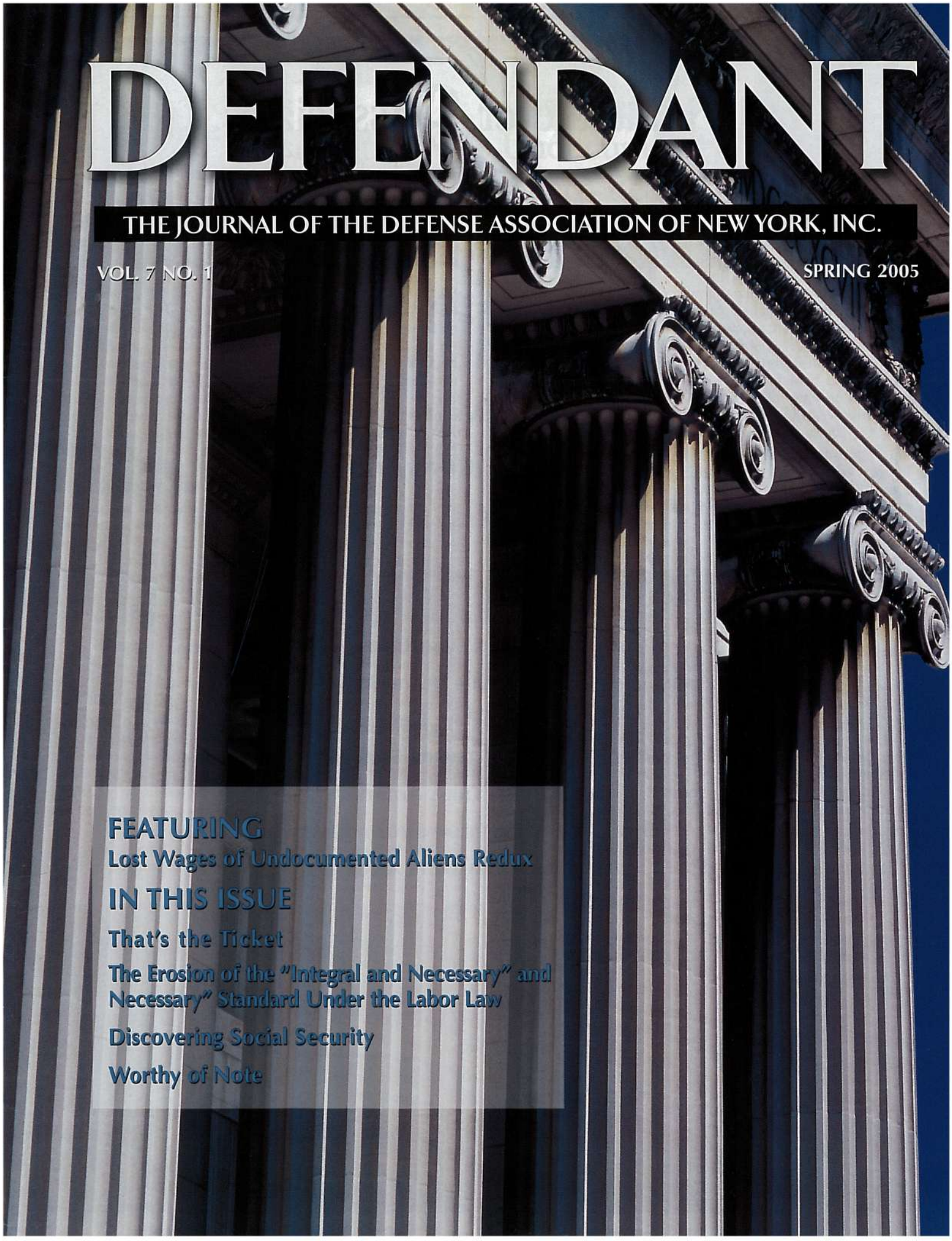

DEFENDANT

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FEATURING

Lost Wages of Undocumented Aliens Redux

IN THIS ISSUE

Lost Wages of Undocumented Aliens Redux

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immigrants toward the United States." Majlinger @ NYS2d 334. Majlinger is still on appeal to the Appellate Division, Second Department.

Facing a similar factual scenario in Balbuena v. IDR Realty, LLC., 13 AD3d 285, 787 NYS2d 35 (1st Dept. 2004), Judge Rosalyn Richter of the Supreme Court, New York County denied the defendant's motion to dismiss plaintiff's future wage claim by reasoning that since no federal statute nor federal constitutional issue was in dispute, New York common law applied to allow the lost wage claim.

The First Department has just addressed this issue in Sanango v. 200 East 16th Street Hous. Corp., 788 NYS2d 314 (1st Dept. 2004) and Balbuena v. IDR Realty, LLC., supra.

Writing for the majority in both the Balbuena and Sanango cases, Judge Friedman addressed the preemption argument by quoting the Supreme Court in Hoffman (535 US at 147-148 [footnote omitted]):

> In 1986 Congress enacted IRCA, a comprehensive scheme prohibiting the employment of illegal aliens in the United States. §1324a. As we have previously noted, IRCA "forcefully" made combating the employment of illegal aliens central to "[t]he policy of immigration law." INS v. National Center for Immigrants' Rights, Inc., 502 US 183, 194, and n.8 (1991). It did so by establishing an extensive "employment verification system" [8USC]. §1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, §1324(h)(3). This verification system is critical to the IRCA regime. To enforce it, IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. §1324a(b). If an alien applicant is unable to present [*4} the required documentation, the unauthorized alien cannot be hired. §1324(a)(1).
>
> Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. §1324(a)(2). Employers who violate IRCA are punished by civil fines, §1324(e)(4)(A), and may be subject to criminal prosecution, §1324(F)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. §1324c(a)...Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 USC §1546(b).
>
> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.

Judge Friedman went on to state that an award of lost wages to an undocumented alien for monies he would have earned but for his injury by somehow remaining in the United States illegally and continuing to work illegally would condone past and future violations of IRCA. The Court went on to allow plaintiff's claim for future lost wages but based only on wages he would have earned, but for his accident, in his country of origin.

Judge Ellerin dissented from the majority opinion by stating that by exempting the employer from liability for future lost wages the majority was conferring a benefit on the employer at the expense of the injured worker. Judge Ellerin conducted no analysis of IRCA nor did she express any opinion as to how retaining this measure of damages would advance Congress' immigration polices through IRCA.

In response, Judge Friedman further pointed out that the potential limitation of one item of damages in a future tort action was too remote to constitute an incentive to the employer to hire illegal aliens. Judge Friedman pointed out that most employers utilize liability insurance to take care of such contingent liabilities and, as a consequence, saw no benefit to the employer. Judge Friedman reinforced the fact of the absence of any incentive or benefit provided by the majority's holding to benefit the employer by pointing out IRCA's criminal and civil penalties to both the employer and employee for an illegal hiring.

While the First Department's decision on this issue is extremely helpful in defining the limits of lost wage claims of undocumented aliens New York's full position on this issue will not begin to emerge until the Second Department issues its decision in Majlinger, supra.

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John J. McDonough
EDITOR IN CHIEF

STAFF
Anthony Celentano
Denise LaGrua
Alexandra M. McDonough

Matthew J. Larkin, Kevin G. Faley, Andrea M. Alonso, Sean R. Smith and Vincent P. Pozzuto

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That's The Ticket: A Discussion of How Traffic Infractions Impact on a Subsequent Civil Law Suit Arising from the Same Incident

MATTHEW J. LARKIN, ESQ.*

Whether defending a fatal accident or a minor fender bender, a recurring issue in the defense of automobile liability cases is the effect of the resolution of traffic infractions on a subsequent civil suit. For some of us who practice both criminal and civil law, the question often arises of how to dispose of violations of the Vehicle and Traffic Law ("VTL") and related traffic regulations when a civil suit is threatened or pending. Moreover, even the civil defense attorney who does not regularly handle automobile liability cases may occasionally be called upon to defend an action for a client such as a public authority, construction company, or other commercial venture, that arises from an automobile accident.

All too regularly, traffic tickets are handled without consideration of how the disposition or verdict will affect a later civil suit. The civil attorney is left to merely accept the consequences of the disposition or trial, which may have even been defended *pro se*. However, on occasion, the civil defense attorney will have the opportunity to counsel and coordinate the resolution of the underlying traffic infractions. In either scenario, it behooves the practioner to fully comprehend the ramifications of the disposition or trial verdict on a later civil suit arising from the same incident. Also, it is important for the criminal defense attorney, who may merely be handling a traffic court appearance, to understand the impact the disposition or trial will have on a civil suit that is yet to be filed.

