to the agreement and dropped its "waiver of contribution" defense under GOL 15-108(c). The trial of the contribution claim could then have proceeded as between Armac and GTC. This procedure, which enables the defendants and/or third party defendants to cap damages and get rid of the plaintiff, is authorized by **Mitchell v. New York Hospital,** 61 N.Y.2d 208, 473 N.Y.S.2d 148 (1984). The stipulation language as approved by the Court reads, in pertinent part:

> It is hereby stipulated and agreed by and between all the counsel present representing all the named parties, that the cause of action on behalf of plaintiff is settled for $____.
>
> All counsel present consent to the settlement and the reasonableness of the settlement will not contest the reasonableness of the settlement.
>
> Payment of the settlement will be made by the (defendant/third party plaintiff) in this action, which has a third party action against the (third party defendant).
>
> The case will remain on the trial calendar of this court for trial of the third party action.
>
> It is specifically agreed and understood by the third party defendant that no one waives any rights to contribution by entering into this settlement.
>
> All cross-claims and counterclaims of any kind or nature in connection with the third party claim, which has been severed, remain in effect.

A Mitchell stipulation can be a valuable tool where the defendant/third party defendants recognize a serious case and are willing to put aside their differences for the moment to get rid of the plaintiff and then try liability (percentages). Depending on the nature of the facts of the case they may need the cooperation of the plaintiff in giving testimony on liability. If so, this should be part of the stipulation settling the case with the plaintiff.

In **Gonzales** the Court was careful to distinguish the pre-judgment stipulation found in **Gonzales, Lettiere** and **Mitchell** from a legitimate post-judgment stipulation as found in **Feldman v. NYCHH Corp.,** 56 N.Y.2d 1011, 453 N.Y.S.2d 683 (1982). In **Feldman** the Court approved a post-judgment loan arrangement by which the plaintiff was paid in full so as to enable the defendant to pursue the third party defendant, **NYCHH Corp.** The third party defendant had already been found 54% liable. Under **Klinger v. Dudley,** 41 N.Y.2d 362, 393 N.Y.S.2d 323 (1977), defendant could not pursue the third party defendant until it had paid off plaintiff's judgment. The loan enabled them to do this. The Court held that the transaction was equitable and consistent with **Klinger** i.e. it prevented a negligent defendant from keeping a contribution from a negligent third party defendant without paying the plaintiff.

In conclusion, pre-judgment settlements in multi-defendant cases whether expressed in percentages or dollars, need the agreement of all parties in order to preserve contribution claims. Where getting rid of the plaintiff is imperative a **Mitchell** stipulation should be considered. ◘

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purposes of doing work. An employee has to be a person actually hired to do work to fall under the protection of the labor law. **See, Gibson v. Worthington Division - of - McGraw Edison Co.,** 78 N.Y.2d 1108, 585 N.E.2d 376, 578 N.Y.S.2d 127 (1991).

Once, however, an individual is deemed an employee on the premises he is owed the protection of the labor law. "The duty runs to all persons employed on the premises without regard to whether they are employees of the party in control or possession." **Employers Mutual Liability Insurance Company of Wisconsin v. Di Cesare & Monaco Concrete Construction Corp.,** 9 A.D.2d 379, 194 N.Y.S.2d 103, 107 (First Dept., 1959).

There are no cases explaining the duties owed (or not owed) to those illegally employed on the premises. It is, therefore, necessary to examine this issue in a step by step manner.

EQUAL PROTECTION

New York State Constitution Article 1 §11 provides that "(n)o person shall be denied the equal protection of the laws of this state or any subdivisions thereof. No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights . . . by any firm, corporation or institution . . ." New York State Constitution, Art. 1 §11 (McKinney's Consolidated Laws of New York, 1982, Supplemental 1993).

There are several cases that can be annologized to the situation.

The Labor Law, as we all know, consists of a series of statutes designed and implemented to protect a certain class of people; to wit, workers and those legally entering upon construction sites. **See, Ressel v. Board of Education of the Greater Amsterdam School District,** 57 A.D.2d 1028, 395 N.Y.S.2d 263 (3rd Dept., 1977). The intent of the legislature to protect this class of citizen is clear from the language of the statutes themselves.

The equal protection clause of the Constitution is designed to "prevent any person or class from being singled out as a special subject of hostile or discriminatory legislation." **People v. Villani,** 100 Misc.2d 192, 418 N.Y.S.2d 974, 976 (Dist. Court, Suffolk County, 1979). The equal protection clause does not mandate identical treatment of all parties; it requires only that classifications be based upon "real and not feigned differences". **See, Budha v. Grasso,** 125 Misc.2d 284, 479 N.Y.S.2d 303, 306 (Civil Court, Queens County, 1984).

"Citizenship" is a classification that can be acceptable in certain circumstances. Border searches are the classic example. The Courts have long recognized a relaxed standard for searching someone when he or she crosses the border. See, **People v. Materon,** 107 A.D.2d 408, 487 N.Y.S.2d 334 (2nd Dept., 1985).

A very interesting, but older, citizenship case is **People v. Crane,** 214 N.Y. 154 (1915). The opinion of the Court was written by the Honorable Justice Cardozo and the scope of the case is such that it touches on many issues confronting us today.

Mr. Crane was a contractor in the City of New York involved in the construction of sewer basins for the City. Mr. Crane was charged with, and found guilty of, violation of section 14 of the Labor Law.

Labor Law §14 provided that employers engaged in construction of public works utilize only citizens of the United States with preference given to New York citizens in doing the work. Failure to so employ said citizens was a misdemeanor punishable by a fine and/or imprisonment.

Mr. Crane had the misfortune of employing an Italian not a citizen of the United States.

Justice Cardozo reasoned that Mr. Crane was charged with a crime of **not** discriminating. The Judge pointed out that Mr. Crane was not a member of the offending class but the laborers were in the excluded class of persons. If, the Judge reasoned, the exclusion of this class was improper than the employment of the aliens was not criminal. The question, therefore, was whether the statute discriminated against aliens in violation of the Constitution.

"The monies of the state belong to the people of the State. They do not belong to aliens" wrote Justice Cardozo. **Id.** at 160. "The power of a state to discriminate between citizens and aliens in the distribution of its own resources is sanctioned alike by decision of the courts and by long continued practice" **Id.** at 161.

Justice Cardozo further reasoned that "(e)very citizen has a like interest in the application of the public wealth to the common good, and the like right to demand that there be nothing of partiality, nothing of merely selfish favoritism, in the administration of the trust. But an alien has no such interest". Justice Cardozo recognized the basic discrimination but reasoned that "disqualifying aliens is discrimination indeed, but not arbitrary discrimination, for the principal

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of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state." **Id.** at 161.

Mr. Crane's conviction was, therefore, upheld.

