VOL. 2 NO. 4 SUMMER 2000

DEFENDANT

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

FEATURING:

REMEDIES OF THE EXCESS INSURER

ALSO IN THIS ISSUE:

BULK RATE
U.S. POSTAGE
PAID
WHITE PLAINS, NY
PERMIT NO. 5007

2000 Display Advertising Rates

(Prices are per insertion)

Ad Size	Per Insertion
Full Page	$400
2/3 Page	350
1/2 Page	275
1/3 Page	175

Deadlines:

The Defendant is published quarterly, four times a year.

Reservations may be given at any time with the indication of what issue you would like the ad to run in.

Deadlines are two weeks prior to the printing date.

Discount:

Recognized advertising agencies are honored at a 15% discount off the published rate.

Art Charge:

Minimum art charge is $75.00. Custom artwork, including illustrations and logos, is available at an additional charge. All charges will be quoted to the advertiser upon receipt of copy, and before work is performed.

Color Charge:

Each additional color is billed net at $175.00 per color (including both process and PMS).

Bleed Charge:

Bleed ads are billed an additional 10% of the page rate.

Placement Charge:

There is a 10% charge for preferred positions. This includes cover placement.

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Call for details about our low cost insert service.

Production Information

Mechanical Requirements:

Ad Size	Width x Height
Full Page	7 1/2" 10"
Two-Thirds Page	4 7/8" 10"
Half Page (Vertical)	4 7/8" 7 1/4"
Half Page (Horizontal)	7 1/2" 4 7/8"
Third Page (Vertical)	2 3/8" 10"
Third Page (Square)	4 7/8" 4 7/8"
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Advertising Copy:

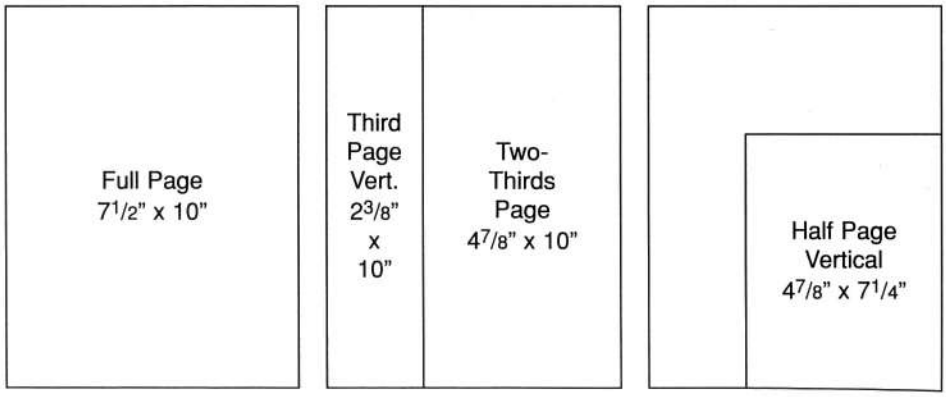
Publisher requires "Camera Ready" art conforming to sizes shown at left. Stats, veloxes or negatives are acceptable BUT NOT FAXED COPY. Publisher provides art if required (see item "Art Charge").

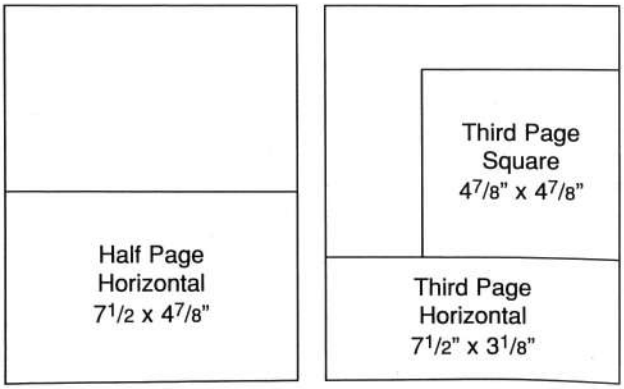
Color:

Specify PMS or ROP. For best results use 133 line screen negatives, right reading, emulsion side down - offset negatives only. For 4-color ads, progressive proofs or engraver's proofs must be furnished.

Bleed:

The trim size of the publication is 8 1/2" x 11". For bleed ads, allow an additional 1/2 inch on each side for trimming purposes.





THE DEFENDANT

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PRESIDENT'S MESSAGE

*by Gail L. Ritzert**

It is not often that an issue presents itself to the profession that may have a dramatic impact on the services lawyers provide to their clients. One such issue presented itself last June when the ABA's Commission on Multidisciplinary Practice issued a recommendation to amend the Model Rules of Professional Conduct to permit lawyers to share fees with non-lawyers.

The ABA's recommendation received immediate support from the Big Five accounting firms. In fact, the Big Five were the major supporters of the proposed amendment since MDP's were largely created by the Big Five in Europe and Australia, and generally have not existed in the United States due Rule 5.4 of the Models Rules, which prohibits lawyers from sharing fees with non-lawyers. The only jurisdiction to permit lawyers to share fees with non-lawyers is the District of Columbia, and then only under certain circumstances.

The push for the introduction of the MDP in the United States has come from the Big Five accounting firms. Accountants turned to forming partnerships with lawyers in Europe to increase the services it provided to its customers to combat the loss of business that followed the revision of the tax code in 1986. The MDP proved to be a financial boon for the Big Five. Naturally, the Big Five would like to experience the same success in the United States.

As expected, lawyers have strenuously opposed the MDP citing the loss of client confidentiality and autonomy. This opposition has been viewed by the proponents of the MDP as a knee jerk reaction, based solely on self-preservation. However, the opponents of the MDP found support for its position in the codes of professional responsibility that governed both lawyers and accountants. In comparing the professional responsibility of the accountant to the lawyers, the most dramatic difference between the two professions is the duty of confidentiality. Where the lawyer has the utmost obligation to preserve and protect client confidences, accountants are obligated to disclose all relevant information necessary to ensure

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** Ms Ritzert is counsel with the firm of Ohrenstein & Brown*

REMEDIES OF THE EXCESS INSURER FOR MALPRACTICE OF DEFENSE COUNSEL: The Quadripartite Relationship

*by John J. McDonough **

There has been significant judicial examination recently of the "tripartite relationship"[1] and the various duties arising between an insurer, an insured and counsel appointed to represent the insured by its insurer. Missing from most of the discussion is any consideration of the rights of the excess insurer where there has been a breach of fiduciary duty by the primary to the excess carrier and possible malpractice by its appointed counsel. Does New York recognize any rights or remedies of the excess insurer in this quadripartite situation? The New York Court of Appeals has yet to rule on this issue but based on two lower court decisions and one District Court decision, New York is one of the few jurisdictions that have permitted a direct action by an excess insurer against a primary carrier rather than limiting it to only those rights available to the subrogee of the insured. Moreover, the First Department has recognized an excess insurer's right to maintain a claim on its own behalf against an insurer's attorneys for malpractice.

While the answer to the question of who is a lawyers client in a situation where the attorney is appointed by the liability insurer of the insured to defend the insured in a tort action continues to evolve, it is clear the excess insurer is contractually bound only with the insured.[2] The excess insurer has a duty to indemnify the insured upon exhaustion of the primary layer by settlement or judgment but generally has no duty to defend. Consequently, the excess insurer relies on the primary insurer to select and hire defense counsel. Given the lack of privity between the excess carrier and appointed defense counsel there would appear to be no duty to be breached as none is owed.

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**Mr. McDonough, the Editor in Chief of the Defendant, is a partner in the Manhattan office of the international firm Cozen and O'Connor, P.C.*

REMEDIES OF THE EXCESS INSURER FOR MALPRACTICE OF DEFENSE COUNSEL...

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In 1983 the Appellate Division of the first Department reinstated an excess insurers complaint against a primary insurer and a law firm in **Hartford Accident and Indemnity v. Michigan Mutual Insurance Co.**, 93 A.D.2d 337, 462 N.Y.S.2d 175 (1st Dep't 1983), aff'd **Hartford Accident and Indemnity Co. v. Michigan Mutual Ins. Co.**, 61 N.Y.2d 569, 463 N.E.2d 608, 475 N.Y.S.2d 267, 1984. Hartford, excess carrier of the defendants in the underlying action, contended throughout the defense of the underlying personal injury action that the defendants, whose primary insurer Michigan Mutual appointed defense counsel for the defendants, should have commenced a third-party action against plaintiff's employer. Hartford alleged this was not done, as it would have expanded the exposure of Michigan Mutual who was the workers' compensation insurer for the employer.

In its complaint, Hartford alleged breach of fiduciary duty by Michigan Mutual and malpractice by its appointed defense counsel. The lower court dismissed the complaint and the issue thus presented on appeal was whether Hartford has a cause of action in its own right, as opposed to acquiring such right through equitable subrogation from its insured, as against Michigan Mutual. In reinstating the complaint for breach of fiduciary duty the Court stated:

> It is well established that, as between an insurer and its assured, a fiduciary relationship does exist, requiring utmost good faith by the carrier in its dealings with its insured. In defending a claim, an insurer is obligated to act with undivided loyalty; it may not place its own interests above those of its assured. Similarly, it has been recognized in this and other states as well as in the federal courts, that the primary carrier owes to the excess insurer the same fiduciary obligation which the primary insurer owes to its insured, namely, a duty to proceed in good faith and in the exercise of honest discretion, the violation of which exposes the primary carrier to the liability beyond its policy limits...

Id. at 341, 462, N.Y.S.2d 178. The Court went on to find Hartford could sue for a breach of the duty owed by the primary carrier in it right. The Court stated the primary insurer, acting as a fiduciary, "is held to an exacting standard of utmost good faith."

With respect to the potential "privity" problem facing an excess carrier due to the fact the excess carrier generally does not have a duty to defend and thus does not usually appoint defense counsel the First Department addressed that issue in **Great Atlantic Insurance Co. v. Weinstein**, 125 A.D.2d 214, 509 N.Y.S.2d 325, 1st Dep't 1986). In this matter the Court reinstated an excess insurer's compliant alleging malpractice against defense counsel appointed by the primary insurer. In doing so the Court found the compliant "legally sufficient" under CPLR §3211 in its allegations that defense counsel owed a duty not only to his client, the insured, but a similar duty to the excess carrier.

More recently Judge Nina Gershon of the United States District Court for the Eastern District of New York was compelled to address New York law on the rights of an excess carrier as against a primary insurer and its assigned defense counsel in **Allstate Insurance Co. v. American Transit Ins.**, 977 F.Supp 197 (E.D.N.Y. 1997). In this matter American Transit Insurance Company was the primary insurer for the lessor, lessee and the driver of a truck that caused severe injuries to two plaintiffs in underlying personal injury actions. Federal Insurance Company was an excess insurer of the lessee and the driver of the truck and Allstate was the excess insurer of the lessor of the truck. American Transit hired one defense firm to represent all three defendants. Allstate alleged that this representation involved conflicts and/or potential conflicts which none of the defendants were advised of. Furthermore, Allstate alleged that neither American Transit nor its assigned defense counsel provided proper notice of the state court action. Allstate and Federal each sought to recover the one million dollars each paid as part of a pre-trial settlement of the action by alleging American Transit breached the fiduciary duties it owed to the excess insurers and by claiming the appointed defense counsel committed malpractice. In denying the defendants F.R.CP. 12 (b)(6) motion to dismiss Judge Gershon stated:

Moreover, as the Court of Appeals for the Second Circuit has noted, New York is one of the few jurisdictions "that have permitted a direct action by an excess insurer against a primary carrier, rather than limited it to only those rights available to a subrogee of the insured. (citation omitted). By establishing direct fiduciary duties between excess insurers and primary insurers, New York has evidenced the strength of its concern that the parties responsible for defense of an underlying claim be held accountable to excess insurers for wrongdoing."

Id. at 201. Clearly, it behooves counsel and claims professionals to be aware of the increasing significance of the quadripartite relationship and the duties and obligations flowing therefrom.

■

[1] In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures Urgin, 2000 WL 668915 (Mont.)

[2] See Restatement of the Law Governing Lawyers American Law Institute Reporters Draft of Comment f to §215 of The Restatement

WORTHY OF NOTE

*by John J. Moore **

*Christine Moore ***

JURISDICTION-LONG ARM-ELEMENTS

In Courtroom Television Network vs. Focus Media, Inc., (___A.D.2d___,695 N.Y.S.2d 17), the First Department concluded that pursuant to the Long Arm Statute, a non-domiciliary defendant is subject to the jurisdiction of the State and there is a substantial relationship between the activity and the cause of action sued upon.

Under the "Transacting Business" Section, the requisite contact with the State may take place by mail or telephone; physical presence in the State is not required. The key inquiry for purposes of "transacting business" is whether the defendant purposefully availed itself as a beneficiary of the State Laws.

Personal jurisdiction, pursuant to "Transacting Business" Section may be predicated on a transaction conducted by means of telephone calls, faxes and the acts of an in State agent.