While there are many factors to consider in the defense of traffic infractions where a civil suit is looming, some considerations are critical to note. First, a VTL violation relating to the occurrence of the accident will invoke the doctrine of negligence *per se* in the civil suit. Second, a traffic conviction based upon a plea is an admission which can be used against the defendant in a subsequent civil case. Third, in certain circumstances, the defendant may be better advised to stand trial on the traffic ticket because a conviction after trial does not give rise to the doctrine of collateral estoppel. Further, a trial conviction, unlike a guilty plea, is not admissible in a subsequent civil suit. However, a traffic trial, as opposed to a negotiated plea bargain, exposes the defendant to uncertainty in sentencing which may even include incarceration. Moreover, the cost of defending the traffic infractions, which are usually not covered by an insurance policy, may be prohibitive to the client.

These are some of the issues that must be contemplated when making the ultimate decision of how to resolve traffic infractions when a related civil suit is ongoing or expected. What follows is a brief discussion which will aid the practioner in handling, or at least coordinating, the defense of traffic infractions[1] with a view toward defending a subsequent or pending civil law suit.

VTL Violations and the Doctrine of Negligence *Per Se*

In order to prove the liability of a defendant in an automobile negligence suit the plaintiff must prove both "negligence" and "proximate cause." See Powell v. Tuyn, 306 A.D.2d 335, 760 N.Y.S.2d 665 (2nd Dep't 2003); Ohdan v. City of New York, 268 A.D.2d 86, 706 N.Y.S.2d 419 (1st Dep't 2000). Negligence has generally been described in New York common law as a lack of ordinary care. See Caldwell v. Village of Island Park, 304 N.Y. 268 (1952); Pompeii Estates, Inc., v. Consolidated Edison Co. of New York, 91 Misc.2d 233, 397 N.Y.S.2d 577 (Civ. Ct. of NYC 1977); see also Mikula v. Duliba, 94 A.D.2d 503, 464 N.Y.S.2d 910 (4th Dep't 1983). Negligence arises from a breach of a legal duty. See e.g., Strauss v. Belle Realty Co., 65 N.Y.2d 399, 492 N.Y.S.2d 555 (1985). Pertinently, violation of a statute which imposes a specific duty constitutes negligence. Van Gaasbeck v. Webatuck Central School District No. 1, 21 N.Y.2d 239, 287 N.Y.S.2d 77 (1967).

Specifically, when the plaintiff's theory of liability is predicated upon a violation of the VTL, New York courts employ a jury instruction requiring jurors to find negligence should they find a statutory violation. Pattern Jury Instruction ("PJI") 2:26 reads as follows:

> The Vehicle and Traffic Law establishes rules of conduct that must be obeyed by motorists and pedestrians alike. Plaintiff claims that defendant failed to comply with §_____ of the Vehicle and Traffic Law. Section _____ provides as follows: [*Here* [the court will] *read applicable sections and relate the facts of the case*]. In considering the evidence in this case, you must determine whether plaintiff has proved that defendant failed to comply with (that, those) statute(s). If you find that defendant violated (that, those) statute(s), such a violation constitutes negligence.
>
> You cannot disregard a violation of the statute and substitute some standard of care other than that set forth in the statute.

Where applicable, this instruction will be given regardless of whether the defendant was convicted of any violation of the VTL. In fact, this charge is given in civil trials, *even when the police have not issued summonses of any kind,* provided there is evidence at trial which supports the charge. The PJI merely instructs the jury on the long-standing rule in New York that an unexcused[2] VTL violation constitutes negligence *per se* and that the statutory violation can not be disregarded by the jury. Batal v. Associated Universities, Inc., 293 A.D.2d 558, 741 N.Y.S.2d 551 (2nd Dep't 2002); Dalal, supra; Cordero v. City of New York, 112 A.D.2d 914, 492 N.Y.S.2d 430 (2nd Dep't 1985).

However, in order to invoke the doctrine of negligence *per se*, the violation must relate to the

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[1] *The discussion that follows applies to traffic infractions. In many instances, it is not applicable to the various misdemeanors and felonies set forth in the New York State Vehicle and Traffic Law.*

* *Mr. Larkin is a partner in the Manhattan office of Cozen O'Conner and practices in the Product Liability and Complex Litigation Group. Formerly, he was as Assistant District Attorney in Nassau County. New York.*

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The Erosion of the "Integral and Necessary" Standard Under the Labor Law

KEVIN G. FALEY* and ANDREA M. ALONSO**
Matthew A. Meladossi assisted in the preparation of this article.

In another example of a growing trend, the Court of Appeals in Martinez v. City of New York,[1] continues to narrow the application of the New York Labor Law. Prior to the decision in Martinez, New York courts had held owners or general contractors liable when a construction worker was injured while performing almost any activity that was deemed to be an "integral and necessary" part of the construction project. With the holding in Martinez, the high court has now greatly restricted the definition of "integral and necessary" with the resultant effect of further strictly construing Labor Law claims.

In the pre-Martinez case of Mosher v. St. Joseph's Villa,[2] 218 AD 2d 197, 637 NYS 2d 991 (3rd Dept. 1996) the plaintiff was injured when he fell from a ladder while cutting down a tree and subsequently brought a Labor Law claim. The removal of the tree was part of a larger project to clear defendant's land in preparation for the future construction of a parking lot and residential building. While plaintiff was not engaged in any of the activities enumerated in the statute, the Fourth Department nevertheless modified the lower court decision and granted summary judgment to plaintiff reasoning that it was sufficient that the work being performed was "necessary and incidental to or an integral part of the erection, etc., of the building or structure." [4] The plaintiff's removal of the tree constituted site preparation which was "incidental and necessary" to the erection of the building.

Similarly, in Covey v. Iroquois Gas Transmission System,[5] the Appellate Division affirmed an order of partial summary judgment in favor of plaintiff. Plaintiff was injured while repairing a backhoe that was used to dig pipeline ditches. The backhoe stood adjacent to a fifteen foot ditch and plaintiff had to climb the machine in order to refill the hydraulic fluid tank. As he pulled himself up, a support railing on the machine broke causing him to fall in the ditch and suffer injury. The court held that this work performed by plaintiff was an integral and necessary part of the larger project because it was required to keep the vital machinery running.[6] The court rejected the defendants' argument that the plaintiff was merely engaged in ordinary maintenance lubrication of heavy equipment which is not an activity enumerated in the statute.

A shift in this legal landscape occurred in Martinez when the Court patently rejected the integral and necessary test and its concomitant expansion of the reach of the Labor Law.

Plaintiff, an environmental inspector, was injured when he fell from a desk upon which he stood to inspect a pipe in the ceiling. The plaintiff was engaged in Phase One of a Two Phase project involving asbestos detection and removal. Phase Two involved the actual cleaning and removal work while Phase One entailed the inspection and identification of asbestos problem areas.

The plaintiff was merely inspecting for the presence of asbestos before any removal work or actual construction commenced. Plaintiff's work was to terminate before any actual commencement of the asbestos removal work. None of the enumerated activities in section 240(1) was underway. The court concluded that:

> while the reach of Section 240(1) is not limited to work performed on actual construction sites...the task in which an injured employee engaged must have been performed during the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.[7]

The court then dismissed the "analysis employed" by the lower court which focused on whether plaintiff's work was an "integral and necessary part" of a larger project. Such an analysis, the court held, "improperly enlarges the reach of the statute beyond its clear terms."[8]

Accordingly, since Martinez, a plaintiff can no longer establish liability under section 240 for activities deemed to be merely integral and necessary to the performance of the enumerated activities; the work must actually be covered by the statute.