IMMIGRATION LAWS

The Immigration and Naturalization Service Laws under 8 U.S.C. §§ 1 **et seq.** control the admission and employment of aliens in the United States. Pursuant to 8 U.S.C. §1182(n) aliens are refused admission unless a prospective employer files certain documents relative to the availability of employment and the need for the worker for that job. There are a series of documents that need be filed that exceed that scope of this article.

Employment of illegal aliens can lead to serious problems for both the employer and employee, as Disneyland recently discovered (Wall Street Journal May 7, 1993). Disneyland, as reported, was to be fined a substantial amount of money for employing aliens with questionable work documents. The employees were reportedly deported for their conduct.

Immigration Laws offer a divergence of benefits and penalties to aliens. The laws serve to protect American jobs and employed aliens. The full examination of those laws exceed the scope of this article. Some reference, however, will be raised at a later point.

THE QUESTION OF FAULT

Comparing the Labor Law, Equal Protection Clause and the "citizenship" classification does not dispositively answer any questions. It does, however, leave one with the impression that the illegality of an employee would not impact on the issue of liability.

It is a safe bet to say that New York Courts would not allow an employer to hide behind the illegality of his employee as a shield against the labor law. The purpose of the labor law is to protect those "employed" on the premises. The statute does not distinguish between legally and illegally employed parties, it only requires employment on the premises.

The labor law, generally, places the duty of providing a safe work place upon owners and general contractors. Allowing an owner or general contractor to escape that duty, a duty created for the general welfare of workers on the job site, would seem to create an arbitrary classification that runs contrary to the public good. It is, therefore, quite unlikely that the issue of the legality or illegality of an employee would ever be considered an issue of liability.

One recent case, **Kirby v. Equitable Life Assurance Society of the United States,** April 20, 1992 N.Y.L.J. page 29 (found thanks to Bob Shaw and Kiernan Conlon of Ahmuty, Demers & McManus) involved a motion by defendants to preclude plaintiff's lost wages claims at an upcoming trial. Defendant contended that plaintiff's status as an illegal immigrant precluded him from recovering future lost earnings.

Justice Florio issued the order of the Court below. The Appellate Division, First Department (Justice Sullivan, Kapferman, Asch, Kassel sitting), affirmed.

Kirby was an Irish immigrant who held non-immigrant status and was visiting the United States. Mr. Kirby did not have work authorization for this country.

Justice Florio, in dicta, touched upon the equal protection clause. Justice Florio noted that pursuant to both Federal and State equal protection clauses an "undocumented alien has a right to sue those who physically injured him." **Id.**

The case did, however, distinguish the issue of damages. While **Kirby** did not specifically qualify the issue of liability as being protected by the equal protection clause it is apparent that there was no question that the plaintiff has a right to sue.

QUESTIONS OF DAMAGES

The issue of damages, however, is quite a different story. The legality or illegality of a plaintiff is a critical issue in this portion of the case.

The recent case of **Collins v. New York City Health and Hospital Corp.,** 151 Misc.2d 266, 577 N.Y.S.2d 227, reargument reported, 151 Misc.2d 270, 580 N.Y.S.2d 834 (Queens County, J. Graci, 1992) clearly establishes this principle.

In **Collins** the public administrator sued as representative of an estate of an illegal alien who was killed here in the United States. Plaintiff sought over $2 million dollars in lost earnings based upon the United States wage loss rates. Defendants move to quash this claim.

The Court ruled that the "earnings of a person engaged in a criminal or unlawful occupation cannot be used as a basis of recovery in a personal injury action" **Id.** decision on reargument, at 834 (citation omitted). The Court noted that in the

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instant action the sole distributee was an adult capable of working and that there was no need to further burden the underfunded hospital system. The Court further noted that plaintiff had earned a living in "violation of both the immigration and tax laws of this Country" and added to the fact that the distributee entered the Country illegally, there was no reason to award lost wages on the United States rate.

Interestingly to note is a comment made by the Court, in dicta, regarding similar situations. The Court noted that it was aware of the possibility of situations where the plaintiff could be permitted to remain lawfully or if the injured illegal alien or his minor dependents may remain lawfully in the United States, then there would be a need for recovery of future earnings at the United States rate. **Id.** decision on reargument at 835, 836. In **Collins** there was no such showing since the distributee was an adult.

The Bronx and First Department case had a different result. **Kirby v. Equitable Life Assurance Society of the United States, supra** held that plaintiff **was entitled** to prove his pecuniary loss based upon potential earnings in the United States. Justice Florio also held that the defendant had the right to prove that plaintiff would have been discovered and deported whereby limiting his recovery. **See, Kirby**, Justice Florio's Opinion, N.Y.L.J. April 20, 1992, page 29.

The First Department unanimously approved Justice Florio's decision. The Court noted that the plaintiff "should be permitted to offer evidence of any wages that his decedent, an alien working in the United States on an apparently illegal basis, might have earned." The Court further noted that "[i]t is for the jury to weigh defense proof that decedent would have earned those wages, if at all, by illegal activity." **Kirby**, Slip opinion, page 2, (1st Dept., April 1, 1993).

The First Department further held, **citing, Barker v. Kallish,** 63 N.Y.2d 19, that the "criminal nature of an act has been held to preclude recovery of damages based on the consequence of that act only where the act is a serious crime that directly caused the injuries." **Id.** pg. 2, **citing, Izzo v. Manhattan Medical Group**, 164 A.D.2d 13, amended, 169 A.D.2d 428, 560 N.Y.S.2d 644, **app. dismissed**, 77 N.Y.2d 981 (1st Dept., 1990). The Court noted that the record did not support a finding, as a matter of law, that decedents illegal conduct was a serious crime. (**Barker** involved a 15 year old suing a 9 year old for selling him firecrackers which he used to construct a pipe bomb which exploded in his hands, recovery was not allowed). (**Izzo** involved a suit of the estate of a drug addict who sued pharmacy for improperly filling out forged prescriptions. Court refused granting defendant's summary judgment motion).

DISCOVERY

Both the **Kirby, supra** and **Collins, supra** cases make one thing clear; the question or the plaintiff's employment status, his or her dependent's status and the nature of how they entered the country are very much discoverable. Both **Kirby** and **Collins** demonstrate that the plaintiff's status is a critical issue.

Needless to say one can expect the usual challenges to such demands. Plaintiff's will object on grounds of privilege, and fifth amendment protections. Such challenges, however, have to be seriously attacked. The plaintiff has placed his citizenship status into question by filing suit. The plaintiff should, at the least, not be permitted to shield himself under the umbrella of the laws he has chosen to flaunt. Plaintiff's citizenship, his or her family's status are all items that are necessary to the proper defense of a case.

THE I.N.S.

One final question; should the plaintiff be reported to the Immigration and Naturalization Service?