A Florida advertising firms sending tapes of advertisements on behalf of its clients into New York for a broadcast from New York Television's Network Studio was a purposeful transaction of business in New York for the purpose of "transacting business" pursuant to the Long Arm Statute.

EXPERT TESTIMONY-PHYSICIAN-SPECIALTY

It was recently submitted by the Second Department that a physician's expertise in neurology and rehabilitative medicine was enough to qualify him to testify as an expert in that area in a personal injury action even though he was not a neurosurgeon. The physician need not be a specialist in a particular field in order to be considered a medical expert (Gordon vs. Tishman Construction Corp., ____A.D.2d___, 694 N.Y.S.2d 719).

MALPRACTICE-HOSPITAL-LIABILITY OF

In Shafran vs. St. Vincent's Hosp. and Medical Center, (___A.D.2d___,694 N.Y.S.2d 642), the First Department ruled that a hospital may be held vicariously liable for the negligence or malpractice of physicians who act in its employ or as its agents. A physician's mere affiliation with the hospital is insufficient to impute the physician's negligence to the hospital. The hospital may be held vicariously liable for the acts of independent physicians who are not its employees, where a patient enters a hospital through the emergency room and seeks treatment from the hospital and not from a particular physician.

JURY-NON PRO TUNC-IMPROVIDENT DISCRETION

The Second Department recently ruled that the denial of defendant's motion for leave to serve and file a jury demand Non Pro Tunc was an improvident exercise of discretion in view of the absence of prejudice to the plaintiffs, the fact that the defendants had no intention of waiving the jury trial and their prompt application to be relieved of their default (A.S.L. Enterprises, Inc. vs. Venus Laboratories, Inc., ___A.d.2d___, 694 N.Y.S.2d 686).

RELATION BACK-CPLR 203-ELEMENTS

In Austin vs. Interfaith Medical Center (___A.D.2d___, 694 N.Y.S.2d 730), the Second Department submitted that for a relation back to date of service were filing of original complaint where a party is added beyond the applicable limitations. The plaintiff must prove that: (1) both claims arose out of the same conduct, the transaction or occurrence (2) the new party is united in interest with the original defendant, so as to be chargeable with such notice of action that the new party will not be prejudice in maintaining its defense on the merits; and (3) the new party knew or should have known that but for the mistake by the plaintiff as to the identity of proper parties, the action would have been brought against the party as well.

A hospital was vicariously liable for malpractice of a physician, an emergency room physician, with the hospital at the time of the alleged malpractice and thus they were "united in interest" as required for claims against the physician to relate back to the date of service for filing of the original complaint.

COLLATERAL SOURCE-PURPOSE

In Bryant vs New York City Health and Hospitals Corp. (93 N.Y.2d 592, 695 N.Y.S.2d 39), the Court of Appeals indicated that at Common Law, the "Collateral Source Rule" precludes reducing a personal injury award by the amount of nay compensation received from a source other than the tort feasor.

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** Mr. Moore is a member of the firm Barry, McTiernan and Moore, located in Manhattan.*

*** Christine Moore is a hearing officer with the city of New York.*

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The Statute governing the admissibility of collateral source payments, which acts to limit the scope of common law collateral source rule, was intended to eliminate double recoveries, and not provide defendants and their insurers with an undeserved windfall.

Social Security Survivor's benefits may constitute as a collateral source which is applicable to reduce the award of the damages.

PRETRIAL CONFERENCE-FAILURE TO ATTEND

In Barsel vs. Green,(___A.D.2d___, 695 N.Y.S.2d 350), the First Department indicated that a defendant's failure to appear for a scheduled pretrial conference was properly excused, where such failure to do to an oversight by their attorneys in entering dates of the conference in their calendars and defendant's papers submitted on their prior motions for summary judgment, including pleadings and affidavits, satisfied the requirement of demonstrating a meritorious defense.

AUTOMOBILE-DIRECTION-FROM THIRD PERSON-INTERVENING ACT

In Duggal vs. St. Regis Hotel (___A.D.2d___, 695 N.Y.S.2d 602) the Second Department ruled that a taxi cab driver's collision with a limousine driver as he loaded luggage into the limousine parked in front of the hotel was an extraordinary and unforeseeable intervening act, and thus served to break the causal of connection between any negligence of the hotel employee in directing the limousine driver to load the luggage in a specific area and the driver's injuries.

INSURANCE-PROCUREMENT-ARISING OUT OF

In Petracca & Sons, Inc. vs. Capri Const. Corp. (___A.D.2d___,695 N.Y.S.2d 403), the Second Department ruled that a subcontractor was not liable to a contractor for breach of the insurance procurement provisions of the subcontract in connection with the contractor's lack of coverage for an injured worker's suit under an additional insured endorsement to the subcontractor's liability policy, where the suit did not arise out of activities covered by the said contract.

MALPRACTICE-DEFINITION

It was recently indicated by the First Department that "malpractice" is the negligence of a professional toward a person for whom a service is rendered. "Profession" for the purpose of a professional malpractice claim, is an occupation generally associated with a long time educational requirement leading to an advanced degree, licensure evidencing qualifications met prior to engaging in the occupation and control of the occupation by adherence to standards of conduct, ethics and malpractice liability (Santiago vs. 1370 Broadway Associates, L.P., ___A.D.2d___, 695 N.Y.S.2d 326).

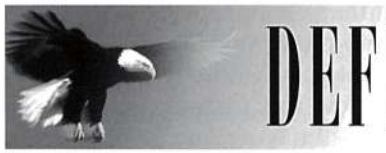
INSURANCE-EXCLUSIONS-LIMITATIONS-INTERPRETATION

The Second Department recently submitted that generally when an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language. Any exclusions or exceptions from the policy are not to be extended by interpretation or implication but are to be accorded a strict and narrow construction (Gaetan vs. Fireman's Insurance Ins. of Newark, ___A.D.2d___, 695 N.Y.S.2d 608).

PRODUCTS LIABILITY-DEFECTIVE DESIGN-ELEMENTS

In Scarangella vs. Thomas Built Buses, Inc. (93 N.Y.2d 655, 695 N.Y.S.2d 520) the Court of Appeals ruled that a defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use, or in other words, a product whose utility does not out weigh the danger inherent in its introduction into the stream of commerce.

A manufacturer may be held liable for selling a defectively designed product because the manufacturer is in a



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superior position to discover any design defects and alter the design before making the product available to the public.

The factors to be considered in balancing the risk created by the products design against its utility and cost for purposes of determining whether the product is defectively designed include the likelihood that the product will cause injury, the ability of the plaintiff to have avoided the injury, the degree of awareness of the product's dangers which reasonably can be attributed to the plaintiff, the usefulness of the product to the consumer as designed when compared to a safer design, the functional and monetary costs of using the alternative design, and likely effects of the imposition of liability for failure to adopt alternative design on the range of consumer choice among products.

The fact that optional safety devices on the product were not made standard does not render the product's design defective where the evidence and reasonable inference therefrom show that (1) the buyer is thoroughly knowledgeable regarding the product and issues and is actually aware that the safety features are available, (2) there are exact normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment and (3) the buyer is in a position given the range of uses of the product to balance the benefits and risks of not having the safety devices in the specifically contemplated circumstances of the buyer's use of the product.

The fact that an optional safety feature for a school bus of a back up alarm was not made a standard feature did not render the design of the bus defective, for purposes of an action brought after the bus driver employed by the school bus company was struck in the company's parking lot by the bus which was being operated in reverse. The bus company which purchased the bus was a highly knowledgeable consumer, the risk of harm from absence of the alarm was not substantial, since only the significant incidents of reverse operation of the buses was in the yard and the bus company was in a position to balance the benefits and dangers of not having the device, and made a considered decision to not buy the alarm.

WRONGFUL DEATH-ELEMENTS

In Johnson vs. Sniffen (___A.D.2d___,696 N.Y.S.2d 211), the Second Department submitted that a plaintiff in an action to recover damages for wrongful death is not held to as higher degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence.

Even in a wrongful death matter, however, speculation, guess and surmise, may not be substituted for competent evidence and where there are several possible causes of an accident, one or more of which the defendant is not responsible for, the plaintiff cannot recover without proving that the injury was sustained wholly or in part by a cause for which the defendant was responsible.

EVIDENCE-PHOTOGRAPHS-ADMISSIBILITY

It was recently held by the Second Department that photographs of a side walk where a fall occurred were admissible in a premise liability matter without redaction of dates of processing imprinted on the back of the photographs, where the photographs were authenticated by testimony that they fairly and accurately represented the condition of the sidewalk on the date of the accident (Diakovasilis vs. Bright and Sunny Corp., ___A.D.2d___,696N.Y.S.2d220).

INSURANCE MODIFICATION OF POLICY-ELEMENTS

In Allstate Insurance Ins. Co. vs. Young (___A.D.2d___, 696 N.Y.S2d 189), the Second Department indicated that amendments contained in a new policy jacket and explanatory inserts allegedly mailed to the insured could not alter the terms of the insureds personal liability umbrella policy where the insured denied having received the jackets and inserts and the insurer failed to proffer confident and sufficient evidence of proper mailing.

RESTORATION TO CALENDAR-ELEMENTS

The Second Department recently ruled that a plaintiff's motion for restoration of an action tot he trial calendar was timely made within one year from the date the matter was marked off the calendar due to plaintiff's failure to answer the calendar call.

Following the dismissal of the matter, plaintiff properly moved for restoration pursuant to the rule governing the dismissal of abandoned cases rather than move for relief from judgment where the record did not indicate that the judgment dismissing the action upon the plaintiff's default was even entered.

The standard for restoring a matter to the trial calendar is essentially the same as the standard for setting aside a default judgment; that is, the moving party must demonstrate a reasonable excuse for the default, a meritorious claim or defense, a lack of intent to deliberately default or abandoning the matter and a lack of prejudice to the nonmoving party (Lupli vs. Venus Laboratories, Inc., ___A.D.2d___695 N.Y.S.2d 598).

DISMISSAL-STRIKING FROM CALENDAR-AUTOMATIC

The Second Department recently held that an action that is not restored within one year of the date it was marked off the calendar is automatically dismissed. Defendant's motion to dismiss was unnecessary as the delay in restoration resulted in an automatic dismissal of the matter, so indicated the Second Department in Nunez vs. County of Nassau (___A.D.2d___, 696 N.Y.S.2d 217).

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LABOR LAW-NON ELEVATED-SECTION 240

In the case of Nieves vs. Five Borough Air-Conditioning and Refrigeration Corp., (93 N.Y.2d 914, 690 N.Y.S.2d 852), the Court of Appeals ruled that after a subcontractor's employee was injured stepping from a ladder on to a drop cloth and tripped over a concealed portable light under a drop cloth, the Court held that no liability existed pursuant to Section 240 Subdivision (1) of the Labor Law because the risk to the plaintiff was not of a nature of extraordinary peril contemplated by Section 240 (1) of the Labor Law. No true elevated risk matter was involved.

LEGAL MALPRACTICE-CONFLICT OF INTEREST-ELEMENTS

The First Department recently submitted that a law firm's failure to disclose to a client its alleged conflict of interest was not actionable, absent any evidence that the client would have prevailed in the underlying litigation or that the client would have saved any expense compensable in malpractice or fraud had the firm disclosed the alleged conflict (Unger vs. Paul Weiss, Rifkind, Wharton & Garrison, ___A.D.2d___, 696N.Y.S.2d 36).

DAMAGES-PUNITIVE-ELEMENTS

In Copec vs. Hempstead Gardens, Inc., (___A.D.2d___, 696 N.Y.S.2d 53), the Second Department indicated that punitive damages may only be awarded for exceptional misconduct which transgresses mere negligence, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness or has engaged in an outrageous or intentional misconduct or with recklessness or wanton disregard of the safety of others.

DISCLOSURE-PRECLUSION OF VIDEO TAPE

In Vigio vs. New York Hosp., (___A.D.2d___,696 N.Y.S.2d 19), the First Department ruled that precluding plaintiffs from using at trial a video tape depicting a day in the life of their decedent was a proper disclosure sanction. The preliminary conference order directed the parties to exchange any photographs, including motion pictures, plaintiff falsely certified that disclosure was complete, that the death of the plaintiff's decedent after the video was made and the death of the defendant's examining physician before the video way disclosed significantly compromised the defendant's ability to refute the decedent's condition as depicted in the video.

COLLATERAL ESTOPPEL-ELEMENTS

The Second Department recently indicated that "collateral estoppel" an equitable doctrine, is invoked when the cause of action in the second matter is different from that in the first action, and applies only to a prior determination of an issue which is actually and necessarily decided in the earlier action and not to those issues which could have been litigated. (Fandy Corp. vs. Lung-Fong Chen, ___A.D.2d___, 697 N.Y.S.2d 90).

Two requirements must be met for the doctrine to apply. Firstly, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from litigating the issue must have had a full and fair opportunity to contest the prior determination.