Subsequent to Martinez, in Ciesielski v. Buffalo Industrial Park, Inc.,[9] the Fourth Department granted defendant's motion for partial summary judgment dismissing the Section 240(1) claim against it. Plaintiff was injured when he fell from a ladder as he was taking measurements for the proposed installation of a racking system in a warehouse. The system was subsequently installed several months later by another company. Because plaintiff was injured before any actual construction began and because plaintiff was not injured during "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure," the court concluded without hesitation that Section 240(1) did not apply. Plaintiff's argument that the activity in question was an "essential part of the construction process" was also rejected by the court echoing the language of the Martinez court: ("That analysis improperly enlarges the reach of the statute beyond its clear terms in as much as the work was performed as part of the merely proposed installation of the racking system at a time when 'none of the activities enumerated in the statute was underway. ' ").[10]

In McMahon v. H S M Packaging Corporation,[11] the plaintiff, president of a plumbing subcontractor, had been installing pipes in the basement level of a building when he left to inspect a site from the roof of an adjacent building as the future, potential location for a condenser unit. The plaintiff fell from a height and was injured. The court likened plaintiff's claim to that brought in Martinez, noting that plaintiff was "merely planning for future construction work, before defendants had the incentive to install safety devices." [12] The Fourth Department also noted that the Court of Appeals "has explicitly rejected analysis that 'focuse[s] on whether plaintiff's work was an "integral and necessary part" of a larger project.' " [13]

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* *Kevin G. Faley is a partner in the law firm of Morris Duffy Alonso & Faley located in Manhattan*

** *Andrea M. Alonso is a partner in the law firm of Morris Duffy Alonso & Faley located in Manhattan*

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happening of the accident. See Dalal v. City of New York 262 A.D.2d 596 (2nd Dep't 1999). Consequently, violations such as driving without a license or driving an unregistered vehicle are not relevant to the defendant's liability and will not invoke the doctrine of negligence *per se*. See Dance v. Town of Southampton, 95 A.D.2d 442, 467 N.Y.S.2d 203 (2nd Dep't 1983); Hyde v. McCreery, 145 A.D. 729, 130 N.Y.S. 269 (3rd Dep't 1911).

Traffic Infractions Outside of the VTL

Unlike a violation of a statute such as the VTL, a violation of a regulation or local ordinance will not invoke negligence *per se*. Rather, a violation of a regulation or local ordinance is "some evidence of negligence" which is to be considered by the jury. See Bauer v. Female Academy of the Sacred Heart, 97 N.Y.2d 445, 741 N.Y.S.2d 491 (2002); Fox v. Lyte, 143 A.D.2d 390, 532 N.Y.S.2d 432 (2nd Dep't 1988); Piarulli v. Lason, 35 A.D.2d 605, 313 N.Y.S.2d 613 (2nd Dep't 1970). Even a violation of a regulation or code enacted to ensure safety is considered evidence of negligence rather than negligence *per se*. See e.g., Heller v. Louis Provenzano, Inc., 303 A.D.2d 20; 756 N.Y.S.2d 26 (1st Dep't 2003); see also Ray v. State of New York, 305 A.D.2d 791, 760 N.Y.S.2d 571 (3rd Dep't 2003). Accordingly, any claimed violation of a regulation or local ordinance such as the Traffic Rules and Regulations of New York City, will only be considered evidence of negligence.

Causation Concerns

Negligence, of course, is only the first prong in the determination of liability. The plaintiff must also prove that the statutory violation was the proximate cause of the accident. Martin v. Herzog, 228 N.Y.164 (1920); Cordero, supra; see also Holleman v. Miner, 267 A.D.2d 867, 699 N.Y.S.2d 840 (3rd Dep't 1999). Proximate cause is a factual question for the jury unless, of course, there is sufficient evidence to warrant summary judgment, directed verdict or dismissal by the court. In order to prove proximate cause, the plaintiff must show that the defendant's negligence was "a substantial factor in bringing about the injury." PJI 2:70.

Again, a violation of the VTL which relates to the occurrence will constitute negligence but may not be the proximate cause of the accident. See generally Sewer v. Gagliardi Brothers Service, 69 A.D.2d 281, 418 N.Y.S.2d 704 (4th Dep't 1979), aff'd 51 N.Y.2d 752, 432 N.Y.S.2d 367 (1980). Further, even though a VTL violation will invoke negligence *per se*, the defenses of comparative negligence, culpable conduct and assumption of risk remain viable. See Rockman v. Brosnan, 280 A.D.2d 591, 720 N.Y.S.2d 538 (2nd Dep't 2001).

To Plea or not to Plea

Clearly, the most important decision in counseling the defense of traffic infractions is whether to plead guilty or stand trial. Surprisingly, the distinction between a traffic conviction based on a guilty plea and one based on a trial verdict is significant. Perhaps more surprisingly, a conviction based on a guilty plea will usually have more detrimental consequences on a subsequent civil suit than a trial conviction. Certainly, circumstances will dictate the best course in each particular case. However, some considerations remain constant.

Notably, a guilty plea to a traffic offense is an admission and will be received as evidence in chief in a subsequent civil proceeding. Ando v. Woodberry, 8 N.Y.2d 165, 203 N.Y.S.2d 74 (1960); Miszko v. Luma, 284 A.D.2d 641, 725 N.Y.S.2d 459 (3rd Dep't 2001); Guarino v. Woodworth, 204 A.D.2d 391, 611 N.Y.S.2d 638 (2nd Dep't 1994); Decker v. Rassaert, 131 A.D.2d 626, 516 N.Y.S.2d 710 (2nd Dep't 1987). In fact, even a guilty plea that has been subsequently vacated may be used as an admission in a civil suit arising from the same incident. Cohens v. Hess, 92 N.Y.2d 511, 683 N.Y.S.2d 161 (1998). An admission is "evidence of negligence." PJI 1:55. As a result, the prior guilty plea will be considered by the jury when determining whether the defendant committed a statutory violation thereby invoking the doctrine of negligence *per se*.

Because a guilty plea is an admission, the attorney negotiating or coordinating the plea bargain should be cognizant of the exact language of the reduced or amended statutory violation to which the plea is entered. For instance, some courts prefer to accept a plea to Disorderly Conduct (Penal Law §240.20)[3] to cover a host of traffic violations. However, as a plea is considered an admission, the client is better advised to enter a plea only to violations actually committed.

Although admissible in evidence, the courts have limited the ancillary effects of a guilty plea because of the nature of traffic court adjudications-which are regularly handled *pro se* and prior to the institution of a civil suit and do not carry the societal stigma of a criminal conviction. For example, a guilty plea alone is insufficient to entitle the civil plaintiff to summary judgment. Stanton v. Ritz, 87 A.D.2d 735, 449 N.Y.S.2d 325 (3rd Dep't 1982). Although the plea may be used as evidence in a summary judgment motion, it must be coupled with proof of causation in order to shift the burden of proof to the defendant. Jones v. Fraser, 265 A.D.2d 773, 698 N.Y.S.2d 57 (3rd Dep't 1999). Even so, the defendant may still avoid summary judgment if he provides an adequate explanation or excuse for the statutory violation. Jones, supra. Similarly, a defendant who has pled guilty to a VTL violation may explain the reasons he entered the plea and even argue during the civil trial that the underlying violation did not occur. Guarino, supra; Luck v. Tellier, 222 A.D.2d 783, 634 N.Y.S.2d 814 (3rd Dep't 1995); Canfield v. Giles, 182 A.D.2d 1075, 585 N.Y.S.2d 242 (4th Dep't 1992).

The Legislature has further restricted the collateral consequences of traffic convictions. Specifically, VTL §155 prohibits the use of a conviction for a traffic infraction for the purpose of impeachment. Iqbal v. Rubin, 238 A.D.2d 378, 657 N.Y.S.2d 329 (2nd Dep't 1997). Accordingly, unlike a prior criminal conviction, the jury can not be instructed that a VTL conviction bears on the credibility of the witness. This is one area where the decision whether to enter a guilty plea or stand trial will have no bearing on a subsequent civil suit, as VTL §155 draws no distinction between a conviction based on a guilty plea and a conviction after trial.

One issue that may favor the decision to stand trial is the inapplicability of the doctrine of collateral estoppel. Collateral estoppel, or issue preclusion, prohibits the relitigation of an issue that has previously been decided in a prior action involving the same party. See generally Gramatan

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[2] *An "excused" violation, refers to "justifiable non-compliance with a statute" such as those covered by the Emergency Doctrine. PJI 2:27. The excuse will be separately charged to the jury and, if accepted, will absolve the defendant from the statutory violation.*

[3] *By the plain language of the Disorderly Conduct statute, a plea of guilty requires an admission to intentional or reckless acts which are hazardous or offensive to the public.*

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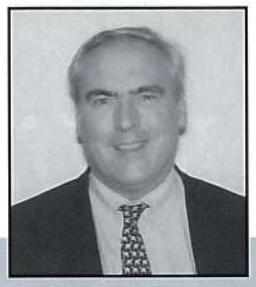

SEAN R. SMITH*

Perhaps you have had the following experience in the course of your career: you are the defense attorney in a personal injury action. Before being deposed, the plaintiff is sworn and provides his or her name and address. You begin questioning the plaintiff and ask for a Social Security number. Immediately, the plaintiff's attorney objects and directs the plaintiff not to answer. When pressed, the plaintiff's attorney responds that this information is privileged, if not completely irrelevant. A session of wrangling ensues, with no true resolution of the issue at hand.