This is a very serious issue because it cuts both ways. The plaintiff might be deported. The defendant might also be subject to criminal action, including but not limited to a fine. The deportation of the plaintiff might end the law suit. The reporting might also seriously hurt your own client.

This article will not tell you which way to turn on that one. That issue is a matter better left between the reader and the client. **However**, after reading **Kirby** it is a thought that should be seriously given.

Fortunately both Mork and Alf were properly reported and deported to cable before formal action had to be taken. It was clear that under both **Collins** and **Kirby** neither was entitled to future wages. ◘

"ADMISSABILITY OF CRIMINAL CONVICTIONS AT CIVIL TRIAL" [Con't.]

The following issues were the subject of motion practice all the way to the Court of Appeals:

CPLR 4513 is unconstitutional on its face and is void due to its overbreadth and vagueness and as to its application to Defendant Reza. It permits into evidence "any crime" at "any time" and the underlying circumstances of the crime, and gives no discretion to the trial judge. It impinges upon the fundamental right to a fair trial by impartial jury and due process inasmuch as it creates a chilling effect, in that, a litigant is fearful to testify for fear of the crime being admitted during the course of the trial. Moreover, the jury is precluded from valuable evidence if the litigant fails to testify due to this chilling effect thereby creating a burden on the system as well. Moreover with a jury knowing about Defendant Reza's murder conviction, no jury on earth would exonerate him for alleged medical malpractice.

CPLR 4513 is an abrogation of the fundamental right to a fair trial by impartial jury and is subject to the strict scrutiny standard of review and there is no compelling state interest which would warrant admitting a conviction concerning the murdering of one's wife in 1982 with respect to allegations of medical malpractice occurring on one date on October 15, 1982 ten years previously. CPLR 4513 failed to qualify itself with any time frames, safeguards, precautions, dichotomies between types of crimes, crime of trustworthiness versus our isolated, violent crime of Passion.

It should be definitively stated whether the words "may be proved" in CPLR Sec. 4513 indicate that a trial Judge has discretion in deciding whether to allow into evidence a criminal conviction. This should be especially true where as here, the conviction occurred 10 years after the alleged medical malpractice, where the probative value of the conviction is overwhelming outweighed by its unfair prejudice to the defendant.

Assuming that CPLR 4513 allows for discretion in the admission of criminal convictions when the probative value of the conviction is substantially outweighed by the damage of unfair prejudice to the defendant, the Court abused its discretion when they sought to allow Dr. Reza's conviction for murder before the jury in a medical malpractice action.

The lower court asserted that it adopted **People v. Sandoval** (a criminal law case) in a civil litigation context, per our request. However, the lower court failed to adhere to the structured guidelines and balancing test concerning the admissibility of criminal convictions at trial, and misapplied **Sandoval** by taking dicta from the case and created a hybrid between CPLR 4513 and **Sandoval.**

The lower court stated that the criminal conviction could be used for credibility and to establish a cause of action for medical malpractice. Ultimately, the statute by its insidious nature accomplishes that same equation for the Juror: murder = malpractice. Therefore, even though the lover court went technically beyond the parameters of the already unconstitutional statute by adopting a hybrid of **Sandoval** and CPLR 4513, the ultimate effect is the same, murder = malpractice.

The lower Court decision mandates admission of the murder 2 conviction at the medical malpractice trial of Dr. Reza, not only for Credibility, as indicated in 4513, but also to establish a cause of action for medical malpractice, ie. medical judgment, and Dr. Reza's philosophy of Life.

An isolated violent felony against an otherwise stellar background has no bearing with respect to issue of liability, damages or proximate cause nor does it have any bearing on credibility inasmuch as it is not involving a crime involving trustworthiness or truthfulness, ie. theft, perjury, larceny, burglary.

The Supreme Court made no distinctions concerning admissibility, depending upon who was calling the witness for trial, plaintiff or defendant.

The Supreme Court failed to address issues raised of strict scrutiny review, compelling state interest, and misconstrued "beyond a reasonable doubt" with constitutional standards of review.

With any jury knowing about Dr. Reza's murder of his wife, no jury in the land would exonerate him from medical malpractice. The murder conviction translates into establishing a cause of action for medical malpractice to the average juror as psychological studies and empirical data suggests.

The Supreme court refused to grant a stay pending appeal to the Appellate Division.

The Appellate Division granted an interim Stay, and then dismissed the Appeal. Ultimately, the case resolved, after intervention was sought to the Court of Appeals. The issues have never been resolved to date and as will be seen need to be addressed by the state legislature.

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"ADMISSABILITY OF CRIMINAL CONVICTIONS AT CIVIL TRIAL" [Con't.]

The plaintiff claimed that Dr. Reza treated him on October 15, 1982 and is guilty of alleged medical malpractice for that particular date of treatment. The claim is failure to diagnose a lung abscess which became a brain abscess requiring a craniectomy and treatment at N.Y.U. Again, the act of medical malpractice occurred on October 15, 1982.

The facts concerning the murder of Dr. Reza' wife by Dr. Reza are gut wrenching, emotional, horrific and graphic and the type of material one would only expect to see in a horror movie.

It is a tragic tale of a prominent pulmonologist who was on top of the world in Long Island, with a young wife, two lovely daughters, an excellent practice and a prominent member of the local church as well as hospitals. He had an affair with the church organist in the same church where he and his wife were prominent members and lecturers and in fact his wife was a member in the choir where the organist played. And of course the media had run rampant, ranging from Court T.V., Print media, T.V. media. There were constant pictures of Dr. Reza and his wife with choir robes with a huge cross on her chest which had bombarded the T.V. night and day. Graphic images of that woman remain with a person for a long time. They are explosive and emotional images.

It is a sad tragic tale of a man with an otherwise stellar background performing an aberrant act in a state of insanity. He took a rifle and went into his bedroom after a failed suicide attempt occurred in the next room with the same murder weapon moments before, and shot his wife in the head with blood pouring out of her mouth. Then he took a neck tie and put it around her neck to ease the pain so she was not going to be brain damaged. He then propped her head up on the pillows and lovingly pulled up her blanket under her neck and folded her hands on her chest and as one policeman put it, "She was killed by someone who obviously loved her."

Dr. Reza then went through days and endless nights of trial splashed over the media, his two daughters steadfast by his side in tears on the witness stand. They begged for mercy through the trial and sentencing on November 4, 1992, indicating even their mother would forgive him if she were alive.

The wife's sister came to his sentencing and decried Dr. Reza and demanded the maximum penalties. Insanity was the defense for this isolated act of aberrant behavior. The jury was not permitted to hear lesser included offenses, manslaughter and negligent homicide where the insanity could come into play. With the jurors feet put to the fire, either convict or acquit, there was no real viable alternatives. The criminal conviction is currently on appeal.