AMENDMENT-EVE OF TRIAL

It was recently held by the Second Department that a motion to amend an answer in a personal injury matter to assert the Statute of Limitations as a defense was properly granted despite the fact that the defendant waited till the eve of trial to bring a motion, where the defendant offered a reasonable excuse for the delay. Delay alone will not be barrier to the amendment of an answer (Lane vs. Beard, ___A.D.2d, 697 N.Y.S.2d 64).

SCHOOLS-BROKEN GLASS-ELEMENTS

In Bradley vs. Smithtown Central School Dist. (___A.D.2d___,696 N.Y.S.2d 65), the Second Department held that a student who was injured by shattering glass when another student leaned against a window in the school cafeteria failed to establish a prima facie case of negligence against the school district. The conclusory expert testimony did not show a violation of current safety regulations, there was not proof that the glass was not in compliance with regulations in effect when the school was built, that the district was required to replace glass to comply with the new regulations, or that the glass as installed was unsafe, and there was no history of any prior similar accidents or breakage.

NOTICE TO ADMIT-ELEMENTS

In Glasser vs. City of New York, (___A.D.2d___,697 N.Y.S.2d 167), the Second Department submitted that a personal injury plaintiff's notice to admit sought an admission of City's constructive notice of a defect which went to the heart of the matter at issue and thusly was improper. The statute governing a notice to admit is self-executing and statutory penalties for refusal to comply with the order or to disclose do not apply.

AUTOMOBILE-DRIVER'S LICENSE-NEGLIGENCE

In Almonte vs. Marsh Operating Corp., (___A.D.2d___, 696 N.Y.S.2d 484), the Second Department ruled that the fact that motorist seeking recovery for a personal injuries was unlicensed when his vehicle was rear ended, failed to demonstrate that he was negligent. The absence or possession of a driver's license related only to the authority for operating a vehicle, and not to its manner of operation.

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INSURANCE-DISCLAIMER-OBLIGATION OF INSURED

In State Farm Insurance Ins. Co. vs. Domotor (___A.D.2d___, 697 N.Y.S.2d 348), the Second Department ruled that once a motor vehicle insurer unequivocally notifies its insured that it was denying all no-fault benefits based upon the opinion of its medical expert that the insured no longer required medical treatment, the insured was excused from further compliance with conditions precedent regarding time limitations for submitting proofs of loss for the treatment she never the less continued to undergo.

SUMMARY JUDGMENT-FURTHER DISCLOSURE

It was recently indicated by the Second Department that in a medical malpractice action, the mere hope that further discovery will reveal helpful information was insufficient to defeat the defendant's motion for summary judgment (Curtis vs. Lopez, ___A.D.2d___, 697 NY.S.2d327).

NEGLIGENCE-CONSTRUCTION-BURDEN OF PLAINTIFF

In Boho vs. City of New York, (___A.D.2d___, 697 N.Y.S.2d 331), the Second Department held that to sustain a cause of action against an owner and general contractor pursuant to the Labor Law for failing to provide adequate safety measures for a construction, excavation and demolition work, the plaintiff must allege that a concrete specification of the Industrial Code has been violated as opposed to general safety standards.

Alleged violations of the industrial Code by the owners of the construction site in failing to secure a mound of excavation materials were either inapplicable to the facts or to general in nature to support a recovery pursuant to the labor law requiring adequate safety measures for construction, excavation and demolition work, and could not provide a basis for a recovery by the worker who was injured when a frozen piece of excavation material fell from a mound onto his leg.

INSURANCE PROCUREMENT-ARISING OUT OF WORK

In Consolidated Edison Co. of New York, Inc., vs. U.S. Fidelity & Guaranty Co. (___A.D.2d___,697 N.Y.S.2d 620), the First Department ruled that a utility settlement liability to an employee of the utilities excavation contractor for injuries allegedly caused by the utility's negligent placement of a barricade arose out of the "contractor's work" for the utility, triggering coverage for the utility under an additional insured endorsement to the contractor's liability policy, even if the dismissal of the utility's third party claim against the contractor supported an implication that the utility was negligent in maintaining an unsafe work place for the contractor's employees.

FRIVOLOUS CONDUCT-ELEMENTS

In Levy vs. Carol Management Corp., (___A.D.2d___,698 N.Y.S.2d 226), the First Department ruled that "Frivolous Conduct" warranting imposition of sanctions against the party to the litigation can be defined in any of three manners. The conduct is without legal merit or is undertaken primarily to delay or prolong the litigation or to harass or to maliciously injure another or asserts material factual statements that are false.

Motion practice several years after judgment lacking legal support and intended only to delay the enforcement of a judgment is a valid basis for sanctions, particulars where the motions are redundant to matters already decided on the merits constituting a lengthy barrage of litigation to relitigate those already decided matters and where the protracted litigation continues, with rulings ignored, despite the court's warnings to cease delaying tactics, then and in that event sanctions are appropriate to punish for the frivolous litigation.

RENTAL AGREEMENT-INDEMNIFICATION

In Cuthbert vs. Pederson (___A.D.2d___, 698 N.Y.S.2d 254), the Second Department ruled that pursuant to the express terms of a rental agreement, the lessee of an automobile was required to indemnify the lessor for damages sustained by a third person in an accident which occurred while the lessee was driving the rented automobile.

The statute which provides that a self-insured lessor of automobiles must provide, at minimum, uninsured motorist coverage is for the benefit of injured persons only.

INSURANCE-DISCLAIMER-41 DAY DELAY

It was recently held by the Second Department in Colonial Penn Ins. Co. vs. Pevzner (___A.D.2d___, 698 N.Y.S.2d 310), that an automobile liability insurer's 41 day delay in disclaiming coverage for the vehicle of its insured based upon the insured's failure to provide it with timely notice of accident was unreasonable as a matter of law.

RES ISPA LOQUITUR-ELEVATOR

A mis-leveling of an elevator could have occurred absent negligence of either building owners or elevator maintenance company, thus, an elevator passenger injured when she stepped out of an elevator could not recover from either the owner of the maintenance company pursuant to the Res Ispa Loquitur's theory, so indicated the Second Department in then Vaynshteyn vs. Cohen,___A.D.2d___,698 N.Y.S.2d 249).

INDEMNIFICATION CONTRACTUAL

In National Union Fire Ins. Co. of Pittsburgh, Pa. Vs State Ins. Fund (___A.D.2d___,699 N.Y.S.2d 111), the Second Department ruled that a stipulation that a City was one per-

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cent actively negligent for a work site accident involving an employee of its renovation contractor rendered the contractor's contractual agreement to indemnify the City unenforceable.

PROCESS-DEATH OF PROCESS SERVER

Where a process server dies after the service and prior to a hearing as to whether service was properly affected, his affidavit of service may be received as prima facie evidence of service provided it is not conclusory and devoid of sufficient detail, so indicated that Second Department in Capital Resources Corp. vs. Auqueste, (___A.D.2d___,698 N.Y.S.2d 303).

NEGLIGENCE-SUPERVISION AND CONTROL

In Butigain vs. Part Authority of New York and New Jersey (___A.D.2d___,699 N.Y.S.2d 41), the First Department ruled that an owner and tenant of a work site were not liable to a laborer under the safe workplace statute for injuries he sustained when he fell from a ladder while pulling ductwork from a ceiling, where they did not exercise supervisory control over his work.

NEGLIGENCE-ASSAILANT-PROXIMATE CAUSE

It was recently submitted by the Second Department in Soto vs. 2101 Realty Co. (___A.D.2d___,699 N.Y.S.2d 107), that a building tenant/superintendent, who was assaulted while working in the lobby of a building failed to present sufficient evidence that his assailants were intruders, such that the building's broken door lock could be viewed as proximate cause of his injuries. The superintendent testified that he did not see the assailants until they were inside the building, he admitted that he did not know every tenant in the building, and he could not say whether the assailants were tenants.

MUNICIPAL CORPORATIONS-LIABILITY OF

In Sabastian vs. The State (93 N.Y.2d 790, 698 N.Y.S.2d 601), the court of Appeals rendered a decision pointing out the responsibilities of a governmental entity. In reaching its decision, the Court pointed out the many situations wherein immunity to responsibility may exist.

The Court recognized that a "governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions." At one end of the continuum lie purely governmental functions "undertaken for the protection and safety of the public pursuant to the general police powers." In this type of situation, the State remains generally immune from negligence claims, absent a special relationship between the injured party and the State.

At the opposite end of the spectrum lies proprietary functions in which governmental activities essentially substitute for or supplement "traditionally private enterprises," Activities cataloged in the proprietary ledger generally subject the municipal entity tot he same duty of care as private individuals and institutions engaging in similar activities.

A governmental entity may act in its proprietary capacity as a landlord by virtue of its ownership of and control over a public facility and at the same time act in its governmental capacity by providing police protection to maintain law and order at that facility. It is difficult to pinpoint the precise moment along the continuum where a complained-of act may be categorized to decide a case and to maintain principled consistency. The courts are obliged to examine the specific act or omission out of which the injury is claimed to have arisen and the capacity in which the act or failure to act evolved. The case reflects on the many types of situation denoting responsibility or the absence thereof regarding given situations.

RES JUDICATA-ARBITRATION

In Huntington Fire Dist. Vs Steven Handlik Const. Corp. (___A.D.2d___, 699 N.Y.S.2d 454), the Second Department ruled that the doctrine of Res Judicata is applicable to arbitration awards and may serve to bar subsequent re-litigation of a single issue for an entire claim.

DEATH OF ATTORNEY-PROCEDURE

The First Department recently submitted that if an attorney dies before judgment, there is an automatic stay in the action until thirty days after notice is served upon the client, and the existence of the stay does not depend on whether the other side has notice of the attorney's disability (Fusco vs. Shailya Taxi Corp., ___A.D.2d___,700 N.Y.S.2d 7).

SZABO VS. XYZ TOW WAY RADIO TAXI ASS'N., INC.

(___A.D.2d___,700 N.Y.S.2d 179), the First Department ruled that a pedestrian, who was absent from work on a full time basis to two full weeks after an automobile accident, and was thereafter able to work half days, with periodic days off, did not meet the no fault act's serious injury threshold, which required a showing that her activities had been restricted to a great extent rather than some slight curtailment or the no-fault act's 90/180 day period of disability requirement, even given the additional allegations of limitations on her "detailed computer work" and her inability to "hold little things" the way she used to.

AUTOMOBILE-REAR END-PRIMA FACIE

In Schuster vs. Amboy Bus Co., Inc. (___A.D.2d___, 700 N.Y.S.2d 484), the Second Department ruled that a rear end collision into stopped vehicle creates prima facie case of liability with respect to the operation of the moving vehicle; however, where the operator of the moving vehicle alleges that the accident was the result of a brake failure and pres-

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ents evidence that the brake problem was unanticipated, and that reasonable care had been exercised to keep the brakes in good working order, that person demonstrated a non-negligent explanation for the happening of the accident.

NEGLIGENCE-INTERVENING ACT-ELEMENTS

The First Department recently concluded that an intervening act of a party other than the defendant will not break the causal chain where the intervening act was a natural and foreseeable consequence of defendant's negligence. Only an extraordinary unanticipated act may serve as a basis for the ruling as a matter of law in a negligence matter that the causal chain has been broken. (McKinnon vs. Bell Sec., ___A.D.2d___, 700 N.Y.S.2d 469).

DAMAGES-MITIGATION-CHARGE

In was recently submitted by the Fourth Department that the jury was properly instructed as to mitigation of damages that is could consider whether the injured plaintiff reasonably could have and should have obtained other employment once he was advised by his physicians that he was permanently disabled from electrical construction work but capable of performing light or sedentary work and whether plaintiff could reasonably be expected to obtain such other employment and the amount of earnings he can be expected to achieve in that capacity (Aman vs. Federal Exp. Corp. ___A.D.2d___, 701 N.Y.S.2d 571).

EVIDENCE-HEARSAY-PHYSICIAN'S DESK REFERENCE (PDR)-PACKAGE INSERT

In Spensieri vs. Lasky,(94 N.Y.2d 231, 701 N.Y.S.2d 689), the Court of Appeals concluded that the Physician's Desk Reference (PDR) is hearsay, and cannot by itself, establish standard of care for a physician in prescribing and monitoring a drug during a treatment of patient. Expert testimony is necessary to interpret whether the drug in question presented an unacceptable risk for the patient, in either its administration or in the monitoring of its use; abrogating Gatto vs. Cooper, 201 A.D.2d 455, 607 N.Y.S.2d 372, Paul vs. Boschenstein, 105 A.D.2d 248, 848 N.Y.S.2d 870; and Armstrong vs. State of New York, 214, A.D.2d812, 625 N.Y.S.2d 317.

LIMITATIONS-FOREIGN OBJECT-TOLLING

In Polichetti vs. Cohen (___A.D.2d___, 702 N.Y.S.2d 85), the Second Department held that a broken dental file was left inside the patient's tooth was a "foreign object" was or reasonably should have been discovered.