This article attempts to answer this very question–Is a plaintiff's social security number discoverable in a personal injury case in New York ?

The Social Security administration commenced the use of social security numbers in the 1930's to keep track of those eligible for benefits. The primary use of social security numbers is to track benefits accrued by person employed in the United States for eventual payment.

Social Security numbers have been the subject of considerable litigation. In a day and age when identity theft occurs regularly, Social Security numbers and dates of birth are critical tools, easily misused in the wrong hands. The conventional wisdom (perhaps only among defense attorneys) is that plaintiffs give up certain privacy rights by filing a personal injury lawsuit. A plaintiff in such actions is normally required to provide a date of birth. Authorizations to obtain medical records related to the case are generally required of plaintiffs. A social security number can provide a defendant with additional information through various databases, especially those related to governmental agencies.

Surprisingly, however, the issue of whether a personal injury plaintiff is required to disclose his or her social security number has not been resolved by the appellate courts, and thus resolution of this issue often depends on the venue. For example, the law secretary assigned to the Intake part in Kings County, prints a booklet outlining various discovery issues, entitled "The Applicable Law Regarding the Most Frequent and Controversial Issues that Arise in the Intake Part", which has a small section pertaining to social security numbers. Quoting two cases, the booklet asserts that "the release of social security numbers constitutes an unwarranted invasion of privacy". The two cases cited are Seelig v. Sielaf, 201 AD 2d 298, 607 N.Y.S. 2d 300(1st Dept.1994) and Bibeau v. Cantiague Figure Skating Club, 294 AD 525, 742 N.Y.S. 864 (2d Dept. 2002). From the perspective of a defense attorney, both cases can be broadly distinguished, albeit for different reasons. Seelig involved an Article 78 proceeding arising out of a dispute as to whether social security numbers of correction officers could be given out in response to inquiries about third persons without the officers' express written consent. The Supreme Court and the Appellate Division ultimately concluded that the disclosure of such information constituted an unwarranted invasion of officers' privacy. In so deciding, the Appellate Division relied on the federal Freedom of Information Law (5 U.S.C. section 552[b](6). That statute holds that under certain circumstances, the release of social security numbers constitutes an unwarranted invasion of privacy. However, Seelig is easily distinguishable from situations where a plaintiff who , by suing for personal injuries, gives up certain rights of privacy in exchange for seeking damages for the alleged wrongs of others.

Bibeau involves not a personal injury matter, but a breach of contract action. In that case, the Second Department found that the Supreme Court erred in compelling the plaintiff to furnish unredacted copies of income tax returns containing her social security number. The Second Department also found that the trial court improvidently exercised its discretion in dismissing the complaint. Certainly, different standards of proof govern discovery issues in contract, as opposed to personal injury cases.

There are only a few other cases on the subject, none of which involve a personal injury plaintiff. Few cases in the state of New York address this precise issue. One case, Kupferberg v. State of New York, 97 Misc. 2d 519, 411 N.Y.S. 2d 790 (Court of Claims, 1973) provides some illustration on this issue. In that matter, the claimant moved to vacate portions of defendants' demand for a verified bill of particulars, in an action for conscious pain and suffering and wrongful death arising out of medical malpractice. The trial judge found that decedent's social security number was not material to any element of causes of action alleged and would not serve to amplify any aspect of pleadings and would be order stricken from the demand. Kupferberg can also be differentiated on various grounds. The social security number of a dead person could be arguably deemed less relevant than that of a live plaintiff whose activities are ongoing. Moreover, while the Kupferberg court decided that the social security number was not a proper item for a verified bill of particulars, it did not decide whether it was a proper line of inquiry at deposition.

The federal courts have weighed in on this issue, albeit in somewhat distinct circumstances. A district court found that New York City may not withhold from discovery the Social Security numbers and addresses of emergency workers in a civilrights lawsuit. The court in Goodman v. City of New York, 2004 WL 1661105 (S.D.N.Y.July 2004) rejected claims by the City of New York that the information was shielded under the "official information" privilege. Instead, the court ordered the data disclosed subject to a confidentiality agreement. This decision would appear to extend the ambit of discovery in relation to Social Security numbers to persons who are not parties to the action. Judge Lynch summarily rejected the claim

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Sean R Smith is an attorney in the law office of Steven G. Fauth located in Manhattan, He can be reached at SSmith@TWRGRP.COM

Worthy Of Note

VINCENT P. POZZUTO*

1. INSURANCE

RESIDENT RELATIVE EXCLUSION WAS NOT VIOLATIVE OF PUBLIC POLICY.

Pfau v. Electric Insurance Company, 788 N.Y.S.2d 441 (3rd Dept. 2005). Plaintiff passenger in an automobile case brought an action against the excess liability insurer of her father, the car's owner. The car had been permissively operated by another. The policy had an exclusion for liability coverage for personal injuries to the named insured or any of the named insured's relatives. Because the plaintiff's father had a primary policy that met the statutory requirements for limits of coverage, the Court held that the resident-relative exclusion did not violate public policy.

2. INSURANCE

EXCLUSION DEFENSE WAS NOT ESTABLISHED ON DOCUMENTARY EVIDENCE

Wright v. Evanston Insurance Company, 788 N.Y.S.2d 418 (2nd Dept. 2005). Insured brought a declaratory judgment action seeking declaration that insurer was obligated to indemnify insured for underlying personal injury action. Court held that documentary evidence submitted by insurer failed to establish by "clear and unmistakable language" capable of "no other reasonable interpretation" that an exclusion applied to negate coverage. Court also held that policy had "ambiguous and conflicting" provisions that were to be construed against insurer. Finally, the Court found that the interpretation advanced by the Insurer would make coverage "illusory".

3. INSURANCE

CLAIMS-MADE POLICY DID NOT PROVIDE COVERAGE FOR MALPRACTICE CLAIM AGAINST ATTORNEY FOR ACTS OCCURRING PRIOR TO TIME OF AFFILIATION WITH DEFENDANT.

Senate Insurance Company v. Tamarock American, 788 N.Y.S.2d 481 (3 Dept. 2005). Legal malpractice Plaintiff brought action against insurer of law firm for acts of an "of counsel" attorney which occurred before his affiliation with the firm. The policy contained a specific provision defining insured to include lawyers "acting of counsel" but only to the extent such lawyer performs services on behalf of the named insured firm. The Court found that the acts or omissions that formed the basis of the malpractice action occurred prior to the time of that target attorney's affiliation with the firm.

4. PROCEDURE

COURT AFFIRMS GRANT OF MOTION TO CHANGE VENUE FOR CONVENIENCE OF MATERIAL WITNESSES.

Gangi v. Daimler Chrysler Corporation, 788 N.Y.S.2d 406 (2nd Dept. 2005). The Court affirmed the lower Court's grant of motion to change venue from Kings County to Delaware County. Defendants submitted papers containing (1) the names, addresses, and occupations of the prospective witnesses (2) the facts to which the witnesses would testify at trial, (3) a statement that the witnesses were willing to testify and (4) a statement that the witnesses would be greatly inconvenienced if the venue of the action was not changed. The Court also held that motions to change venue can be made at any time before the trial.

5. LABOR LAW

"GRAVE INJURY" ESTABLISHED WHEN WORKER CAN NO LONGER WORK IN ANY CAPACITY.