The criminal court Judge lambasted Dr. Reza at his sentencing on November 4, 1992 decrying his use of his medical gifts for the taking of life rather than the saving of life. This was splashed all over the media the day after Election Day and had prominent coverage even though there was an upset land slide victory by the Democrats on that day. This proves the type of sensationalism surrounding this case, this murder and this trial.

At the time of his sentencing on November 4, 1992 he received the maximum 25 years to life.

Amidst this horrific and gut wrenching emotional background, the plaintiff indicated that they wanted to bring in everything concerning his conviction and had issued a Writ to obtain his presence in Court. It had no logical bearing to a wholly unrelated matter of alleged medical malpractice that occurred on one day, October 15, 1982, ten years prior to the conviction and sentencing of Dr. Reza. No one in their right mind would vindicate a man if they know he is a convicted murderer. Angel Gabriel if he were to sit upon the jury, would hold against Dr. Reza.

CPLR 4513 is overly broad, vague and constitutionally defective on its face. It severely infringes upon the fundamental right to a fair trial by an impartial jury and due process, those rights implicit in the concept of an ordered liberty. It gives no proscriptions or safeguards concerning the admission of criminal convictions but merely admits into evidence "any conviction" at "any time", without court discretion; convictions are admissible carte blanche without rhyme or reason. Moreover, it is subject to the **strict scrutiny** standard of review. It cannot pass muster under this review inasmuch as there is no presumption of validity and no compelling state interest to allow a criminal conviction of an isolated violent felony in a fit of aberrant behavior in a fit of insanity from being admitted during the course of a trial for alleged medical malpractice, especially where as here, the alleged malpractice occurred on one day on October 15, 1982, ten years prior to the conviction. The statute has no standards, parameters, guidelines, time frame, materiality, relationship to credibility; whether it bears logically to credibility. There is no distinction between a party and a nonparty. The statute does not allow for trial Judge discretion ie. prejudice v. probativeness. It is unconstitutional on its face.

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"ADMISSABILITY OF CRIMINAL CONVICTIONS AT CIVIL TRIAL" [Con't.]

The lower court declared the statute to be constitutional without addressing the strict scrutiny review; compelling state interest, and mixed up "beyond a reasonable doubt" standards of review with constitutional review.

CPLR 4513 creates a chilling effect, in that, a litigant will be fearful to testify at the time of trial for fear that the scarlet letter of his crime will be hung about his neck as a badge of dishonor and shame that will virtually guarantee a finding of liability for any act under the sun in civil litigation. Obviously, there can be no limiting instruction from the trial Judge that can weigh against the gross prejudice that would occur to Dr. Reza if the conviction and the underlying events concerning the conviction are brought to bear before the jury. Obviously, any jury will translate murder in the 2nd degree as the equivalent of establishing a cause of action in medical malpractice. There is no doubt as the plaintiff would not have moved so hard and so tough to get that conviction into evidence. Moreover, there is no limiting instruction that can assure that a jury will use the conviction on the issue of credibility as it will always revert to the equivalency syndrome (murder = malpractice).

People v. Sandoval although claimed to be used by the Court, was in fact misused by the court. The case traditionally applies to criminal actions, and gives a host of safeguards and guidelines to prevent the kind of injustice that CPLR 4513 seeks to impose. It provides guidance concerning dichotomies of crimes, ie. crimes of trustworthiness (theft, perjury, larceny, burglary, false pretenses) as opposed to an isolated violent impulsive felony which has absolutely nothing to do with credibility. It also talks about time frames, relationship and time to the act complained of which are significant, which CPLR 4513 does not address.

The court misapplied **People v. Sandoval** and in effect created a hybrid of CPLR 4513 and **Sandoval**, ignoring all of the safeguards and balancing tests contained in **Sandoval** and relying upon dicta in **Sandoval** to support the non discretion aspect of CPLR 4513. The Court did not use the **Sandoval** test of whether the conviction bears logically and reasonably on the issue of credibility, lapse of time effecting materiality and relevance; the fact of an isolated impulsive act of violence in a fit of insanity, remote in time to the acts of malpractice, has no bearing on credibility, honesty, veracity. Murder does not make you inherently untruthful. Will defendants be deprived of a fair trial? Does the information have a disproportionate and improper impact on the trier of the fact? Will it deter defendants from taking the stand and deprive the jury from the evidence? Rather than analyze the information under these standards, the court erroneously limited itself to the dicta in **Sandoval**, concerning the self interest scenario, ie. murder places one's interests above that of society, without examining the balancing standards in **Sandoval**. The court failed to address **Sandoval's** principles that proof of such a crime may be highly prejudicial and inadmissible when it "has no purpose other than to show that a Defendant is of a criminal bent or character . . ."

The placement of self interest above society did not apply to the case, as it was an uncontrollable act of insanity provided for in **Sandoval**. Moreover, that dicta does not encompass all the balancing guidelines of **Sandoval**. In essence, the court created a hybrid of **Sandoval** and CPLR 4513; and called it **Sandoval** by using dicta from **Sandoval** without utilizing **Sandoval** standards and guidelines, but in reality, utilized CPLR 4513 to support the ruling. Even in criminal cases, you cannot use a similar crime to establish propensity to perform the crime at issue. Therefore, it should have been impermissible to use the crime issue here to establish the cause of action for medical malpractice and propensity with respect to issues of malpractice.

A proper reading of **Sandoval** mandates exclusion of the murder 2 conviction. An isolated violent impulsive act of murder does not bear on the issue of trustworthiness. ie. crimes of perjury, theft, larceny. Nor is there systematic criminal behavior. Lapse of time effects credibility. The fact that he was convicted of murdering his wife in December 1990, does not mean his veracity concerning an alleged act of malpractice can be brought into question, that occurred 10 years previous to the conviction.

Moreover, the Court assumed without evidence, that Dr. Reza murdered his wife because he had a mistress. The defendant was convicted of murder 2nd degree, as the criminal Judge refused to charge the jury with lesser included offenses, manslaughter and negligent homicide. The jury then had their feet put to the fire: either totally acquit Dr. Reza and let him go free, or convict him of murder 2nd degree. There was no interim basis, or lesser charge to drop down to, wherein Dr. Reza's insanity/diminished capacity could be considered. Faced with this all or nothing approach, the jurors, composed of people employed by the police department and those seeking police employment and those related to police personnel, had no choice but to convict. The only other choice was letting him walk away scot free.

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The American fabric of society comprehends well and understands well the concept of physical disease, cancer, AIDS, multiple sclerosis—physical disease. We can see it, feel it and know it tangibly, by our ken and senses. On the other hand, the "American public is leery of insanity and diminished capacity. We cannot taste it, smell it, and feel it, unless we see a "psycho" in action, in keeping with the American genre of horror flicks."