MUNICIPAL CORPORATIONS-DUTY TO PROTECT-THIRD PERSONS

In Basher vs. City of New York, (___A.D.2d___, 702 N.Y.S.2d 371), the Second Department ruled that a municipality may not be held liable for failure to provide police protection unless a special relationship exists between the municipality and the injured person thereby creating a "special duty" to protect the injured person.

Similarly, in another case generated by the Second Department, it was indicated to establish the special duty of protection between the claimant and the municipality giving rise to liability the claimant must show(1) assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of a party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking. (Bain vs. New York City Bd. Of Ed., ___A.D.2d___,702 N.Y.S.2d 334).

NEGLIGENCE-ELEVATOR-PROXIMATE CAUSE

In People vs. Jose (94 N.Y.2d 844,702 N.Y.S.2d 574), the Court of Appeals ruled that the action of a construction worker in jumping out of a stalled freight elevator six feet above the lobby floor in a building where he was performing work, as a matter of law, was not foreseeable in the normal course of events resulting from alleged negligence on the part of the general contractor and elevator manufacturer, and thusly, superseded the defendant's conduct and terminated their liability for injuries allegedly sustained as a result of the jumping. The worker was not threatened by injury while in the stalled elevator and was aware that the elevator operator had telephoned for assistance.

INSURANCE-DECLARATION PAGE-ENDORSEMENTS-ELEMENTS

In Ruiz vs. State Wide Insulation & Const. Corp., (___A.D.2d___,703 N.Y.S.2d 257), the Second Department submitted that a declaration page and the accompanying endorsements were made part of a general commercial liability policy and were incorporated by reference into the policy regardless of whether the insured received actual delivery thereof.

INSURANCE-INTERPRETATION OF POLICY

The Second Department recently held that in construing an insurance policy to determine the scope of coverage, the courts apply the test of common speech and focus on the insured and against the insurer. (Allou Health & Beauty Care, Inc. vs. Aetna Cas. & Sur. Co., ___A.D.2d___, 703 N.Y.S.2d 253).

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NEGLIGENCE-SNOW REMOVAL-LIABILITY

The First Department recently indicated that an owner of a real property is under no duty to the public to remove snow and ice which naturally accumulates upon the sidewalk in front of its premises, and in order to incur liability, the owner's snow removal efforts must have made the sidewalk more hazardous. The owner was not liable for an accident which occurred on the abutting sidewalk, absent any showing that owner created any dangerous condition on the sidewalk or made any attempt to remove snow and ice before the accident occurred. (Rodriquez vs. City of New York, ___A.D.2d.___, 703 N.Y.S.2d 176).

90-DAY NOTICE-AVOIDING DEFAULT

In Burke vs. Klein, (___A.D.2d.___,703 N.Y.S.2d 203), the Second Department ruled that to avoid a default after the receipt of the 90-day demand seeking a dismissal for want of prosecution, plaintiffs were required to comply therewith either by timely filing a note of issue or by moving, before the default date, to vacate the notice of to extend the 90-day period.

CONTRACTUAL INDEMNIFICATION-VOID-ELEMENTS-SUPERVISION AND CONTROL

In Smith vs. Xaverian High School, (___A.D.2d___, 703 N.Y>S.2d 526), the Second Department ruled that a contract between a general contractor and subcontractor violated the statute voiding agreements which exempt owners and contractors from liability for negligence, where the contract would have resulted in a subcontractor indemnifying a general contractor for the general contractor's negligence in causing injuries of the subcontractor's employee, who the general contractor supervised.

The property owner was entitled to indemnification from the general contractor to the extent of the owner's vicarious liability pursuant to the scaffolding statute, for agent either supervised or controlled the worker.

INSURANCE-COOPERATION-ELEMENTS

In Baghaloo-White vs. Allstate Ins. Co., (___A.D.2d___, 704 N.Y.S.2d 131), The Second Department held that to effectively deny insurance coverage based upon a lack of cooperation, an insurance carrier must demonstrate (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the carrier were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his cooperation was sought, was one of willful and avowed obstruction.

NEW TRIAL-CONFUSION OF JUROR

In Sabol Sports, LLC vs. Nassau Precision Casting Co., Inc., (___A.D.2d___,704 N.Y.S.2d 36), the First Department held that a verdict could not be set aside on the basis of jury confusion, where the claim of confusion was based on a special verdict answer of only one juror whose vote would not change the verdict.

TRIAL-VACATING VERDICT-ELEMENTS

In Kaminski vs. Modern Italian Bakery of West Babylon (___A.D.2d___, 704 N.Y.S.2d 275), the Second Department ruled that the Appellate Court has the power to set aside a jury verdict and grant and new trial in the jury's determination is palpably incorrect and a substantial injustice would occur if the verdict were sustained.

Defense counsel's reference to irrelevant matters such as personal injury plaintiff's immigration status and alcohol abuse were prejudicial and inflammatory remarks which impuned the plaintiff's character and likely tainted the jury's verdict in an action arising from a delivery vans driving into the plaintiff when he was intoxicated an d laying in the roadway. The court ruled that the evidence did not support the jury verdict, which failed to find negligence on the part of the delivery van driver who drove into an intoxicated individual lying in the roadway. A new trial was warranted as to the liability issues.

EMOTIONAL DISTRESS-ELEMENTS

The Second Department recently submitted that although physical injury to a person is no longer a necessary element of the cause of action for negligent infliction of emotional distress, such a cause of action generally must be premised upon conduct that unreasonably endangered the plaintiff's physical safety or causes the plaintiff to fear to his or her physical safety. An assistant principal's claim of emotion distress from the schools permitting a parent who had assaulted the assistant principal to enter a school office, contrary to an order of protection, were to remote and speculative for her to prevail on a claim of negligent infliction of emotional distress. The assistant principal was not even aware that the parent had been at the school until several days later. (Johnson vs. New York City Board of Educ., ___A.D.2d___, 704 N.Y.S.2d281).

AMENDMENT-BILL OF PARTICULARS-DENIED

The First Department held that a janitor's request to amend his bill of particulars three years after commencement of the action, and five months after the filing of a note of issue in order to allege various statutory violations under the theory that his employer was running a factory or mercantile establishment was properly rejected as untimely and prejudicial, in his suit against the employer's landlord and the landlord's managing agent to recover for his slip and fall on water that had leaded from a toilet while he was mopping a washroom floor. (DelRosario vs. 114 Fifth Avenue Associates (___A.D.2d___,699 N.Y.S.2d 19)

*by Andrew Zajac**

REPORT FROM THE COMMITTEE ON THE DEVELOPMENT OF THE LAW: Whether A Defendant In A Lead Paint Case Is Entitled To An I.Q. Test Of The Mother.

On behalf of DANY, the Committee has submitted an *amicus* brief to the Court of Appeals in Andon v. 302-304 Mott Street Associates. The facts in this case, which has generated considerable interest and publicity, are as follows:

This action, which is pending in the Supreme Court, New York County, is one where the plaintiff Antonio Andon, an infant born in 1991, by his mother, Prudencia Andon, and Prudencia Andon, individually, seek recovery for alleged injuries that resulted from Antonio Andon's exposure to lead-based paint. Those injuries include a diminished I.Q. and developmental delays, as well as learning disabilities and speech and language delays. It is the plaintiff's contention that those injuries are attributable solely to the infant plaintiffs' exposure to lead-based paint.

Prior to the alleged exposure to the lead paint, no I.Q. evaluation of the infant plaintiff was ever performed. Such an evaluation was undertaken only after the exposure, by the plaintiffs' experts. The plaintiffs seek to establish the alleged cognitive impairments, i.e. learning and developmental disabilities by relying upon the post-exposure I.Q. evaluation conducted by the plaintiffs' experts.

The defendants, who are represented by Skadden, Arps, Slate, Meagher & Flom, LLP, moved for an order compelling the infant plaintiff's mother, Prudencia Andon, to appear for an I.Q. examination by an expert designated by the defendants. In support of their application, the defendants presented an excellent record. The defendants pointed to the facts that Prudencia Andon had a limited formal education that took place entirely in rural Mexico, that she has no copies of her academic records, and that the defendants were unable to obtain any records from the Mexican schools that she identified. In addition, Mrs. Andon has been employed outside of the home only in Mexico and there are therefore no employment records that shed light on the issue of her I.Q. Also, the infant plaintiff is an only child. Thus, there are no siblings with whom his disabilities can be compared.

In Addition, the defendants submitted the comprehensive affidavit of Andrew Adesman, M.D., the Chief of the Division of Development and Behavioral Pediatrics, Department of Pediatrics at Schneider Children's Hospital in New Hyde Park, New York. In his affidavit Dr. Adesman discussed his familiarity with medical literature regarding intelligence testing, the maternal component of a child's intelligence, and the effects of exposure of lead-based paint on children. He also described his extensive background in testing children to determine whether or not they suffer from developmental deficiencies. In opining that a child's genetic background, and especially maternal intelligence, is a strong predictor of a child's intelligence, Dr. Adesman stated that it is difficult to properly evaluate the source of the infant plaintiff's problems

> without the careful examination of known significant risk factors for such impairments, including genetic factors...Studies that have examined the impact of risk factors on childhood intellectual and cognitive development have concluded that a child's genetic background is a strong predictor of educational performance. Maternal IQ is particularly significant in that it reflects the biological endowment of the child and the intellectual stimulation available in the home. Hence, information regarding maternal IQ is extremely relevant to the assessment of whether a child is performing according to his or her potential, whether or not a child is, in fact, truly "delayed" and in helping to determining [sic] causes of any developmental deficits...Such a test is particularly important here, where the mother only attended grade school, and her education records are maintained, if at all, in a foreign country. To assess whether results of [the tests conducted on

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** Andrew Zajac is associated with the law firm of Fiedelman & McGaw, and he co-chairs the Committee.*

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REPORT FROM THE COMMITTEE ON THE DEVELOPMENT OF THE LAW...

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> the infant plaintiff] reflect [his] potential IQ in the absence of lead exposure, it will be extremely helpful to compare the results of these IQ tests with the result of an IQ test administered to [his mother]. In this way, it can be determined whether [the infant plaintiff] is performing as would be expected...In short, the injuries claimed by [the infant plaintiff] can be due in whole or in part to risk factors other than exposure to lead. While those other factors certainly include environmental and social factors not referred to herein (such as consideration of the dominant language spoken at the home and the child's early and ongoing intellectual stimulation), consideration of genetic endowment is critical. Accordingly, obtaining Prudencia Andon's IQ is of great importance for a complete evaluation of the cause or causes of the minor plaintiff's developmental status.

The defendants also submitted the affidavit of Carlos Flores, Psy. D., a clinical neuropsychologist on staff at The Brady Institute For Coma Recovery/Traumatic Brain Injury Unit at Jamaica Hospital Medical Center in Jamaica, Queens. Dr. Flores indicated that his first language is Spanish, and that his professional training and experience includes the administration and evaluation of intelligence tests. Dr. Flores set forth the particular course he would follow if he were permitted to evaluate Prudencia Andon's I.Q. He indicated that his interview and testing of Mrs. Andon would be completely non-invasive. He stated that the evaluation would be conducted in Spanish and would take only about three hours. Dr. Flores concluded that he was well-qualified to administer the I.Q. evaluation of Mrs. Andon, and that the result of the test would establish an appropriate measure of her intellectual functioning.

In opposing the motion, the plaintiffs argued that the defendants had not shown anything more than a "hypothetical relevance" of Mrs. Andon's I.Q. to the issue of whether the infant plaintiff's emotional and cognitive problems are related to his ingestion of lead paint.

The Supreme Court (Hon. Jane S. Solomon, J.S.C.) granted the motion. Judge Solomon held that the results of the tests could not be used for purposes outside of this litigation, and that they could not be filed in this action without prior leave of court. Judge Solomon further stated that the admissibility of the test results would be determined at the time of trial. The plaintiffs appealed.

In a decision dated May 20, 1999 and reported at 257 A.D.2d 37, 690 N.Y.S.2d 241, the Appellate Division, First Department reversed and denied the motion. The Court held that the I.Q. test of Mrs. Andon was a mental examination within the meaning of CPLR 3121(a), that Mrs. Andon's physical or mental condition was not in controversy in this case, and thus, the evaluation which the defendants sought were impermissible. Additionally, the court indicated that notwithstanding New York's liberal discovery scheme, the I.Q. test was inappropriate because "the test result will raise more questions than it will answer and hardly aid in the resolution of the question of causality." The court stated that to allow the evaluation would "dramatically broaden the scope of the litigation,...turning the fact-finding process into a series of mini-trials regarding, at a minimum, the factors contributing to the mother's I.Q. and, possibly that of other family members." The court also declared that the test would impinge upon Mrs. Andon's privacy interests. Subsequently, the Appellate Division granted the defendants' motion for permission to appeal to the Court of Appeals.