Rubeis v. Aqua Club Inc., 788 N.Y.S.2d 292 (2004). Plaintiff sustained a brain injury when he fell 19 feet from a ladder while working at Defendant's premises. Site owner commenced a third-party action against Plaintiff's employer for common law contribution and indemnification. The Court of Appeals noted a split of authority among the departments on the meaning of "permanent total disability" under Workers' Compensation Law Section 11. Specifically, the Third and Fourth Depts. had held that the permanent total disability envisioned by Section 11 "relates to the injured party's employability and not his or her ability to otherwise care for himself or herself and function in a modern society." The Second Department, however, focused on the plaintiff's ability to engage in day to day functions. The Court, noting that the intent of the legislature in revising Section 11 was to narrow tort exposure for employers, held that limitation of permanent total disability to a vegetative state was too harsh a test and that the proper test is the ability to work in any capacity. The Court also noted that other types of grave injuries defined within the statute do not have the effect of preventing plaintiffs from performing daily life activities. Finally, the Court held that "disability" under the Workers' Compensation Law generally refers to inability to work.

6. DISCOVERY

PLAINTIFF COULD NOT PROVE IDENTITY OF MANUFACTURER OF TIRE. SPOLIATION OF EVIDENCE LEADS TO DISMISSAL OF COMPLAINT.

Albulhasa v. Uniroyal Goodrich Tire Company, 788 N.Y.S.2d 497 (3rd Dept. 2005). Plaintiff commenced a personal injury action as administrator of estate of his deceased wife. Decedent perished in an automobile accident. Plaintiff brought suit against the alleged manufacturer of a tire on the subject automobile. After reviewing the evidence, the Court held that plaintiff established only a possibility rather than a

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

Worthy Of Note

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probability that defendant was the manufacturer of the subject tire. In addition, the Court held that plaintiff's willful disposal of the tire before defendants had an opportunity to inspect it severely prejudiced defendants and warranted ultimate sanction of dismissal.

7. LABOR LAW

PLAINTIFF WAS NOT EXCLUDABLE AS A "CONTRACTOR" FROM LABOR LAW'S PROTECTIVE AMBIT. SUMMARY JUDGMENT WAS PROPERLY GRANTED ON SECTION 240 CLAIM. SUMMARY JUDGMENT WAS DENIED ON SECTION 241(6) CLAIM.

Spages v. Gary Nill Associates, Inc., 788 N.Y.S.2d 355 (1st Dept. 2005). Plaintiff was injured in a scaffold accident. The Court held that although plaintiff contracted to perform the work on the premises leased by defendant, he was not disqualified from Section 240 protections as a contractor. Plaintiff did not act as a general contractor. The owner maintained control over all hiring and plaintiff had very little supervisory authority and control over the project. The Court further held that plaintiff's fall was attributable to failure of the lessee and owner to provide plaintiff with adequate scaffolding, thus Section 240 was properly granted. However, in light of evidence that plaintiff himself equipped the scaffold with knotted, non-stress quality floor boards, and contributory negligence is a defense to Section 241(6) claims, the motion for summary judgment on Section 241(6) should have been denied.

8. DAMAGES

UNDOCUMENTED ALIEN'S CLAIMS FOR LOST WAGES LIMITED

Sanango v. 200 East 18th Street Housing Corp., 788 N.Y.S.2d 314 (1st Dept. 2004). The Court held that prior holdings allowing an undocumented alien to recover lost wages that might have been earned in the United States was no longer tenable after the United States Supreme Court holding in Hoffman Plastic Compounds v. NLRB 535 U.S. 137, L.Ed.2d (2002) The Court held that pursuant to Hoffman, allowing undocumented aliens to recover lost wages that they might have earned in the United States would run counter to the federal immigration policies embodied in the Immigration Reform and Control Act of 1986. The Court further held that undocumented aliens would be permitted to recover those wages that they would have been able to earn in their country of origin.

9. PREMISES LIABILITY

OPERA HOUSE WAS NOT LIABLE TO INJURED PLAINTIFF WHERE ANOTHER PATRON FELL INTO HER.

Gilson v. Metropolitan Opera, 788 N.Y.S.2d 342 (1st Dept. 2005). Plaintiff was injured while attending a performance at defendant's premises. Plaintiff fell when another patron, who had difficulty walking, and was proceeding to his seat after the house lights went down, fell into her. The Court held that the "house rule" that patrons not be seated after the house lights went down was not established primarily for safety, and even if it was, would amount to an internal rule that imposes a standard of care that transcends reasonable care. The Court further held that plaintiff's expert's theories regarding lighting conditions, and the cited Building Code sections either did not apply or were not probative of the condition of the theater at the time of the accident. Finally, the Court held that nothing in plaintiff's submissions explained how this alleged negligence of the defendant caused the first patron to fall into plaintiff and that his fall appeared to be related to his own difficulty ambulating.

10. AUTOMOBILE LIABILITY

PUNITIVE DAMAGES

PROOF OF DRAG RACING CAN SUPPORT A CLAIM FOR PUNITIVE DAMAGES. OWNER OF VEHICLE CANNOT BE HELD LIABLE FOR PUNITIVE DAMAGES.

O'Connor v. Kuzmicki, 788 N.Y.S.2d 414 (2nd Dept. 2005). In an action to recover damages for personal injuries arising out of a motor vehicle accident, the Court held that proof of defendant's drag racing can support a claim for punitive damages. The Court further held the owner of the vehicle could only be vicariously liable, and thus, could not be liable for punitive damages.

11. INSURANCE

INSURER'S STATUS AS AN UNLICENSED CARRIER DOES NOT AFFORD BASIS TO DENY ENFORCEMENT OF PROVISION WHICH EXCLUDED COVERAGE

3405 Putnam Realty v. Chubb Custom Ins., 788 N.Y.S.2d 64 (1st Dept. 2005). Plaintiff commenced declaratory judgment action against insurer seeking declaration that insurer owed plaintiff both defense and indemnity related to underlying personal injury suit seeking damages resulting from exposure to lead. The lower Court denied insurer's motion for summary judgment. The Appellate Division held that exclusion in the policy for bodily injury arising from lead exposure was in clear and unmistakable language and should have been given effect. The Court further held that although Chubb was an unauthorized insurer in New York, under the statutory scheme, it is the excess line broker, not the unauthorized insurer, that must be licensed, and therefore the insurer was improperly penalized for the broker's failure to comply with the licensing requirements. Finally, the Court held that even if the insurer was properly chargeable with the excess line broker's failure to secure proper licensing, refusing to enforce the lead exclusion was an unauthorized penalty.

12. INSURANCE

SEEPAGE/POLLUTION/CONTAMINATION EXCLUSION DID NOT APPLY TO EXCLUDE INSURED'S ALLEGED LOSSES.

Pepsico, Inc. v. Winterthur International America Insurance Company, 788 N.Y.S.2d 142 (2nd Dept. 2004). Plaintiff, manufacturer of soft drinks, brought an action against its first-party property insurer for breach of contract, challenging the insurer's disclaimer for losses that occurred after faulty raw ingredients caused the manufacture of a batch of soft drinks with an "off taste." The insurer disclaimed based on a seepage/pollution/contamination exclusion contained within the policy, claiming that the provision applied to product contamination based on the plain meaning of the word "contaminate". The Court held that in construing terms in pollution exclusions, the New York Courts favor a common sense approach over a literal approach. The court concluded that pollution exclusions address environmental type harms, and that therefore the exclusion did not apply to bar coverage.

13. LABOR LAW

PLAINTIFF, WHOSE FINGERS WERE SURGICALLY REATTACHED, DID NOT SUSTAIN "GRAVE INJURY".

Vincenty v. Cincinnati, Inc. 788 N.Y.S.2d 92 (1st Dept. 2005). Plaintiff, whose pinky and ring fingers were amputated in a work place accident, had his fingers surgically reattached. Plaintiff regained partial use in both fingers. The Court held that because the fingers and their use were not permanently and totally lost, plaintiff did not sustain a "grave injury" under Section 11 of the Workers' Compensation Law, and thus, third-party action against the employer must be dismissed.

14. WRONGFUL DEATH

BUSINESS AGENT NOT ENTITLED TO SEEK DAMAGES FOR ALLEGED WRONGFUL DEATH OF MUSICIAN.

Barry & Sons, Inc. v. Instinct Productions LLC, 788 N.Y.S.2d 71 (1st Dept. 2005). Music producer alleged that video producer was negligent in arranging for transportation of pop star, Aliyah, who died in airplane accident. The Court held that music producer was not valid plaintiff in wrongful death under EPTL Section 5-4.1, which limits recovery for wrongful death to distributees at law of decedent. The Court further held that music producer's description of Aliyah as the "primary asset" of the company and thus arguing that negligence action was viable, did nothing to dispel the obvious, that the claims asserted nothing more than wrongful death.