The mind is subtle. It snaps. It is not necessarily something you can readily see or feel or know about.

Until and unless people are made more fully aware of insanity and its ramifications, it is extraordinarily difficult to prove an insanity defense. There was no proof that the jury made its determination based on the mistress issue. Numerous volumes of testimony came in that he broke off with the mistress long before the murder; that there was psychological overlay, in that, he perceived that in shooting his wife, he was killing himself. Unfortunately, the court refused permission to correct numerous unilaterally formed misconceptions of the case, by the court.

He was not pursuing his own self interests to kill his wife in order to keep a mistress. His mistress testified the affair ended November 14, 1990 well before her death in December 1990. The prosecutor himself stated that he was not suggesting that the affair was the motive for killing during closing statements. Dr. Reza wanted to destroy himself and in his uncontrollable insanity, he destroyed his wife, thinking, in turn, he would wither away and die as a consequence. So in turn, he was, in his reality, killing himself. He suffered from insanity and delusion.

The defendant's philosophy of life had no bearing on his testimony, medical judgment or medical standards. If that were so, doctors who believe in Zen, New Age, crystals, anti-abortions, pro-abortions, would be subject to cross-examination concerning their philosophy of life. The fact that he killed his wife in a fit of insanity, does not mean he is not a good doctor.

The lower court stated that no one should kill another person; that it is not a test of civilization. Yet to some, abortion is murder and doctors perform abortions. Should those abortionists be cross-examined concerning their values and philosophy of life? I think not.

The court in essence, utilized the same negative judgment against Dr. Reza, that a typical juror would , and by the words out of the court's own mouth, condemned that doctor, perceiving him guilty of all things, just as an average juror would.

Dr. Reza is not a career criminal. His sole impulsive uncontrollable act in 1990, bears not one whit to an alleged malpractice in 1982. The crime is not one of "inherent untrustworthiness."

Moreover, the lower court's statement that Dr. Reza's philosophy of life (or disregard for life) has some bearing on his medical treatment of this patient, back in 1982, is illogical. Since when do defendant doctors in malpractice actions answer questions concerning philosophy of life?

If plaintiff had called Dr. Reza to the stand, as they had every intention of doing, they would have been limited, in that they cannot impeach their own witness. The court failed to address that issue.

There is absolutely no prejudice to plaintiff by precluding the crime and overwhelming prejudice to the defendant if admitted.

Similarly, plaintiff unwittingly fell into the same trap as the court, trying and convicting Dr. Reza in the media, and by plaintiff's counsel's own lips condemned Dr. Reza by virtue of the same knee jerk reaction. The same knee jerk reaction any jurors would have. Out of plaintiff's own lips, plaintiff's counsel proved our point.

For example, plaintiff alleged before the court, ". . . [H]e killed his wife in "cold blood". He therefore has "deviat[ed] from the norm." He is a "convicted felon" He is suspect; "He willful[ly] [took] . . . the life of a woman he is committed to love and honor for the rest of his life"; He's a perjurer and "calculated" If he takes the life of his wife he is a liar; and will lie when there is an action for pecuniary loss.

The last two assumptions are illogical. A man serving twenty-five years to life, convicted of murder 2 of his wife, would not normally be worried about pecuniary loss in a medical malpractice action. Somehow, in the range of priorities, it is not plausible to believe that money is on top of the list and that he'd lie to save it, especially with the existence of medical malpractice insurance. After all, he is not exactly worrying when to purchase a car, house, or to go to Europe, now is he? He doesn't need to worry about his rates from going up. Further, the fact that he took the life of his wife, does not make him a liar. One thought does not logically translate to the next. After all, he admitted he killed her.

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However, plaintiff's series of well meaning, but illogical assumptions made in the lower court were precisely the kind of prejudicial assumptions, for the most part, that would be felt by any juror on the case.

Plaintiff claimed perjury, but failed to reveal the particulars. There never was or has been a charge of perjury against Dr. Reza. There never has been a claim that Dr. Reza lied under oath in court or lied out of court under oath. If there had been such a claim, the prosecutor would have claimed it. He did not.

However, again, through these explosive emotion packed words, plaintiff reaffirmed defendant's position, just as plaintiff assumed the worse concerning Dr. Reza, via media blitz, bits n' pieces heard here or there, the jury would make the same erroneous assumptions, based on partial information, media and visceral reaction and not on the facts and evidence.

The issues raised by plaintiff in the lower court of alleged "feigned robbery" "conference in Washington, D.C." were obvious dead giveaway clues by an insane man with a diminished capacity, desirous of being caught and dying. After all, does a sane man kill his wife? No.

Plaintiff's counsel admitted "He deviated from the norm" when he killed his wife. That is so in December 1990 when the killing took place and not in October 1982, date of alleged malpractice.

Moreover, as part of the conference in Washington, D.C., a black rat crossed Dr. Reza's path, and click, the communication via the rat and signal took effect—the killing took place. Killing his wife was delusional of killing himself. Obviously, there was aberrant behavior and insane behavior in December 1990, again, having nothing to do with conduct or credibility 10 years earlier.

Further, with explosive words from plaintiff in oral argument and in motion papers like "cold blooded murderer" and the like Dr. Reza would not have a prayer of a fair and impartial trial by jury. It would be a trial on paper, but a kangaroo court in reality.

Moreover, assuming that the murder 2 conviction was used for credibility alone, there is no limiting instruction devisable, that would preclude the natural assumption [made by both a Supreme Court Judge and a plaintiff's attorney] that murder means malpractice.

The unchecked use of a previous felony conviction will encourage the jury to focus upon a comparative moral evolution of the parties, and calculate damages accordingly. Gold, FRE 403: Observations on the Nature of Unfairly Prejudicial Evidence, 58 Washington Law Review 497 (1983). Once jurors are convinced that a litigant with a prior conviction is a bad person, there is a risk that they will evaluate the litigant's evidence less conscientiously and thus reach a verdict contrary to what their decision would have been absent the damaging convictions evidence. **Gold, supra.** Further, jurors will be less reluctant to deprive the morally reprehensible litigant of a verdict. **Shows v. M/V Red Eagle**, 695 F.2d 114 (5th circuit 1983). Rule 609 (a) in the Civil Context: A Recommendation for Reform, Teresa E. Foster, Fordham Law Review, October 1988 (**Foster**) page 20.

"The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction". **Krulewith v. United States**, 336 U.S. 440. Justice Learned Hand characterized the task allocated to jurors concerning prior convictions as a "mental gymnastic which is beyond, not only their power but anybody else's". **Nash v. United States**, 54 F. 2D 1006 (2d circuit), **cert denied**, 285 U.S. 556 (1932). Confining the consideration of prior convictions demands tremendous sophistication because it is counter intuitive, given the emphasis that most people place on character assessment in their daily lives, **Foster** at 24.