Thereafter, the Committee contacted the defendants' attorneys, Skadden, Arps, Slate, Meagher & Flom, LLP, and we worked closely with that firm in preparing an *amicus* submission, which would supplement the excellent brief which that firm filed with the Court of Appeals. In their brief, Skadden, Arps argued that the I.Q. evaluation of the infant plaintiff's mother was highly relevant to the issues of both causation and damages and it was therefor discoverable. They also contended that the Appellate Division inappropriately superseded the established scientific methodology reflected in Dr. Adesman's affidavit with its won lay opinion. Skadden, Arps further asserted that the Appellate Division's conclusion with respect to Mrs. Andon's privacy interest was erroneous. Under CPLR 3101, the only limitations on discovery are privilege and relevance, and there is no differential between information that is private and that to which no privacy interest attaches. Skadden, Arps also asserted that the Appellate Division erroneously included that the I.Q. evaluation was a mental examination within the meaning of CPLR 3121. The format of the I.Q. evaluation, as outlined in Dr. Flores' affidavit, was substantially equivalent to answering questions at a deposition. Further, Skadden, Arps contended that the Appellate Division's refusal to allow the test deprived the defendants of their fundamental right to defend against the plaintiffs' claims.

The Committee submitted an *amicus* brief on behalf of DANY, which the Court of Appeals accepted for filing over the plaintiffs' opposition. In our brief, we argued that a blanket prohibition against the non-intrusive I.Q. evaluation of the infant plaintiff's mother at issue in this case,

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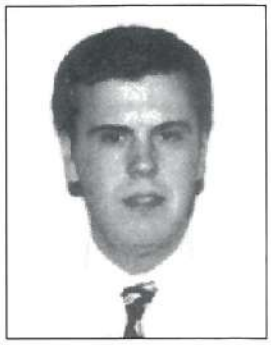
while allowing the infant plaintiff's post-exposure I.Q. with no baseline for comparison, is not only meaningless in the context of establishing the proximate cause and damages elements of the case, but severely prejudices defendants by depriving them the opportunity to defend against the claims of cognitive deficiencies by precluding them from exploring other factors that affect cognitive abilities. We also argued that there appears to be a disturbing trend in the First Department as evidenced by that Court's decisions in Andon and in Monica W. v. Milevoi, 252 A.D.2d 260, 685 N.Y.S.2d 231 (1st Dep't 1999), limiting the right of defendants to obtain discovery in actions predicated on lead paint exposure. In Monica W., the First Department held that information regarding the developmental and academic records of a sibling of a plaintiff alleged to have suffered injuries caused by exposure to lead paint were not discoverable. We argued such holdings essentially prevent defendants from asserting or preparing any meaningful defense to these actions. We pointed out that the Appellate Division, Second Department has liberally granted such discovery, acknowledging that this type of discovery is material and necessary to the defense of these cases. Anderson v. Siegel, 255 A.D.2d 409, 680 N.Y.s.2d 587 (2d Dep't 1998) and Salkey v. Mott, 237 A.D.2d 504, 656 N.Y.S.2d 886 (2d Dep't 1997). We concluded by arguing that the holdings of the Appellate Division, Second Department comport with both this State's liberal disclosure scheme and principles of fundamental fairness.

Andon was argued in the Court of Appeals on April 4, 2000, with a decision expected in late May to early June. We will, of course, report on the outcome.

On behalf of DANY, I want to express my profound thanks to Elizabeth A. Fitzpatrick and Dawn C. DeSimone for their invaluable contribution to our *amicus* brief.

RECOVERY FOR VICTIMS OF COMMERCIAL AVIATION DISASTERS WITHIN 12 MILES FROM THE U.S. SHORE IS NOT LIMITED TO PECUNIARY DAMAGES



*by Jeffrey D. Fippinger**

On July 17, 1996, T.W.A. Flight 800, en route from New York's Kennedy Airport to Paris exploded in midair and crashed approximately eight (8) nautical miles south of the shore of Long Island, New York.[1] Relatives and estate representatives of the 213 passengers and crew members on board brought suit against Trans World Airlines, The Boeing Company and Hydro-Aire, Inc. In February 1997, the Judicial Panel on Multidistrict Litigation transferred all wrongful death cases arising from the crash to the Southern District of New York for consolidated pretrial proceedings.

In July 1997, the defendants moved to dismiss plaintiffs' claims for nonprecuniary damages under Fed.R.Civ.P. 12(b), arguing that the Death on the High seas Act[2] ("DOHSA") applied to this case and limited recovery to pecuniary damages. In June 1988, Judge Sweet denied defendants' motion, determining that DOHSA applied only where death occurred on the high seas and beyond a marine league from shore.[3] Judge Sweet concluded that the crash did not occur on the high seas, and therefore DOHSA did not apply.[4] The defendants appealed Judge Sweet's decision tot he Untied States Court of Appeals, Second Circuit. On March 29, 2000, the Court of Appeals, Second Circuit, upheld the district court's decision that DOSHA does not apply to the crash, concluding that the crash occurred in United States territorial waters.[5] Accordingly, by holding that DOHSA does not apply to the crash, the Second Circuit provided the victims' rela-

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tives and estate representatives with a more generous recovery.

BOUNDARIES OF THE TERRITORIAL SEA

In the seventeenth and eighteenth centuries, states utilized three different methods for claiming sovereignty over adjacent waters; the line of sight rule, the cannon-shot rule, and the marine league.[6] The line of sight rule was vague, and included distances out to 20-30 miles or more. The cannon shot rule held that a sovereign could exercise authority over the sea that fell within a cannon's range from the shore, which varied but was generally within three miles. The marine league method was related to the cannon shot rule but precise, being equal to three nautical miles.[7] This method was encoded by the British-U.s. Convention of 1818, which called for three-mile delimitation. By the close of the nineteenth century the three-mile limit was generally accepted by the major powers.[8]

During the twentieth century, there were various unsuccessful efforts to broaden the three mile limit of the territorial sea. Following the two World Wars and various other hostilities, a number of countries declared "neutrality zones" to assure their security.[9] In addition, advances in military technology and resource mining then made the three mile limit economically and militarily too narrow.[10] In an effort to broaden the territorial sea, the United States and Canada proposed a six mile territorial sea during the 1960 Geneva Conference, which came within one vote of approval.[11] In 1970, the United States officially supported a 12 mile limit in the U.N. Convention of the Law of the Sea, which is still pending.[12]

Finally, in 1988, President Reagan formally proclaimed in Presidential Proclamation No. 5928 that the United States was extending its territorial sea to 12 nautical miles.[13] The Proclamation thus altered the three mile boundary that had historically defined the territorial sea.[14]

DOHSA LIMITED VICTIMS' RECOVERY TO PECUNIARY DAMAGES ON THE HIGH SEAS BUT OUTSIDE OF THE TERRITORIAL SEA

In 1920, Congress passed DOHSA. The purpose of DOHSA was to create a uniform remedy for wrongful death at sea where none had existed before, and which arose beyond the territorial limits of the United States."[15] DOHSA created a remedy for wrongful death "occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States.[16] "High seas" was not expressly defined within DOHSA.

The phrase "beyond a marine league" excluded from DOHSA's reach state territorial waters, which traditionally were three nautical miles from shore until 1988. DOHSA did not displace preexisting state remedies, and a state's wrongful death statute continued to provide the remedy for deaths in territorial waters.[17]

Where a death occurs on the high seas, the Courts have been clear that DOHSA is the exclusive remedy. In this respect, the Courts have denied recovery under general maritime law,[18] denied recovery under state statute,[19] denied loss of society damages,[20] and denied damages for pre-death pain and suffering.[21] DOHSA limited a plaintiff's recovery to pecuniary damages.[22]

DOHSA WAS AFFECTED BY THE 1988 CHANGE IN THE TERRITORIAL SEA

Thus, as the U.S. territorial sea now extended to 12 nautical miles, and as DOHSA applied beyond one marine league from shore (three nautical miles) but state law remedies were to apply to the territorial sea, a conflict arose as to whether DOHSA or state law remedies would apply to the newly created territorial sea which extended from the traditional 3 mile limit to the new 12 mile limit from shore.

If the T.W.A. crash had occurred prior to Presidential Proclamation No. 5928 of 1988, the crash would have occurred beyond U.S. territorial waters so that DOHSA would apply. However, following the Proclamation, the issue arose as to whether Congress intended for the jurisdiction of the existing statute to include the expanded territorial sea. Plaintiffs argued that the Proclamation effectively moved DOHSA's starting point from three to 12 miles from the shore, and therefore did not apply to the crash site eight miles from shore. Thus the plaintiffs argues that they were entitled to recover pecuniary and non-pecuniary damages. The defendants argued that the Proclamation did not alter DOHSA's application beyond one marine league from shore, and would therefore apply in this matter to limit plaintiffs' recovery to pecuniary damages only. The defendants argued that nothing in DOHSA's language, legislative history, or purpose indicated that Congress intended DOHSA" boundary line to be variable depending on charges in international law.

Since a President cannot revise, amend or alter legislation enacted by Congress, the Proclamation should not have affected DOHSA. However, when faced with the interpretive question of whether Congress intended DOHSA to be affected by a change in the meaning of the U.S. territorial sea under international law, on March 29, 2000, the Second Circuit concluded that the existing statute would be altered by the expanded territorial sea, and would not apply to deaths within 12 miles from shore.[23] Pursuant to this recent decision, relatives and estate representatives of victims of commercial aviation disasters which occur within 12 miles from the U.S. shore would be entitled to recover both pecuniary and non-pecuniary damages. It is noted that the District Court did not resolve the choice of law issues which remained once it was determined that DOHSA did not limit plaintiffs'

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RECOVERY FOR VICTIMS OF COMMERCIAL AVIATION DISASTERS WITHIN 12 MILES FROM THE U.S. SHORE IS NOT LIMITED TO PECUNIARY DAMAGES

Continued from page 15

damages.

A bill is currently pending for the President's signature which would 1) alter DOHSA's remedial scheme by allowing compensation for nonprecuniary damages for deaths resulting from commercial aviation accidents; 2) declare DOHSA inapplicable to deaths occurring in the disputed zone if they resulted from commercial aviation accidents; and 3) set the act's effective date as of July 16, 1999, one day prior to the T.W.A. crash.[24]

■

[1] One nautical mile equals approximately 1.15 land miles.

[2] 46 U.S.C. app. §§761-767.

[3] One marine league equals three nautical miles.

[4] *In re Air Crash off Long Island, New York*, 1988 WL 292333 (S.D.N.Y., June 2, 1988).

[5] *In re Air Crash off Long Island, New York*, 2000 WL 329022 (2nd Cir., March 29, 2000).

[6] Carter, Barry E. and trimble, Phillip R., *International Law*, 1991, pp.951-952.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Proclamation No. 5928, 54 Fed.Reg. 777 (1988).

[14] See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989).

[15] *D'Aleman v. PanAm World Airways*, 259 F.2d 493 (2d Cir. 1958).

[16] 46 U.S.C. app §761.

[17] *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98, S.Ct. 2010, 56 L.Ed. 581 (1978).

[18] *Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed. 581.

[19] *Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed 174 (1986).

[20] *Zicherman v. Korean Air Lines*, 524 U.S. 116, 118 S.Ct. 1890, 141 L.Ed. 596 (1996).

[21] *Dooley v. Korean Air Lines*, 524 U.s. 116, 118 S.Ct. 629, 133 L.Ed.2d 102 (1998).

[22] DOHSA provides that "[t]he recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought." See 46 U.S.C. §762.

[23] *In re Air Crash off Long Island, New York*, 2000 WL 329022 (2nd Cir., March 29, 2000).

[24] See H.R. 1000, 106th Cong. (2000).

RE: INJURED PLAINTIFFS AND FORMIDABLE CAUSES

*by Anthony J. McNulty**

ED. NOTE: The following article by Mr. McNulty is in response to a letter to the editor of the New York Law Journal on February 25, 2000 by Carol Moore and Andrew Zajac. The letter is reprinted herein.

A cavalcade of radio and T.V stations regularly try to charm their listeners with a cache of "Oldies but Goodies". The law can be no different in its catchy grouping of old but good law. Grateful as we should be for Mr. Andrew Zajak's and Ms. Moore's fascination with review of recent cases on plaintiffs' "Status", when they leap to their harm from a stalled or malfunctioning elevator ("Criteria for Liability No Plaintiff's Status" -NYLJ, Feb. 25, 2000), I recall an old adage of how often "old informs the new" in current development.