15. MEDICAL MALPRACTICE/EVIDENCE

PROFFERED TESTIMONY REGARDING CAUSATION WAS INADMISSIBLE UNDER FRYE.

Pauling v. Orentreich Medical Group, 787 N.Y.S. 2d 311 (1st Dept. 2005). The Court held that plaintiff failed to meet her burden of proof during a Frye hearing that her theory of causation was generally accepted in the medical community. The theory that facial injections of liquid silicone could cause "silicone toxicity" was novel, not recognized in standard text books, and unsupported by any medical literature. Further, no scientific organization or national board has recognized a causal relationship between silicon and systemic disease.

16. LABOR LAW

3 MM SCAR AND SOME MOTTLING OF CHEEKS DID NOT CONSTITUTE A "GRAVE INJURY"

Krollman v. Food Automation Service Techniques, Inc., 787 N.Y.S.2d 581 (4th Dept. 2004). Plaintiff was injured during the course of her work for Third-Party Defendant. Third-Party Defendant moved for summary judgment arguing that plaintiff had not sustained a "grave injury" under Section 11 of the Worker's Compensation Law. Plaintiff and third-party plaintiff submitted the affidavit of an expert who opined that plaintiff sustained severe and permanent disfigurement. The Court held that expert medical evidence is relevant on the issue of permanence, but not severity. The Court further held that a 3 mm scar and some mottling of the cheeks failed to rise to the statutory threshold of severe facial disfigurement constituting a "grave injury" under Section 11 of the Workers' Compensation Law.

17. PROCEDURE

ORDER STRIKING DEFENDANT'S ANSWER DID NOT STRIKE DEFENDANT'S CROSS-CLAIMS AGAINST CO-DEFENDANTS.

Cillo v. Resjefal Corp., 787 N.Y.S. 2d 289 (1st Dept. 2004).

The Court held that the lower Court's interpretation of a ruling striking the answer of one defendant for failing to respond to plaintiff's discovery demands erroneously included the striking of cross-claims against co-defendants. The Court stated that the Order was intended to only benefit plaintiff, that the cross-claims were not at issue and that the co-defendants in no way supported the motion to strike. In addition, the Court held that the defendants conduct in failing to respond to plaintiff did not prejudice the co-defendants. Thus, the cross-claims survived.

18. SETTLEMENT

LETTERS BETWEEN ATTORNEYS CONSTITUTED BINDING SETTLEMENT AGREEMENT.

Roberts v. Stracick, 787 N.Y.S. 2d 591 (4th Dept. 2004). Plaintiff's counsel sent a letter to defendant's counsel with a settlement demand, stating that it would remain open for 30 days. Defendant timely notified plaintiff in writing of Defendant's acceptance of the demand. The Court held that this constituted a binding settlement agreement under CPLR Section 2104.

19. LABOR & EMPLOYMENT

PLAINTIFF'S CIRCULATION OF A MEMORANDUM TO OTHER DEPARTMENT CHAIR PERSONS CRITICIZING MANAGEMENT WAS INSUBORDINATE AND NOT PRETEXTUAL.

Trieger v. Montefiore Medical Center, 789 N.Y.S.2d 42 (1st Dept. 2005). Plaintiff brought action for breach of employment contract and age discrimination. The Court held that plaintiff's circulation of a memorandum to other department chair persons criticizing management gave defendant just cause to terminate plaintiff's employment contract. The Court noted that plaintiff was terminated immediately after circulating the memorandum, and there was no other evidence to support plaintiff's claim of pretext.

20. LABOR LAW

FACT ISSUE PRECLUDES SUMMARY JUDGMENT ON PLAINTIFF'S 241(6) CLAIM.

Militello v. 45 West 36th Street Realty Corp., 789 N.Y.S.2d 23 (1st Dept. 2005). Plaintiff, a drywaller, was injured when he tripped on a piece of pipe extending from an uninstalled radiator. Plaintiff testified that several such radiators were "scattered back and forth" across the room he was working in. Citing Industrial Code Section 23-1.7(e)(2), the Court held that plaintiff's testimony created an issue of fact as to whether the radiators were "scattered" and thus a violation of the code.

21. DISCOVERY

DEFENDANTS ESTABLISHED POSSIBLE RELEVANCY OF TESTIMONY OF DECEDENT'S STEP-SON AND BABYSITTER IN WRONGFUL DEATH ACTION.

James v. American Tobacco Company, 789 N.Y.S.2d 90 (1st Dept. 2005). Decedent's estate brought an action against defendant tobacco company for physical and emotional injuries decedent suffered allegedly as a result of cigarette smoking. The Court held that defendant established the possible relevance of the testimony of decedent's step-son and baby-sitter, and granted motion for open commissions. The Court found that the witness had close personal contact with the decedent in the 1950's and 1960's, and thus may be able to testify regarding decedent's state of mind and potential awareness of heath hazards of smoking during that period.

22. INSURANCE

INSURER CREATED PRESUMPTION OF MAILING OF EXCLUSION.

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Morales v. Yagloobian, 786 N.Y.S.2d 562 (2nd Dept. 2004). Insured brought a declaratory judgment action against its insurer seeking defense and indemnity in an underlying lead paint case. The Court held that the insurer submitted sufficient evidence of its mailing policies to create a rebutable presumption that it had mailed to the insured a notice of a new lead poisoning exclusion 60 days before the policy's renewal date. The Court further held that the insured's denial of receipt of that notice, without-more, is insufficient to rebut the presumption.

23. BAD-FAITH

INSURED FAILED TO ESTABLISH BAD-FAITH.

Little Princess Express Cab Corp. v. American Transit Insurance Company, 785 N.Y.S.2d 430 (1st Dept. 2004). Insured brought action against Insurer alleging bad faith for failure to settle an underlying personal injury action. The Court held that the insured failed to make any showing that a demand for settlement was made, and that the insured lost an opportunity to settle the claim when all serious doubts about its liability were removed, as is required in a bad-faith action. The Court further held that insurer's failure, if any, to keep insured apprised of the developments in the case against it were insufficient standing alone to constitute bad-faith.

24. CONTRACTUAL INDEMNIFICATION

WRITTEN AGREEMENT BETWEEN PREMISES OWNER AND PLAINTIFF'S EMPLOYER WAS EFFECTIVE ON DATE OF PLAINTIFF'S ACCIDENT.

Elescano v. Eighth-19th Company, LLC, 785 N.Y.S.2d 447 (1st Dept. 2004). Plaintiff was employed by AT&T when he was injured during the course of his work on defendant's premises. Defendant brought a third-party action seeking contractual indemnification from AT&T based on a written agreement. The accident occurred on December 8, 2000. The facts were unclear as to when the agreement was executed. The Court held that "a term in a contract executed after a plaintiff's accident may be applied retroactively where evidence establishes as a matter of law that the agreement pertaining to the contractor's work was made "as of" a pre-accident date, and the parties intended that it would apply as of that date." The Court noted that the first page of the agreement "made as of the 8th day of December" and that above the signature lines, it read "[t]his Agreement entered into as of the day and year first written above." The Court also held that the lower Court correctly relied on the deposition testimony of an AT&T employee who testified that the work commenced on December 8, 2000.

25. LABOR AND EMPLOYMENT

SUMMARY JUDGMENT GRANTED TO EMPLOYER ON CAUSES OF ACTION ALLEGING DEFAMATION, TORTIOUS INTERFERENCE WITH EMPLOYMENT OR BUSINESS RELATIONS AND TORTIOUS INTERFERENCE WITH PROSPECTIVE EMPLOYMENT OR BUSINESS RELATIONS.

Baker v. Guardian Life Ins. Co. of America, 785 N.Y.S.2d 437 (1st Dept. 2004). Plaintiff brought action against former employer alleging Defamation, Tortious Interference with Employment or Business Relations and Tortious Interference with Prospective Employment or Business Relations. The Court dismissed all three causes of action. The Court held that plaintiff's cause of action for defamation was an improper attempt to circumvent the rule that an at-will employee has no cause of action for wrongful discharge. The Court held that as an at-will employee, plaintiff could have no cause of action based on a co-employee's alleged tortious interference with his employment. Finally, the Court held that plaintiff failed to identify any specific employment or business relationship that he was prevented from entering into as a result of defendant's conduct, nor did he adequately allege that defendant acted with the sole purpose of harming him, such as would support a claim for tortious interference with prospective business or employment relations.