Courts have expressed skepticism as previously indicated, about the abilities of jurors to cope with this incongruity. Commentators are virtually unanimous in condemning as mere legal sophistry the proposition that limiting instructions provide an antidote to the prejudice inherent in prior conviction evidence. These suspicions about the effectiveness of limiting instructions in relieving prejudice inherent in prior convictions proof are amply supported by empirical evidence. H. Kalven and H. Ziesel, The American Jury 160 (1966), **Foster** at 24-25.

In criminal cases jurors are unwilling or unable to abide by judicial cautionary instructions concerning prior convictions. Jurors and judges are less likely to acquit the previously convicted defendant. Jurors almost universally used defendant's record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial. On a survey, 98% of attorneys and 43% of judges queried expressed doubts that cautionary instructions are at all effective. **Id.**, Broeder, the University of Chicago Jury Project, 38 Nebraska

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Law Review 744; Note, other crimes evidence at trial 70 Yale Law Journal 763 (1961); Note, the, Dilemma of the Defendant with a criminal record. 4 Column: J.L. and Soc Probs. 215 91968), **Foster** at 25.

Although these involve criminal trials, there is no reason to assume that jurors are better equipped in civil litigation to cope with prejudicial information about moral depravity conveyed by prior convictions. This conclusion is supported by literature discussing the plight of civil plaintiffs—with prior convictions—who invoke section 1983 to sue police officers for damages re-illegal search and seizures. The description of plaintiff's criminal past results in jury bias in police misconduct trials. Casper, Benedict and Perry, The Tort Remedy in Search and Seizure cases: A case study in Juror Decision Making, 13 Law and Society Inquiry 279 (1988), **Foster** at 25.

The practice of relying on limiting instructions to rectify the unfairness posed by convictions evidence is particularly insidious because jurors are likely to be unaware of the intuitive appeal of this proof. Even conscientious, well intentioned jurors are likely to be affected. Thus jurors are instructed to use their finding of a witness' disregard for social mores and accompanying willingness to engage in criminal activity only in assessing the witness' veracity, even though the inference that a witness who has shown a "general readiness to do evil", is morally reprehensible and therefore undeserving of justice, can be compelling. Even the deliberations of conscientious jurors in this context are prey to contamination by inferential error in considering a witness' prior convictions, **Gold,**[1] **infra, Foster** at 20.

Clearly, the probative worth of prior convictions evidence as a credibility determinant is suspect and the prejudice it imports into the civil process is overwhelming.

Moreover, psychological studies reveal that prior conviction proof as an impeachment device, lacks scientific or rational validity.

The false premise which the courts have traditionally used is the belief that character is a compilation of innate, discernible traits that govern behavior patterns and remain relatively stable throughout a person's lifetime, Lawson, Credibility and Character: A Different Look at an Interminable Problem, 50 Notre Dame Law 758, 766-89 (1975), **Foster** at 28.

The concept of character as inducing behavior consistent with one's innate traits lends credence to the practice of inferring character from specific conduct and adverting to character evidence as a predictor of in court veracity. See 2 J. Wigmore, Evidence Section 519. It mirrors the trait theory of behavior, Foster at 28.

The trait theory involves behavior which derives from a unique combination of traits that make up the character of each individual. See H. Eysenck, Crime and Personality 20-21 (1977). Behavior becomes predictable once underlying generalized traits are discerned and identified, **Id.**, at 20. Thus a person who manifests an aggressive character trait would display belligerent behavior in an unending variety of contexts, driving, at a ball game, in a Business meeting - Mendez, California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies 31 U.C.L.A. Law Review 1003 (1984). Similarly, a person with a sociable trait would remain affable in those contexts. See H. Eysenck, at 20. With respect to the impeachment process, a person also would steal in one situation would also swindle in another, cheat in a third and lie when possible. Burton, Generality of Honesty Reconsidered, 70 Psych. Rev. 481, 482 (1963). See also Mendez, **Foster** at 28.

These trait orientated psychologists have failed to support the above theories with empirical data. W. Mischel, Personality and Assessment 123, 177 (1968), rendering reliance upon it suspect, **Foster** at 28.

Situationalism discredited the trait theory. Situationalism views behavior as a learned response to specific contextual factors. Situation oriented psychologists maintain that predictability of behavior comes from the correlation of identical elements shared by the situations being compared. Burton, Generality of Honesty Reconsidered, 70 Psych. Rev. 481 (1963); Mendez, **Foster** at 29-30.

Evidence that a person would cheat in business or sports or deceive his business associates, bears meager predictive value for that person's veracity when testifying under oath.

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[1]Professor Gold states:

Instructions may be considerably less efficacious than is commonly assumed. When people are required to conduct self analysis in order to determine why they act a certain way or think certain thoughts, they are subject to making the same errors they tend to make when engaging in any other inferential task. This suggests that, even if jurors diligently attempt to ignore the prejudicial aspect of evidence as instructed by the court, they may not be conscious of the impact that evidence has upon them and thus will be unable to control it. Prejudice resulting from evidence that induces inferential error is dangerous precisely because it is so subtle and common.

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Burton **supra** at 482; H. Eysenck at 15, **Foster** at 30.

The classic study performed by Professors Hartshorne, May and Shuttleworth was described as a landmark that has not been surpassed by later work. See H. Eysenck, at 25. H. Hartshorne, character in Human Relations (1932); H. Hartshorne, M. May and F. Shuttleworth, Studies in the Organization of Character (1930); H. Hartshorne and H. May, 1 Studies in the Nature of Character-Studies in Deceit (1928), **Foster** at 29.

The study was performed by the psychologists to test the validity of the concept that a character trait for honesty existed, a trait considered to determine a person's moral behavior in a variety of situations, **Foster** at 29.

The researchers thought their results would hold with generally accepted principles: that the behavior of an individual who is fundamentally honest will reflect honesty in all situations, regardless of contextual incentives to be honest or dishonest; and that a dishonest person would similarly behave dishonestly despite situational differences. At one end of the scale you would have saints and at the other sinners, **Foster** at 29.

Their results surprised the researchers and shocked the world of psychology.

There was no predictability factor concerning honesty.

There was no unified character trait for honesty and that honesty is primarily a function of situational factors and not a consistent behavior determined by an underlying character trait.

Consequently, the rejection of the trait oriented approach by psychologists discredits the laws continued reliance on proof of character traits to evaluate credibility, **Foster** at 29.

Decades ago Dean Wigmore criticized the laws reliance upon the predictive value of character for testimonial veracity. 3 A J. Wigmore, Evidence, Section 922, at 725 but concluded that rejection of the law's dependence upon character proof should be postponed until science provides a better method. 3 A J. Wigmore Section 922 at 725, **Foster** at 31.