THE OLD

Surely, specific "status" of a plaintiff maybe used to assess the risk facing him while he gambles on outcome of undertaking it only to lose. Moreover, what the Zajac/Moore letter instructs also correctly corroborates (for Fiedelman & McGaw) these past theses about foreseeability and proximate cause of the risk faced. In sum, they replicate what I and others appreciated when reared in days of the absolute defense under old contributory negligence rule (for McNulty & McNulty). For example, I recall a series of fascinating cases arising from what we termed the "**Nucci** rule"-taken from its case name. The Cart of Appeals there held the issue of risk posed a "dilemma" for all plaintiffs whenever their own negligence was so obvious it "colored" a right to recover against a premises owner (before CPLR 1411) (**Nucci v. Warshaw Construction Corporation**, 12 NY2d 16, 18, 234 NYS2d 196, 198 [1962]). **Nucci** involved a fall over a dangerously shored trench well known to T.A. workers. It was held that "actionable negligence" attempts by the plaintiff (TA inspector) only succeeded in showing his own fault. Doing so, the court relied on another old but tried truism taken from **Shields v. Kelton Amusement Corp.** (228 N.Y.396, 127 N.E. 261 [1920]). There, it was a skating rink with sun-made soft spot obvi-

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ous to plaintiff. She was an experienced ice skater who tripped and fell over what she saw. In **Nucci**, the majority opinion, authored by a delightful democratic Judge Adrian Burke, could put these tested rules in even modern perspective (prior to CPLR§1411).

> "If any negligence was proved below, it was that of plaintiff in essaying to place his foot too close to the edge when he stepped over the trench" (p.19).

He made the plaintiffs' "status" as knowing workers-or a skater on the holed-up ice in **Shields'** rink-relevant only for denying plaintiff an issue for the jury. Quotable also is the court's analysis for today's elevator falls. They put plaintiffs on same modern "horns of dilemma" for their gambles in exiting a dangerous place (**Nucci**, p.19).

> "Putting aside the extraordinary precaution plaintiff would have defendants take, and focusing on the danger itself, plaintiff's own evidence demonstrates that any 'risk to be perceived' was as perceptible to the plaintiff as to defendant and must color the acts of the former as well as the latter" (emph. Supplied, p. 19).

We had then always noted, however, that even this "coloration" comes with caution for defendants. It must be tinged with another old but solidly good rule of thumb. In fact, five of them are counted by another estimable Jurist-Hon. James D. Hopkins in his Second Department folklore (**Pagan v. Goldberger**, 51 AD2d 549, 382 NYS2d 549, 552 [1976]): namely, "status, temporal duration, spatial relation, foreseeability and public policy". Using all those time-honored tests to assess that 3-year old's infant's accident when she fell, face-down, on a sharp radiator stem the family's landlord knowingly (to family) left uncovered with a protective cap in a Brooklyn tenement, the court wrote that the "facts" precluded a finding the tot's and family's sole fault brought about her injury (before CPLR *1411). Perceptibly, I must venture that the old and the new on such foresight of perceived risk, with plaintiff's "status" concerning it, converge on the modern day elevator accident.

THE NEW

In products parlance, for instance, today's required "warnings" are not yesterdays. I must note, even after material product alternation, a "warning" of that risk becomes relevant for recovery, but the warning may not always be needed for those "obvious" risk inherent in an altered product. **Liriano v. Hobart** shed slight on duty of care for a manufacturer after the famed rule of **Robinson v. Reed-Prentice** (92 NY2d 232, 242, 677 NYS2d 764, 770 [1998]; **Robinson** [49 NY2d 471]). Our **Liriano** Court held that, such a product-stricken worker may actually "strike out" against defendant manufacturer on not having warnings that are obviated by the risks he assumes. The question depends more on what he or she already knows or can readily observe to be patent on the offending machine. **Liriano's** discussion concludes that, "Where only one conclusion can be drawn from the established facts, however, the issue of whether the risk was open and obvious may be decided by the courts as a matter of law"; (*.242 of 92 NY2d). So, "status" and risk-assumption is still rife, I submit, even in strict products liability (**Robinson vs. Liriano**).

NO GENERATION GAP

Finally, there is nothing to disturb the soundness of another old but good stop-gap rule for plaintiffs. If sounds death knells to summary judgment in that the court held years ago before the onset of comparative fault that "the issue of contributory negligence,...is a jury question in all but the clearest cases" (**MacDowall v. Koehring Basic Construction Equipment**, 49 NY2d 824, 827, 427 NYS2d 617, 618 [1980]. I recall also how in that case's fact pattern the same rule was used to save plaintiff, a backhoe-operator, when he looked his own injury in the eye. Indeed, harm came to him from a high-tension seat spring. It recoiled to hit him square in the face as he peered and pulled at it while petting up from sitting o the rig. The Court, however, declined to award its defendant manufacturer judgment on the law. It used that fact-sensitive test for adjudging plaintiff's own fault in essaying his risk of injury by even there taking matters (the seat) literally into his own hands and face!

I believe the moral of all the erstwhile analysis is worth a recall: that the law can be a living and evolving organism. Or, as the Holmes adage still holds true, its "life is not always logic, but experience."

LETTERS

To The Editor

Reprint from the law Journal, Feb. 25, 2000

CRITERIA FOR LIABILITY NOT PLAINTIFF'S STATUS

As the attorneys who, on behalf of the law firm of Fiedelman & McGaw represented the successful appellants in both **Egan V. A.J. Construction**, __NY2d __, __ NYS2d __, 1999 WL 12202226 (1999) and **Antonik v. New York City Housing Authority**, 235 AD2d 248, 652 NYS2d 33 (1st Dept. 1997), we would like to comment on "To Jump or Not to Jump? Elevator Accidents and Employment Expertise" (*NYLJ*, Feb.4).

The plaintiffs' status as experienced workers in **Egan** and **Antonik**, while not irrelevant to the proximate cause determination, was not the decisive factor. Whether or not a plaintiff's exit from a stalled elevator is a superseded-

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DROPPING IN ON THE CAUSATION CONTROVERSY IN STRICT LIABILITY SCAFFOLD CASES

*by Julian D. Ehrlich**

The issue of proximate cause in analysis of the so-called scaffold statute, Labor Law §240(1), moved into the spotlight following the 1998 Court of Appeals case of **Weininger v. Hagedorn & Co.**[1] In his March 10, 1999 New York Law Journal article entitled *In Scaffold Cases, Courts are Moving from Absolute to Relative Liability*, Judge Andrew V. Siracuse noted that this case has been described by members of the plaintiff's bar as the end of strict liability under section 240 through a reintroduction of comparative negligence by the backdoor of proximate cause.[2] On the other had, Judge Siracuse found the holding of **Weininger** "unexceptional"[3] when considered in light of facts not discussed in the Court of Appeals decision.

This disparity exemplifies the stark differences, confusion and angst in how to approach proximate cause in Labor Law §240 cases.

Has the "exceptional protection"[4] of the strict liability standard of Labor Law §240 fallen to a lower level via proximate cause analysis?

The following review of recent decisions dealing with the issue reveals decidedly different outcomes based on seemingly similar accident facts. Accordingly, identifying trends is problematic.

What is clear is that it is more important than ever for a skilled practitioner (1) to develop what will be decisive facts through investigation, depositions, discovery for trial and (2) to understand the key language in the developing case law to use in support of the practitioner's position.

The statute itself is silent as to how causation should be analyzed.[5] However, as with the Pattern Jury charge for many other torts, the applicable jury charge, PJI 2:217,[6] requires the jury to find first a failure to provide proper protection, then that the construction, placement, operation and maintenance of the scaffold, hoist, etc., was a substantial factor in causing the plaintiff's injury.

Why is the proximate cause analysis of this statute different from that of other torts? The courts frequently have to grapple with the concepts contained in the following four questions:

1. Where does foreseeability fit in light of the duty defined in the statute?
2. What constitutes proper protection?
3. When do the plaintiff's acts constitute the sole proximate cause of the accident?
4. When are the plaintiff's injuries due to other hazards not compensable under the statute?

The decision as to who is to judge the answers to the above questions determines in the first instance whether a summary judgment motion is granted to the plaintiff or the defendant or instead to the jury to determine fact issues.

There has been disagreement in the courts with respect to the issue of foreseeability. In **Second v. Willow Ridge Stables, Inc.**,[7] Judge Andrew V. Siracuse stated "[f]oreseeability is a gauge for duty in negligence cases, but in the face of the flat unvarying standard set out in Section 240(1) it has no application at all."[8]

However, the Second Department took a different view in the often-cited case of **Mack v. Altmans Stage Lighting Company, Inc.**[9] In fact, the court in **Mack** stated that "when, as here, liability is sought to be imposed without regard to fault, there is even more reason to require a nexus between the wrongful act and the injury."[10] The court explained that in the §240 case "[f]oreseeability also plans a role in the proximate cause equation, albeit quite different from that in determining the scope of duty."[11] The court opined that foreseeability provides a rough gauge as to whether the chain of causation is broken by an intervening act since "[a] defendant remains liable for all normal and foreseeable consequences of his acts."[12]

Regardless of whether or not it is proper to consider foreseeability in this context, court since **Mack** have repeatedly done so.

Similarly with respect to proper protection the courts have grappled with the concept of the reasonableness. The Court of Appeals in **Zimmer v. Chemung County Performing Arts, Inc.**[13] held that

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> the primary distinction between sections 240 (subd.1) and 241 (subd. 6) is that the latter requires a determination of whether the safety measures actually employed on a job site were 'reasonable and adequate,' while the former is mandatory in its nature and imposes absolute liability for any injury arising from its breach. The question of circumstantial reasonableness is therefore irrelevant under subdivision 1 of section 240.[14]

Nonetheless, as discussed below, there is no shortage of decisions that, seem to consider the reasonableness of protection under the circumstances. This particularly true in situations where there is nothing wrong with the ladder or scaffold or there is a question as to whether such a device was even needed. Moreover, in at least one case the court hold that in addition "the totality of the circumstances" will determine whether the defendants are entitled to the separate but related defense that plaintiff was a recalcitrant worker.[15]

It is clear since **Weininger** that when the plaintiff's acts constitute the sole proximate cause of the accident, no §240 claim will lie. How is proximate cause to be distinguished from the plaintiff's comparative negligence? When is the chain of causation broken? When do the defendant's acts constitute a substantial cause of events producing the plaintiff's injuries?

The following three considerations were set forth in **Mack**: (1) the aggregate numbers of factors involved that contribute towards the harm and the effect which each has in producing it; (2) whether the defendant has created a continuing force active up to the time of harm, or whether the situation was acted upon by other forces for which the defendant is not responsible, and (3) the lapse of time.[16]

Frequently, defendants can argue that the plaintiff's acts were the sole proximate cause, while plaintiffs can argue that their acts are comparative negligence that is not to be considered.

With regard to whether the plaintiff was injured by other types of hazards not compensable under the statute, the Court of Appeals held in **Ross v. Curtis-Palmer Hydro-Electric Co.**[17] that §240 "was aimed only at elevation-related hazards and that, accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device."[18] Other types of hazards are considered in a myriad of situations.

The remainder of this article will examine the above concepts, dispositive facts and prevailing arguments in seven common §240 scenarios.

Although many decisions give only a brief description of facts and arguments, the losing side often seems to have failed to develop or advocate proven arguments.

NOTHING WRONG WITH THE LADDER OR SCAFFOLD

Cases both before and after **Weininger** deal with the situation where a plaintiff falls from a scaffold or ladder that neither fails nor is improperly placed. Typically, the cause of the fall is either unknown or is due to some activity taking place in the area.

If the ladder does not fail, has the defendant met the duty to provide proper protection?

In a traditional analysis of any tort, the plaintiff must prove the four elements of a tort in sequence: (1) duty, (2) breach, (3) causation, and (4) damages. If any element is not met along the way, further analysis is not necessary. The jury charge for a §240 case in PJI 2:217 follows this step-by-step method.

In addition, support for this approach is found in Judge Fischer's decision in **Guite v. Cooke Brothers of Brockport, Inc.**,[19] wherein he states "[c]lose examination shows that the issues of 'proper protection' and proximate cause are discrete."[20]

Following the classic approach, if the proper protection is found to be in place, then there is no breach and thus no need to consider proximate cause.

Nonetheless, cases have intertwined the concepts. For example, in **Weber v. 1111 Park Avenue Realty Corp.**,[21] the First Department, citing **Zimmer**, reasoned that "if proximate cause is established, the responsible parties have failed, as a matter of law, to give 'proper protection.'"[22]

Does this mean there can be liability under §240 where the defendant provided proper protection? The remainder of the court's analysis in **Weber** indicates otherwise.

In **Weber**, the court considered a situation where the plaintiff, who was installing a sheet rock ceiling while standing on a ladder, was shocked by temporary light cables causing him to fall.[23] The court denied the plaintiff's motion for summary judgment under Labor Law §240 and, referring to **Weininger**, stated that "[I]n similar circumstances, where injury resulted from a fall from a ladder not alleged to be defective in any way, the court of Appeals recently stated 'a reasonable jury could have concluded that plaintiff's actions were the sole proximate cause of his injuries, and consequently that liability under Labor Law §240(1) did not attach.'"[24]

Indeed, the conclusion in **Weber** appears to interpret **Weininger** as supporting the notion that where there is nothing wrong with the ladder or scaffold, there should be an issue of act as to whether plaintiff's sole negligence was the proximate cause of the accident for plaintiff. Thus, where there is nothing wrong with the ladder, plaintiff should not be given summary judgment.