26. PRODUCTS LIABILITY

ALLEGED DEFECT IN FORKLIFT WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY.

Garcia v. Crown Equipment Corporation, 786 N.Y.S.2d 109 (2d Dept. 2004). Plaintiff sustained injuries when he fell from a raised pallet on a forklift in a work-related accident. Plaintiff brought an action against the manufacturer of the forklift. Plaintiff's employer had purchased a safety platform which could attach to the forklift and completely enclose a passenger. The safety platform also had an interlock system that prevented the forklift from moving while it was being used. However, it was not used at the time of plaintiff's accident and appeared to have been non-operational at the time. Plaintiff alleged that the forklift was defectively designed and had inadequate warning labels. Plaintiff also alleged that defendant failed to repair and maintain the forklift and safety platform. The Court held that because plaintiff did not use the safety platform, the purported design defect was not a proximate cause of the accident. The Court further held that the warning labels were adequate to convey the danger of riding while raised on the forks, unenclosed by the safety platform. Finally, the Court held that the maintenance agreement did not cover the safety platform, and that plaintiff failed to raise a triable issue of fact relative to defendants' showing that it had performed proper maintenance on the forklift.

27. LABOR LAW

§240 DID NOT APPLY TO PLAINTIFF'S ACTION.

Ramos v. Champion Combustion, Inc., 786 N.Y.S.2d 1 (1st Dept. 2004). Plaintiff was injured during the course of his work on a boiler installation project. Plaintiff was standing on a permanent staircase, with one foot on the bottom step and the other on the third step. Plaintiff was holding onto steel plates that were stacked vertically on the floor, about chest high. Plaintiff was injured when his co-workers attempted to remove a steel plate from the pile, causing the pile to shift and fall onto him. The Court held that the Labor Law §240 cause of action was properly dismissed as the plates were not elevated above the work site and his activities did not otherwise involve the extraordinary elevation-related risks envisioned by the statute. The Court further held that plaintiff failed to rely upon specific or applicable sections of the Industrial Code, and dismissed the Labor Law §241(6) claim. Finally the Court held that defendant did not exercise supervisory control over plaintiff's work, and held that the Labor Law §200 cause of action was properly dismissed.

Discovering Social Security

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of the City of New York that the "official information privilege" protects witnesses from disclosing the requested information to plaintiff. Notably, the court noted that the City of New York failed to offer case law in support of its position. The decision goes on to state that there is no generic "privacy" privilege under the broad discovery regime of the Federal Rules of Civil Procedure, other than the provisions under Rule 26 (c) to protect persons from "annoyance, embarrassment, oppression, or undue burden or expense". The Goodman decision would appear to examine, and reject, the notion that Social Security numbers are privileged. The decision is also noteworthy in that it uncovers Social Security numbers for persons who are not even actual parties to the underlying action. Indeed, Goodman could conceivably provide precedent for plaintiff's attorneys seeking to uncover the Social Security numbers for defendants in personal injury actions.

Cases from other jurisdictions also provide some illustration. In Busse v. Motorola, Inc. 2004 WL 1393612 (Ill. App.1 Dist. 2004) a cell phone customer brought a class action against various cell phone companies. The court noted several federal court cases where social security numbers were deemed not to be private or confidential . See Phillips v. Grendahl, 312 F. 3d 357, 373 (8th Cir. 2002). (discovery of a person's social security number does not fit the profile of intrusion upon seclusion); Andrews v. TRW, Inc. 225 F. 3d 1063, 1067 (9th Cir. 2000), rev'd on other grounds, 534 U.S. 19, 122 S.Ct. 441, 151 L. Ed. 2d 339 (2001) "[w]e take judicial notice that in many ways persons are required to make their social security numbers available so that they are no longer private or confidential but open to scrutiny or copying ").

Plaintiffs in personal injury cases forfeit significant rights of privacy by filing a claim or lawsuit. Plaintiffs are required to furnish authorizations for health care providers and collateral sources related to their claims. While these sources and the records contained therein may themselves lead to plaintiff's social security number, courts in New York state have not clarified whether the plaintiff's social security number is a necessary item to be provided in such case. However, it does not appear that plaintiffs in personal injury actions are protected from providing social security numbers under any established right of privacy. Indeed, the federal courts provide broad parameters for provision of social security numbers in various contexts. It is difficult to imagine that a person filing a lawsuit based upon the alleged wrongs of others could logically claim that this information is either privileged or irrelevant.

The real question remains whether social security numbers are relevant in personal injury cases. Certainly, social security numbers have significant utility in many instances. A social security number acts as a strong identifier in instances where a plaintiff has an exceedingly common name. Information from a variety of locales can be gleaned from a social security number. Various employment information can oftentimes be related to this number, as can motor vehicle information from state archives. Health care data can also be organized by social security number. In an era where much information can be generated from the touch of a computer key, a bare social security number gains increasing relevance on a regular basis. Nonetheless, the discovery and relevance of these numbers needs to be directly addressed by the state courts in New York. However, the issue to be determined is somewhat narrow and may or may not be a logical topic for appellate review in and of itself. Federal courts have been supportive of the notion that the social security number of a relevant person is discoverable in a variety of actions. While it is possible that state courts might ultimately determine that the relevance of these numbers is to be ascertained on a case by case basis, a social security number has increasing value for defendants. Hopefully, the courts will determine that the value and relevance of such numbers merits discovery in New York courts.

The Erosion of the "Integral and Necessary"

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In Adair v. Bestek Lighting and Staging Corp.,[14] the First Department affirmed the denial of plaintiff's motion for partial summary judgment. Plaintiff, a stagehand, ascended a man-lift in order to position overhead lights in preparation of a performance. The court considered the lights to be already fully installed when plaintiff began to adjust them. She was then injured when the lift fell over. Referring to Martinez, the Appellate Division refused to acknowledge plaintiff s necessary and integral argument because it considered the construction, that is, the installation of the lights, to have been already completed at the time of injury. Also, plaintiff failed to show in any other way that the activity fell within Section 240(1).

While the Martinez decision stands, the integral and necessary reasoning has resurfaced in the treatment of supervisors injured on construction sites. In Campisi v. Epos Contracting Corporation,[15] the Appellate Division reasoned that Martinez did not address or apply to the activity of supervising, that is, the ongoing inspection of construction work as it is in progress.

Plaintiff was a superintendent of construction hired by the City of New York. As he returned to the renovation site after lunch, plaintiff did not hear any of the typical noises produced from construction which indicated that no work was being performed inside the building. As he walked in through the entrance to investigate, plaintiff fell through a gap in the floor and suffered an injury. The Appellate Division reversed the lower court's decision to grant summary judgment to defendant. It held that while plaintiff's contribution to the project was not through the use of any construction tools, he was "as much employed 'in the [construction]' within the meaning of the statute as any of the employees whose work he inspected."[16] Therefore, an inspector or supervisor who is injured during construction may be protected under the integral and necessary test, while a worker who is injured before or after the construction period is not.

In another case involving an inspector, Prats v. Port Authority of New York and New Jersey,[17] the Court of Appeals accepted and answered in the affirmative the certified question of whether inspections of construction work fell within purview of section 240(1). Plaintiff was an assistant mechanic working under contract to repair and rehabilitate air handling units in the World Trade Center. On the day of the incident, he and a coworker were assigned to prepare air units for inspection. Plaintiff was positioned at the base of a ladder holding it in place while the other worker ascended. Shortly after, plaintiff also began to ascend the ladder in order to bring a wrench to his co-worker. When he climbed to a point about fifteen feet above ground, the ladder slid out from under him, he fell and was injured. In concluding that plaintiff s activity was protected, the court indicated a