Given the psychological conclusions stated herein, the trait oriented approach is discredited, and grossly suspect. Therefore, use of the trait oriented approach as a tool for impeachment is inherently suspect.

There are numerous impeachment tools available—more effective than crude character proof because they more precisely reveal a witness' in court veracity:

1. Probing cross-examination concerning every aspect of his testimony

2. Demonstrable biases

3. Prior inconsistent statements, if any

4. Contradiction by non collateral information

5. Deprivation of impressions about credibility and character via court room appearance, apparel, and court room demeanor, **Foster** at 26.

Any scant benefit derived from relying upon prior convictions as a veracity determinant is overwhelmed by the massive irreversible prejudice inherent in this proof. **Gold, supra.**

The probative worth of prior convictions evidence as a credibility determinant is suspect and the prejudice it imports into the civil process is overwhelming, **Foster** at 20.

The prejudicial effect of convictions or impeachment evidence in civil cases affects the general fairness of the trial process. Inflammatory evidence of this murder conviction deflects jurors from their obligation of neutrality by focusing their attention on the respective moral qualifications of the litigants, rather than upon the specific conduct of the parties and the legal merits of their cases. **Boyer v. Chicago,** 603 F.Supp. 132 (D. Minn. 1985), **Foster** at 21.

Informing the jurors of a litigant's transgressions persuades them to draw the compelling close inference that bad character translates not only into lack of veracity, but also into improper conduct. And in the lower court's decision, the plaintiff has been given carte blanche to do just that, to utilize the information for credibility and conduct, as per the Judge's own directive. Thus plaintiff received the inequitable advantage to sway jurors concerning the merits of the dispute, through demonstrating the moral depravity of the opponent under the guise of presenting proper impeachment proof. **Diggs v. Lyons,** 741 F.2d 577 (3d Cir. 1984) [Decided prior to change in F.R.E. 609, allowing judicial balancing and discretion], **Foster** at 21.

Judge Albert Maris, former Chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, and an impartial participant in the

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development of the FRE, expressed misgivings concerning his absolutist approach to rule 609 (a) in **Diggs, Foster** at 13. FRE 609 (a) has since been changed to allow discretion in civil matters when deciding whether to admit a conviction.

Before the change, the mandatory admission of all felony convictions on the issue of credibility produced unjust and even bizarre results. Evidence that a witness has in the past been convicted of manslaughter by automobile can have but little relevance to his credibility as a witness in a totally different matter. **Diggs, supra,** 741 F.2d at 582, **Foster** at 13.

F.R. 609(a) was changed in 1990 to avoid such unjust results as a result of **Green v. Bock,** 490 U.S. 504 (1981). Prior to said change, F.R. 609 permitted all prior felony convictions in civil cases automatically without the benefit of any judicial discretion, as applied to a civil plaintiff only. However, with respect to a civil defendant, judicial discretion applied. The result was unjust, and due, in part, to the fact that the code had a criminal context and interests at stake, via legislative history and notes. The amendment did not disturb the special balancing test for the criminal defendant who chose to testify. Thus, the rule recognizes that in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice - i.e. the dangers that convictions that would be excluded under FRE 404 will be misused by a jury as "propensity evidence" despite their introduction solely for "impeachment purposes". The rule requires that the probative value of convictions as impeachment evidence outweighs their prejudicial effect. Advisors, Committee Notes, FR 609, 1990 Amendment, **Foster** at 14.

FR 609 (old and new law) permits without discretion all crimes concerning dishonesty, crimen falsi convictions. FR 609 (b) in essence disregards convictions 10 years old.

FRE 609, had a long and tortured history of conflicting unjust and confused results. Finally, the rule obtained clarity and clarification and balancing, interests and discretion. It also makes distinctions of veracity crimes, both before and after the change in the rule and has a 10 year old conviction rule.

CPLR 4513, on the other hand makes no distinctions of crimes; crimen falsi convictions; time frames; party versus non party; nor balancing competing interests, nor discretion, nor remoteness.

In **Green v. Bock, supra,** the court was restricted by the language of the Statute FR 609: "shall be admitted," with operative word being shall, coupled with automatic admission of crimen falsi convictions. As a consequence, that statute was interpreted as barring discretion for the felonies.

On the other hand, the language of CPLR 4513 says "may" be admitted. Consequently, it should be interpreted as requiring balancing interests, safeguards and discretion, as the word "shall"—a mandate—does not appear in the wording of CPLR 4513. See 5 WK & M Par. 4513, 10, at 315 to 316.

With respect to the chilling effect, Dr. Reza a civil defendant, had no power to avoid plaintiff's subpoena already served in this case, and would have been forced to testify. Dr. Reza could not take advantage of the constitutional safeguards against having to testify as a criminal defendant. Non party witnesses may also suffer from a chilling effect, thereby precluding valuable testimony to be heard by the jury. Therefore, in a slip and fall or medical malpractice action, a witness may prefer to remain anonymous rather than put himself on the line to be torn apart on the witness stand, given some transgression in past, i.e. vehicular manslaughter.

The fundamental dilemma is whether proof of a witness's prior misconduct has any place in civil litigation. The law excludes proof of general character and prior specific acts as circumstantial evidence of conduct in civil cases.

According to McLaughlin, "CPLR 4513 appears to leave no room for discretion", McLaughlin, Evidence, N.Y. Law Journal, November 9, 1973, at col. 1 and 4, col. 3. He suggested that CPLR 4513 be amended so as to make the rules in civil and criminal practice uniform, **Id.**

Next, **Guarisco v. E.J. Milk Farms,** 90 Misc.2d 81, 393 N.Y.S.2d 883 (S.Ct. Queens Co., 1977) (**Guarisco**) presents antediluvian view in its barring judicial discretion and is contrary to the weight of existing authority.

Guarisco's reasoning barring discretion in CPLR 4513 brushes aside the policy considerations upon which **Sandoval** was based.

The **Sandoval** court indicated that proof of prior crimes could result in a conviction unfairly based on the impression that a witness-defendant possesses a propensity toward committing the alleged act. The same result ensues in a civil context.

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Guarisco represents an aberration from the common law traditional doctrine allowing a trial judge broad discretion in establishing the permissible scope of cross-examination. **Guarisco,** moreover, is a 1977 Civil Court Queens County case.

Statutes from other jurisdictions drafted similarly to CPLR 4513, have been interpreted by those courts as requiring discretion, Cal. Evidence Code 788 (West 1966) **People v. Beagle,** 6 Cal.3d 441, 452 (1972).

In **People v. McCleaver,** 354 N.Y.S.2d 847, the Supreme Court of The State of New York took cognizance of the California Statute and interpretation described **supra,** inclusive of discretion and adopted the same principle of discretion, utilizing the wording, "may", contained in 4513 as the operative word permitting discretion. The court held that it was equally applicable to 4513, as it is in conformity with the common law authority of a court to restrict testimony to subjects relevant and material to the issues on trial and even to exclude competent evidence where its prejudicial impact far outweighs its relevance or materiality.