Judge Fischer in **Guite** stated "[t]here is a split in the

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DROPPING IN ON THE CAUSATION CONTROVERSY IN STRICT LIABILITY SCAFFOLD CASES

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departments of the Appellate Division concerning whether summary judgment should be granted in such a case [where the ladder did not fail], and the question arises whether the recent Court of Appeals opinion in **Weininger**...resolves this conflict."[25]

However, there are cases in all four departments denying plaintiffs' summary judgment motions based, at least in part, on the fact that the ladder or scaffold did not fail.[26] In fact, Second and Third Department cases have gone further and actually held the dismissal of plaintiffs' claims on this basis proper.

In **Custer v. Cortladt Housing Authority**,[27] the court dismissed a plaintiff's §240 claim where there was no evidence to suggest that the ladder in any way failed, the plaintiff testified that he was satisfied that the ladder was stable, and the foreman testified at deposition that the ladder was still standing after the fall and had not moved at all. The foreman and a co-worker did not hear the ladder rattling or the plaintiff crying our prior to observing plaintiff fall through the air.[28] the court found that the plaintiff, who claimed amnesia, could only speculate that he must have slipped.[29] The court mentions in a footnote that the plaintiff had admitted a history of passing out and falling at work and that the foremen testified that plaintiff appeared to be unconscious at the time of the fall.[30]

The court in **Smith v. Wisch**[31] reached an outcome similar to that of **Custer**. In **Smith**, the plaintiff was found dead on the ground below a sundeck, which he accessed earlier by a ladder.[32] The railing of the sundeck was also found broken on the ground near plaintiff but the ladder was in place.[33] There was no eyewitness account of how the plaintiff came to fall or where he was just before he fell.[34] However, plaintiff's co-worker had warned the plaintiff on many occasions not to lean on any fence.[35] In dismissing the plaintiff's 240 claim, the court held:

> The circumstances of the deceased's fall imply the absence of any causative defect as clearly as they imply its presence and therefore would subject a jury to speculative evaluation of the merits of the action. Where a jury would be compelled to speculate upon various possible causes of an accident "which may be as reasonably attributed to a condition for which no liability attaches as to one for which it does, then the plaintiff is not entitled to recover, and the evidence should not be submitted to the jury."[36]

However, similar facts do not necessarily lead to similar outcomes. **Custer** and **Smith, supra**, are to be compared with **Saldana v. Saratoga Realty Associates Limited Partnership.**[37] In **Saldana**, decided just two years prior to Custer, the same court the decided **Custer** actually granted the plaintiff's summary judgment under §240 where the plaintiff similarly claimed no memory of the accident and was last seen before the accident climbing a ladder to a mezzanine five to ten minutes prior to his fall.[38] After a crash was heard the plaintiff was found unconscious on the concrete floor under the mezzanine with the ladder on the floor beside him.[39] The court held that "[a]lthough plaintiff has not established the precise manner in which the accident occurred, it is undisputed that he was injured as a result of a fall, either from the ladder itself, which was neither tied nor secured in any fashion, or from the elevated mezzanine area where he was assigned to work."[40] The court went on to hold that

> the only reasonable inference that my be drawn from this record is that plaintiff's injuries were the consequence of defendant's failure to furnish an appropriate safety device 'so constructed, placed and operated' as to provide proper protection from the special gravity-related hazards associated with working at a significant height above the ground.[41]

What facts are decisive? The position of the ladder after the accident? One plaintiff's admission that he thought the ladder was stable? One plaintiff's history of passing out?

One lesson to be learned by contrasting **Custer** and **Smith** with **Saldana** is that the position of the ladder after the accident can be dispositive and thus should be explored during investigation and deposition.

An additional important but often overlooked issue concerning proper protection to be explored during investigation and discovery is whether use of a ladder or scaffold was even necessary to accomplish plaintiff's task.

In **Curtis v. Halmar Corporation**,[42] the court upheld a defendants' verdict where a jury found a section 240 violation but no proximate cause. In **Curtis**, the plaintiff was allegedly injured when he fell from a ladder that kicked out from under him while he was allegedly injured when he fell from a ladder that kicked out from under him while he was attempting to use a drill at a five to six-foot-high railway platform.[43] Of note is that the plaintiff was five feet three inches tall and after the fall accomplished his task without the use of the ladder.[44] In upholding the jury's finding of no proximate cause, the court held that

> the jury could have found either that the accident had not occurred as the plaintiff claimed or that no safety device was necessary to perform the task which allegedly injured the plaintiff. Thus, the jury could reasonably have concluded that the failure

by the plaintiff to provide safety devices was not a substantial factor in causing the plaintiff's injury.[45]

Is there proper protection where the ladder performs its primary function but is involved with another danger?

In **Adams v. Owens-Corning fiberglass Corporation**,[46] the court dismissed a §240 claim where the plaintiff, a self-employed master electrician, used an aluminum extension ladder (provided by the general contractor) in order to reach a junction box where he was to connect some wires. The wires became electrified and since the plaintiff wasn't to wearing insulated gloves, his muscles contracted making it impossible for him to release the wires or climb down the ladder.[47] He asked another worker to kick the ladder out so the weight of his falling body would free him from the uninstalled wires.[48] He sustained multiple injuries after falling to the concrete floor. In dismissing the claim the court noted that the "ladder did not slip, collapse or otherwise fail to perform its function of protecting Adams from falling."[49] Indeed, the ladder prevented the plaintiff from falling and but for his directions that his coworkers kick the ladder from under him, he undoubtedly would have been fatally electrocuted.[50]

It is interesting to compare **Adams to Sprague v. Peckharn Materials Corp.**,[51] in which the court denied plaintiff's section 240 motion where he fell from a ladder after the ladder's right leg sank into the gravel on the ground.[52] The court found that an absence of any ladder defect precluded summary judgement.[53]

As Judge Siracuse pointed out in his NYLJ article, surely a ladder resting on unstable soil is improperly placed.[54]

Also of note in this category is **Capalbo v. Lederle Laboratories, Inc.**,[55] where the court denied the plaintiff's motion to amend his complaint to assert a Labor Law §240 claim.[56] In **Capalbo**, the plaintiff had originally pled that his fall from a ladder was due to a defective drill bit becoming lodged in a reinforced steel bar, causing the drill to spin around and hit the plaintiff in the chest, knocking him off the ladder.[57] Moreover, the plaintiff in **Capalbo** had originally provided an expert report indicating that the prime contributing factors to his injury were the improper design and /or manufacture of the drill's safety clutch and the failure of defendants to warn the plaintiff of the drilling hazard caused by hidden steel bars in the wall.[58] In denying the plaintiff the ability to even allege a Labor Law §240 violation, the court noted that the plaintiff's deposition testimony refuted any claim that the ladder was defective or unsafe, or that the absence of any protective device was a substantial cause of his injury.[59]

The tone of the **Capalbo** decision suggests that the court punished the plaintiff for attempting to add a §240 claim as an afterthought to a situation where such a violation is routinely pled.

What if the safety device works as intended but the plaintiff is still injured?

In **Kyle v. City of New York**,[60] the trial court dismissed the plaintiff's Labor Law §240 claims where the plaintiffs, ironworkers working under the 59th street bridge, were standing on a platform that buckled and collapsed. As a result, the plaintiffs were suspended in their safety body harnesses 130 feet above the river until they were rescued by a crane.[61] The trial court found "the safety equipment provided and actually used by the plaintiffs worked as intended and prevented them from free falling."[62] In the trial court decision plaintiffs' injuries were not specified and the decision does not indicate whether the plaintiffs argued that another device should have been used.

However, the First Department reversed.[63] In its decision, the First Department provided more details of the accident adding that plaintiff Kyle fell 30 feet although he was equipped with a body harness, lanyard and "yo-yo" which operated like a retractable dog leash.[64] He dangled for 45 minutes and his injuries included cervical derangement and radiculopathy, disc bulge at C5-C6, C6-7. The court held "it is evident that the safety device provided proved inadequate to shield plaintiff from the harm which flowed directly from the application of the force of gravity to his person."[65]

What is the plaintiff had only fallen a foot but suffered the same injuries? Is the equipment provided inadequate by definition if the plaintiff is injured?

Cases where nothing is wrong with the ladder are to be distinguished from cases where a functioning ladder is insufficient and another device should have been used. In **Dunn v. Consolidated Edison Co. of New York, Inc.**[66] and **Choi v. Bayside K.M. Realty**,[67] the plaintiffs were knocked off ladders by objects they were working on and the courts granted plaintiffs' §240 motions on the ground that the ladders were inadequate devices for the work taking place.

Based on **Dunn** and **Choi**, defendants must prepare a logical explanation for the choice of one device over another.

COWORKERS' ACTS

Another area that highlights how slight fact differences can result in different outcomes is the scenario where the plaintiff's injuries are caused by a coworker knocking into the scaffold.

As discussed above, in **Adams** the court dismissed the plaintiff's §240 action where plaintiff instructed the coworker to kick out the ladder to avoid electrocution.[68] However, in **Mooney v. PCM Development Company**,[69] the plaintiff fell off a scaffold after it was struck by a mechanical lift.[70] In granting the plaintiff's §240 motion, the court

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held "[t]he risk that the scaffold might be stuck by another piece of equipment operated in the same area was neither so extraordinary nor so attenuated as to constitute a superseding cause sufficient to relieve [defendants] of liability."[71]

Nonetheless, in **Bernal v. City of New York**,[72] the court denied a plaintiff's section 240 motion where the plaintiff fell while a coworker attempted to lower him on a Hi-Lo to a scaffolding that collapsed when the Hi-Lo bumped into it. 73 The court noted that on prior occasions the parties had not used the Hi-Lo to access the scaffold but rather the workers had climbed the scaffolding structure itself. 74 The court held "[g]iven this evidence, a reasonable fact-finder might conclude that the coworker's conduct was the sole proximate cause of the plaintiff's injuries or that the coworker's conduct constituted an unforeseeable superseding, intervening act."[75]

Is a co-defendant's knocking into a ladder foreseeable or not? Does it depend upon the circumstances (i.e. circumstantial reasonableness)?

In **Girty v. Niagara Mohawk Power Corporation**,[76] the court granted plaintiff's §240 motion where the plaintiff was secured to a utility pole by a safety belt and gaffs he wore on his legs, but was nevertheless slammed several times into the pole after it was struck by another worker driving a truck into a steel support wire.[77] Although the plaintiff only fell one foot until his safety belt caught on the line, the court found "his injuries were the proximate result of the failure of the devices he was using to 'give proper protection'".[78] The court found for the plaintiff even though the plaintiff did not fall to the ground and his injuries did not result solely from the impact of his fall but were also caused when his body was slammed several times into the shaking utility pole.[79]

It is difficult to reconcile the holding in **Girty** with that in **Kyle**, sine both cases involve plaintiffs injured even though the safety belt device worked.

SNOW, WIND, RAIN, BEES AND GREASE

Anther scenario where proximate cause comes into play is when the plaintiff's injury resulted from combination of use of the ladder or scaffolding with exposure to the elements. Arguably, every natural element involved in the various plaintiffs' accidents in the following cases is foreseeable, but the outcomes go both ways.

In **Ross v. Threepees Realty Corp.**,[80] the court dismissed plaintiff's §240 claim where he fell from ladder after being stung by a bee.[81]

In **Zeitner v. Herbmax Sharon Associates**,[82] the court denied plaintiff's §240 motion where plaintiff admitted that a gust of wind caused him to fall of a ladder while he was holding a storm window with both hands.[83] The court found that since there was no evidence of placement or positioning problems with the ladder, there were unresolved material issues of fact with regard to proximate cause.[84]

However, in **Robinson v. NAB Construction Corp.**,[85] the court granted plaintiff's §240 motion where plaintiff fell off a scaffold-ladder during a rainstorm.[86] The court held that

> [e]vidence of rain, or other 'concurrent cause,' at the time of the accident does not create a issue of fact as to proximate cause where plaintiff has met her burden in establishing her *240 claim. If anything, the readily foreseeable occurrence of rainy conditions at an outdoor construction site highlights defendants' negligence in failing to provide statutorily-prescribed safety measures.[87]

The court in **Robinson** did not state what the messing measures were. Further, it is difficult to distinguish how a bee sting or a gust of wind would not be as foreseeable as rain at an outdoor construction site. Are these the "other hazards" that are not elevation related referred to in **Ross v. Curtis-Palmer Hydro-Electric Co.**?