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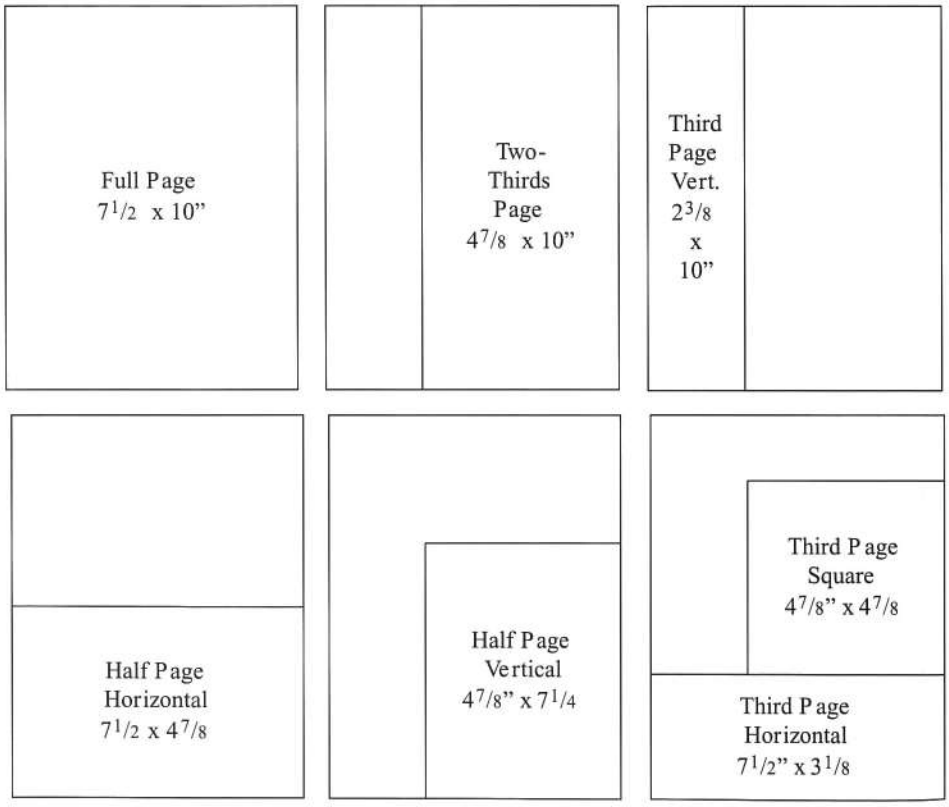

The Erosion of the "Integral and Necessary"

Continued from page 15

"confluence of factors" that may bring a worker's activity within the statute. These include whether the nature of the worker's position requires him to routinely perform an enumerated activity; whether his employer is under contract to complete an enumerated activity; and whether he was participating in an enumerated activity during and on the site of the specific project.

In the instant decision, that plaintiff was injured "during" construction was not dispositive. Eventually, other factors, including his position as a mechanic and the purpose of his employer's contract, afforded him the protection of the statute.

The "integral and necessary" test once worked to potentially expand the duty owed by owners and contractors to their workers beyond the enumerated activities in Labor Law Section 240(1). This test may still be used by workers injured during inspection services , however, the Court of Appeals has clearly ruled that the "integral and necessary" test will no longer be applied to enlarge the grasp of the Labor Law and it seems clear that the Court's mission to contract the Labor Law will continue.

[1] *93 N.Y.2d 322, 712 N.E.2d 689, 690 N.Y.S.2d 524*
[2] *184 A.D.2d 197, 637 N.Y.S.2d 991 (3rd Dept. 1996)*
[3] *N.Y. LAB. LAW 240(1) (McKinney 2002)*
[4] *Id at 1002*
[5] *218 A.D.2d 197, 637 N.Y.S.2d 991 (3rd Dept. 1996)*
[6] *Id at 198-199*
[7] *93 N.Y.2d at 322*
[8] *Id.*
[9] *299 A.D.2d 817, 7510 N.Y. N.Y.S.2d 246 (4th Dept. 2002)*
[10] *Id at 818*
[11] *302 A.D.2d 1012, 755 N.Y.S.2d 186 (4th Dept. 2003)*
[12] *Id at 1013*
[13] *Id.*
[14] *298 A.D.2d 159, 748 N.Y.S.2d 362 (1st Dept. 2002)*
[15] *299 A.D.2d 4, 747 N.Y.S.2d 218 (1st Dept. 2002)*
[16] *Id at 7*
[17] *100 N.Y.2d 878, 800 N.E.2d 351, 768 N.Y.S.2d 178*

That's The Ticket

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Home Investors Corp., v. Lopez, 46 N.Y.2d 481, 414 N.Y.S.2d 308 (1979). However, a conviction of a traffic offense after trial does not give rise to the doctrine of collateral estoppel. Rice v. Massalone, 160 A.D.2d 861, 554 N.Y.S.2d 294 (2nd Dep't 1990); see also Gilberg v. Barbieri, 53 N.Y.2d 285, 441 N.Y.S.2d 49 (1981). Accordingly-again because of the nature of traffic adjudications-a party in a civil suit may relitigate the statutory violation.[4] Rice. As a result, a defendant convicted after trial is freely permitted to reargue the violation and, unlike a defendant who has pled guilty, has not made a formal admission.

Another factor in favor of trial is the inadmissibility of a trial conviction as evidence in a subsequent civil suit. Remarkably, a conviction after trial of a traffic offense, unlike a guilty plea, is not admissible as evidence in a subsequent civil suit based upon the same incident. See e.g., Augustine v. Interlaken, 68 A.D.2d 705, 418 N.Y.S.2d 683 (4th Dep't 1979); Montalvo v. Morales, 18 A.D.2d 20, 239 N.Y.S.2d 72 (2nd Dep't 1963); Walther v. News Syndicate Co., Inc., 276 A.D. 169, 93 N.Y.S.2d 537 (1st Dep't 1949); Calia v. Khoury, 114 Misc.2d 243, 450 N.Y.S.2d 996 (Sup. Ct, Ulster Cty 1982). While this rule appears counterintuitive, further analysis reveals its sound policy and evidentiary basis. Namely, a guilty plea requires and subsumes an actual admission in open court; whereas, a verdict after trial held in the humblest forum, typically without counsel or even a genuine motivation to contest the charges, should not dictate the outcome of a subsequent civil suit where the stakes are much higher and the ultimate payor may be an insurance company unaware, or uninvolved, in the defense of the traffic infractions. See generally Augustine, supra.

Often, the most desirable solution is a guilty plea to the infractions which do not relate to the happening of the accident, such as operating an unregistered vehicle, in exchange for dismissal of the remaining charges. Of course, this is the defendant's ideal plea bargain and may not be offered by the prosecutor or accepted by the court. If such a bargain can not be achieved–when considering solely the implications on a civil suit–a defendant should stand trial rather than enter a guilty plea. This is true for two simple reasons: collateral estoppel does not apply and a traffic trial conviction is inadmissible as evidence in a civil suit. Of course, other considerations such as the cost and inconvenience of a trial and the client's exposure to punishment, certainly should be taken into account when advising a client how to proceed. On the other hand, a negotiated plea bargain, which reduces the nature of the infraction or the number of infractions, with an agreed upon sentence, has its own obvious benefits.

One scenario in which a trial is generally preferable to a plea is where the named defendant in the underlying traffic case is a corporation rather than an individual. In such a case there is no possibility of incarceration. Further, a corporation will presumably have the resources available to pay any fines if convicted. In light of the favorable evidentiary treatment, a corporate client that is willing to bear the costs for defense, or whose insurer extends coverage, is often best advised to stand trial rather than accept any plea to any infraction that relates to the happening of the accident.

Finally, the practioner should be cognizant of the trial record created in the traffic court. Certainly, the officer who issued the summonses will be required to take the witness stand, creating an otherwise unavailable opportunity for discovery. Additionally, if a trial is held, the traffic court defendant should be able to obtain prior witness statements and any exculpatory material prior to trial. In some instances, the other party to the accident and potential plaintiff, will be required to testify; again, creating a transcript that will be available for later use. On the contrary, the defendant is not required to testify in the traffic case unless he chooses to do so. While each case must be treated individually, these factors weigh in favor of a trial rather than a plea. However, as is often the case, discovery cuts both ways and any evidence in the traffic trial that establishes the defendant's negligence will be available for the plaintiff's later use as well.

Closing Thoughts

Although each case has its own complexities, the issues discussed herein should provide the practioner with an overview of the substantive factors to be considered when coordinating the defense of traffic infractions with the defense of a concurrent or anticipated civil suit. Clearly, the decision whether to enter a plea of guilty or demand a trial to a traffic infraction has ramifications beyond the walls of the traffic courthouse. Ultimately, however, it must be the decision of the client-with full knowledge of the risks and benefits-whether to enter a guilty plea or stand trial.

[4] *However, a civil jury will be bound by the same instruction set forth above that a finding of a statutory violation constitutes negligence per se.*

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