The court in essence, adopts the **Sandoval** balancing test; **McCleaver** was decided two months before **Sandoval.** The court in **McCleaver** also cites Chief Justice Burger, in **Gordon v. United States,** 127 U.S. App. D.C. 343 (1967), "The nearness or the remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness."

If that is so for a prior conviction, all the more for a subsequent conviction, 10 years hence.

Lastly, many types of information are routinely rejected as trial proof to further policy objectives, as set forth in **McCleaver, supra.** Such restrictions help avoid the dangers associated with evidence bearing only scant probative worth, but tainted by the potential for overwhelming prejudice, i.e. character, insurance, settlement offers, subsequent corrective measures, rape victims past sexual conduct inadmissible, etc.

The attention of the jury should properly focus on the conduct of the plaintiff and the defendant with respect to the accident which gave rise to plaintiff's claim. Admitting plaintiff's conviction could only serve to poison the minds of the jurors by arousing their punitive instincts thereby diverting their attention from the issues that are central to the case. **Boyer v. Chicago,** 603 F.Supp. 132 (D. Minn. 1985).

Assessment of the party's conduct is focal to civil litigation—not character. Importing character evidence into the civil trial process in the form of prior convictions allows parties to accomplish through the back door of impeachment precisely what the exclusion of character evidence as substantive proof of conduct is intended to obviate. The jury will engage in comparative moral evaluation of the parties and their witnesses and will view all prior convictions as revelatory of conduct. The temptation is to reward the good litigant, and by association, his witnesses, by a favorable verdict and punish the "bad" litigant and his witnesses, with an unfavorable verdict. Convictions of second degree murder, burglary, arson, reckless disregard are only **minimally probative** on credibility. **Garnett v. Kerner,** 541 F.Supp. 241 (1982) **Davenport v. DeRobertis,** 653 F.Supp 649 (1987).

In civil cases, the question becomes whether the convicted plaintiff will hesitate to file suit, and the convicted defendant will hesitate to defend a claim or whether the terms of any settlement will be dictated or influenced by the prior convictions of either party.

CPLR 4513 is antiquated—created at a time when "felons" had no civil rights. They were not competent to be a witness and testify; they could not be a plaintiff or a defendant; they could not own property. They were not purged of the scarlet letter of their crime until their death and final judgment.

Clearly, we are no longer in the Dark Ages; we no longer use the Stock to ridicule offenders in the public square; we do not brand prisoners; we do not hang scarlet letters around their necks; we do not have trial by Inquisition, and we do not deprive red blooded Americans of their constitutional rights to a fair trial by impartial jury and due process and those rights implicit in the concept of an Ordered liberty—that penumbra of rights emanating from the constitution and Bill of Rights.

If CPLR 4513 is not declared unconstitutional, and permits admission of an explosive criminal conviction for murder 2 into evidence at trial, our country will be taking an irrevocable step backwards in safeguarding those cherished rights, we as Americans have taken for granted, for these many years. These are rights which our men and women have fought and died for on foreign soil to protect.

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In a changing world, where hard fought freedoms are gradually being won, after years of slavery to Iron curtain dictates, it is not the time for the land known as the beacon of freedom to regress into the Dark Ages when it comes to safeguarding our fundamental freedoms.

If we cross the Rubicon, here, all other freedoms will follow suit. Once we start chipping away, bit by bit, at our fundamental freedoms they will be so eroded that they will be meaningless, or worse yet, non existent.

The Courts of New York have been well known for being forward thinkers—taking the first step. This is not a time to defer or avoid.

The time is now—the place is here.

If not you, then who?

If not now, then when?

We cannot and should not fear the challenge of doing what is morally and legally right. Those before us took the challenge and ran with it to ultimate victory:

1. Brown v. Board of Education

2. Plessy v. Ferguson

3. Right of women to vote

Ultimately, there should be a total ban on prior convictions in a civil litigation context. They have no place at trial. If not, guidelines and safeguards and balancing tests drawn to provide guidance to the trial judge must be adhered to, i.e. **People v. Sandoval**, with the burden of proof on the party seeking to offer the evidence at trial. He must establish its probative value exceeds its disproportionate prejudicial impact on the jury.

These issues are ripe. They require resolution. We are in the 1990s—not the 1890s.

Further, **Sandoval** speaks of **prior criminal convictions**, ostensibly, though questionable, for introduction into evidence, with respect to a subsequent act. Statutes from other states and the federal rules also deal with prior convictions.

However, with respect to Dr. Reza, we do not have a prior criminal conviction, bearing on a subsequent act. We have alleged malpractice on one day, 10/15/82, and a conviction of murder 2, involving the doctor's wife, a family situation occurring 10 years later. Therefore, the crime has no bearing on the issue of either credibility or medical malpractice. It did not presage the act at issue.

Next, we can liken the situation to Life Insurance policies, that have a 3 year suicide clause prohibition. If suicide occurs 10 years down the road, the company pays, acknowledging that circumstances change; people change.

All the legal pundits commenting on Court T.V. agree that Dr. Reza is not a career criminal and this will be his one and only crime.

The events surrounding the ultimate conviction in October 1992 all occurred in December 1990. Nothing can be traced back to October 15, 1982 (one office visit).

Plaintiff in the lower court decried the defense's position concerning the invocation of the constitutional right to a fair and impartial trial by jury for Dr. Reza, labeling him a murderer and hence somehow less worthy of protection under the U.S. constitution.

When our forefathers drafted the U.S. Constitution, Bill of Rights, etc., the litmus test for their application was not whether you deserved it by being like mother Teresa or a pillar of the community. Fortunately, subjective criteria of 'deservability' plays no part in whether or not an American can exercise his/her fundamental freedoms and rights in the U.S.A. If that were the case, every one of us would be subject to question. However, the cumulative bias against Dr. Reza, triggered by knowledge of a murder conviction with respect to his wife, reflected in the lower court's pronouncements and plaintiff's counsel's papers, reflects the identical bias of anyone who will sit as a juror in the medical malpractice action, from the first moment that juror hears the magic words, "MURDER 2".

As each person reads this article, do not each one of you have a visceral response, to Dr. Reza's killing his wife? If that is so, could anyone of you sit on this jury, hear evidence of the murder conviction and ignore it? Or weigh it without coloring the entire defense with it adversely in disproportionate fashion?

Your answer to this question will provide the answer to this issue.

The legislature must act since the courts have not taken a leadership role in properly protecting a civil litigant's constitutional rights under this statute. The legislature has to take a hard and long look at CPLR 4513. Its breadth and scope encroaches upon our American Civil liberties in an ominous way.

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