In **Arce v. 1133 Building Corporation**,[88] the court fainted the plaintiff summary judgment under §240 where plaintiff testified that he fell from an unsteady ladder even though defendants contended that the plaintiff may have fainted due to heat.[89] The court stated that "even if the testimony of defendants' expert witness were sufficient to raise a fact question on the cause of plaintiff's fall, partial summary judgment would still have been properly granted to plaintiffs because defendants failed to provide proper protection to plaintiff, e.g., a scaffold, in the event he became overcome by heat, which was foreseeable under the circumstances."[90]

Similarly, in **Nephew v. Barcomb**,[91] the court granted plaintiff's §240 motion where plaintiff slipped on a slightly pitched roof where he was removing snow and ice.[92] Disposition in **Nephew** was that "no safety device was provided to protect plaintiff from a fall from a pitched roof covered with snow and ice..."[93] Unavailing to defendants was that plaintiff actually slid several feet along the roof to the edge before attempting to grab a ladder to arrest his fall.[94]

However, in **Fernicola v. Benenson Capital Company**,[95] the court dismissed the plaintiff's Labor Law §240 claim

where he slipped on grease on a rung of a scaffold, noting that the scaffold was not defective and did not move or collapse.[96]

Is providing a slippery, greasy scaffold providing and operating a proper device?

ESCAPE

Yet another situation where lack of proximate cause may defeat a §240 claim is where the plaintiff voluntarily attempts to leave a safe but inconvenient area. Foreseeability weighs heavily here.

Most recently in **Egan v. A.J. Construction Corp.**,[97] the Court of Appeals held that plaintiff's §240 claim was not only properly dismissed but that plaintiff's actions constituted a superseding event terminating defendant's liability.[98] In **Egan**, the plaintiff and 25 to 30 other construction workers were caught in an elevator that stalled.[99] When plaintiff jumped to the lobby floor, he felt a shock in his spine.[100] The Court of Appeals held that "[a]s a matter of law, plaintiff's act of jumping out of a stalled elevator six feet above the lobby floor after the elevator's doors had been opened manually was not foreseeable in the normal course of events resulting from defendants' alleged negligence."[101] Of importance to the court's decision was that the plaintiff was not threatened by any injury while in the stalled elevator and that he was aware that the operator had telephoned for assistance.[102]

It should be noted that the Egan case reversed the Appellate Division's divided First Department decision and has been the subject of criticism by Professor David Siegel in the February 2000 issue of New York State Law Digest.[103]

Similar to **Egan is Antonik v. New York City Housing Authority**,[104] where the court held plaintiff's §240 claim was properly dismissed where plaintiff had fallen to his death attempting to exit a stalled elevator.[105] As in **Egan**, critical to the court's decision was that the plaintiff was not in an emergency situation and merely had to wait for the operator to restart the stalled elevator.[106]

Also, in **George v. State of New York**,[107] the court held a plaintiff's §240 claim properly dismissed, rejecting the so-called "danger invites rescue" doctrine.[108] In **George**, the plaintiff twice jumped eight feet to a protective debris shield where a coworker had fallen instead of using a ladder 100 fee away.[109] The court held that "the claimant was not compelled to jump to his coworker's aid as a result of any negligence of the defendant and accordingly any such negligence was not a proximate cause of his injuries."[110] Further "his gratuitous and unnecessary second jump was the sole and superseding proximate cause of his injuries."[111]

Similarly in **Mack**, the court held that the plaintiff's §240 claim was properly dismissed where a plaintiff, stranded on a roof after wind blew the ladder down, decided to lower himself using a worn, old rope that broke.[112] In so holding, the court noted that plaintiff was not in any immediate danger, although no alternative means of descent was discussed.[113]

However, if the court finds the jump necessary to avoid a danger caused by a §240 violation, plaintiff will be granted judgment. Such was the case in Cosban v. New York City Transit Authority,[114] where the plaintiff jumped from a crane that was in the process of falling due to defective wood cribbing.[115]

Is examining the emergency nature of plaintiff's situation a consideration of circumstantial reasonableness?

MISUSE

A number of decisions--including **Weininger** itself--deal with situations where plaintiff misused the device in question or failed to use the proper method to accomplish the task at hand. How is misuse to be distinguished from plaintiff's comparative negligence, which cannot be considered?

In cases favorable to defendants, plaintiff's misuse raises the specter of whether plaintiff's actions were the sole proximate cause of the injury. However, here as is the other areas, the decisions frequently contain only abbreviated descriptions of facts and arguments.

In **Weininger** itself, although not mentioned in the Court of Appeals decision, there was evidence that plaintiff was standing on a cross bar of the ladder, thus misusing the device.[116] There the Court of Appeals held "in the circumstances presented, actions were the sole proximate cause of his injuries and consequently liability under Labor Law §240(1) did not attach."[117]

Weininger is consistent with **Anderson v. Schul/Mar Construction Corp.**,[118] where the court held plaintiff's §240 motion properly denied where there was testimony that plaintiff missed a wrung while descending the ladder as a person would descend a staircase, i.e., facing away from and not holding on to the ladder, carrying a cup of coffee in one hand and his breakfast in the other.[119]

Another misuse case is **Vouzianas v. Bonasera**,[120] where the court denied plaintiff's §240 motion since the "plaintiff's conduct in disassembling the extension ladder at issue, and in using only the top half which lacked non-skid pads, constituted an unforeseeable, independent, intervening act which was a superseding cause of the accident."[121] Unfortunately, no additional facts are given.

In another misuse case, **Martin v. A-1 Compaction, Inc.**,[122] the court held a plaintiff's §240 claim properly dis-

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missed where plaintiff was fatally injured jumping up and down on a conveyor belt of a wood chipper in order to collapse the belt so the chipper could be moved.[123] Dispositive to the court's decision was the evidence that the conveyor belt could be folded while workers stood on the ground.[124]

Martin is consistent with the earlier similar case of **Richardson v. Matarese**,[125] where the court denied plaintiff's §240 motion.[126] In **Richardson**, the plaintiff fell through a floor while rolling an 800-pound radiator.[127] Since there was evidence that the plaintiff was instructed to break up the radiator and throw the pieces out the window, the court found "there is an issue of fact as to whether a violation of Labor Law §240 was a proximate cause of the plaintiff's injuries."[128]

Accordingly, another subject to explore through investigation and discovery is whether there was a more appropriate alternative method to accomplish the task plaintiff was undertaking.

Other instances where the court has denied the plaintiff's §240 motions include **Ossorio v. Forest Hills South Owners, Inc.**,[129] where there was evidence that plaintiff cut the rope of the scaffold on which he was standing,[130] and **Tweedy v. Roman Catholic Church of Our Lady of Victory**,[131] where the plaintiff may have untied a rope of a scaffold and then steeped on the unsecured section.[132]

However, the above cases no doubt would be subject to criticism that the plaintiff's negligence is not to be considered in §240 analysis.[133] Indeed, in other misuse cases the courts do not seem reluctant to grant plaintiffs judgment under §240.

In **Lawrence v. Forest City Ratner Companies**,[134] the court granted the plaintiff summary judgment under Labor Law §240 where plaintiff fell 16 feet off a scaffold that broke in two.[135] In **Lawrence**, the court stated "[t]o the extent that plaintiff may have failed to lock the wheels of the scaffold, it cannot be said that this was the sole proximate cause of the accident."[136]

Also, in **Vanriel v. Weissman Real Estate**,[137] the court granted the plaintiff's §240 motion rejecting defendants' arguments that plaintiff fell because of his own failure to activate a locking device for scaffold wheels.[138]

Similarly, in **Orcutt v. American Linen Supply Company**,[139] the Court granted a §240 motion to the plaintiff where plaintiff drove a manlift into a hole, finding this to be a foreseeable consequence in this situation created by defendant's negligence in not barricading holes in the floor.[140]

Also, in **Clark v. Fox Meadow Builders, Inc.**,[141] the court granted the plaintiff's *240 motion where plaintiff removed the plywood cover over an opening and subsequently fell in the opening, stating "it cannot be said that removal of the plywood cover was an unforeseeable intervening act."[142]

It is interesting to note is that many of these decisions rely in large part on their consideration of foreseeability.

In **Smizaski v. 784 Park Avenue Realty**,[143] the court granted plaintiff's §240 motion where he fell 30 feet off a scaffold despite wearing a safety line.[144] The defendants offered the explanation that the plaintiff failed to engage a rope grab that would have arrested his fall, and was in fact holding it in the open, disengaged position as he fell.[145] In finding for the plaintiff the court held that since the rope grabbing mechanism could be accidentally held in the disengaged position, it was defective.[146] Since plaintiff's conduct was foreseeable, it was not considered a superseding cause.[147]

In an obvious understatement that resonates throughout this topic, the court held "[u]ndeniably the distinction between the situation when a worker's conduct is the sole proximate cause of an accident, and when it is merely a contributing factor, can be difficult to discern under a given set of facts."[148]

INTOXICATION

Another cluster of cases discusses the related issue of plaintiff's intoxication.

In **Kijak v. 330 Madison Avenue Corp.**,[149] the court found that plaintiff's fall from a flimsy ladder established a §240 violation as a matter of law despite evidence of the smell of alcohol on plaintiff's breath in the hospital.[150] The court found that "defendants offered no evidence of how much the plaintiff had to drink, when he drank it, whether or not he was intoxicated or whether or not his intoxication was even a contributing cause of his fall, let alone the sole cause."[151]

In **Hodge v. Crouse Hinds Division of Cooper Industries**,[152] the court considered evidence of plaintiff's intoxication to be merely contributing negligence "admissible only as proof that such intoxication was the sole proximate cause of the accident."[153] Since lack of safety devices was found to be a proximate cause, the intoxication was not a defense.

In **Tate v. Clancy-Cullen Storage Co., Inc.**,[155] the court similarly found a §240 violation as a matter of law where

a plaintiff unsecured by a safety belt fell, despite defendant's submission of an affidavit from a biological psychologist who concluded from a review of hospital and medical records that plaintiff was intoxicated.[156] The court deemed the plaintiff's intoxication was merely evidence of contributing negligence not to be considered after the §240 violation was found to be a contributing cause.[157]

The consistent approach is that intoxication can only be admissible as evidence if it would allow the fact-finder to conclude that the plaintiff's actions were the sole proximate cause of the injuries.

PERILS TOO TENUOUSLY CONNECTED TO GRAVITY

In **Ross**, the Court of Appeals held that the special hazards to which the statute applies "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity."[158] What are such perils?

In **Califano v. Brodcom West Development Co.**,[159] the court dismissed the plaintiff's Labor Law §240 claim where the plaintiff was startled by the crash caused by the falling of an improperly secured crane wrecking ball.[160] Plaintiff's start caused him to drop steel tools he was carrying and fall tot he ground.[161] The court held that the fact that the noise was caused when part of the hoist fell to the ground is not sufficient to bring plaintiff's accident within the purview of the statute."[162]

Also in **Stark v. Eastman Kodak Company**,[163] the court dismissed the plaintiff's §240 claim where plaintiff stepped off the second rung of the ladder with greater force than expected because he believed he was on the bottom rung. 164 The court found the plaintiff's actions to be the sole proximate cause of the accident.[165]

However, in **Mattesi v. Tishman Speyer Properties**,[166] the court granted the plaintiff's summary judgment motion where plaintiff was pulled and then crushed into machinery when rope used to hoist a heavy load broke.[167] The court found the plaintiffs injuries here to have directly flowed "from the improper rope."[168]

CONCLUSION

In sum, it is more important than ever that defendants be prepared not only to oppose plaintiffs' summary judgment motions but also attempt to lay ground work for a potential motion to dismiss plaintiffs' §240 actions. It is essential to conduct early investigation by contacting the plaintiff's foreman and coworkers to determine potential contrary versions of the accident or plaintiffs' misuse of equipment or methods, and to develop any inconsistencies in plaintiffs' versions. Mere speculation and alleged contradictions that do not raise bona fide credibility issues will not suffice.[169]

The above discussion is certainly not exhaustive of every case discussing proximate cause in the §240 scenario but rather is intended to serve as a guide and framework as to where counsel's efforts should be focused. The disparate holdings underscore that the area is developing and ripe for practitioners to test where courts will draw the line cutting off proximate cause.

■

[1] 91 N.Y.2d958,672 N.Y.S.2d 840 (N.Y. 1998).

[2] J. Breakstone, *Notes & Decisions*, New York State Trail Lawyers Association *Bill of Particulars* December 1998, at 16.

[3] Siracuse, *In Scaffold Cases, Courts are Moving from Absolute to Relative Liability*, N.Y.L.J., March 10, 1999.

[4] *Ross v. Curtis Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 500-501, 601 N.Y.S.2d 49, 52 (1993).

[5] Labor Law §240 states:

> **Scaffold and other devices for use of employees:** 1. All contractors and owners of one and two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so employed. 2. No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers as provided for Article One Hundred Forty Eight of such law who do not direct or control the work for activities other than planning and design. This exception shall not diminish or extinguish any liability of professional engineers or architects or landscape architects arising under the common law or any other provision of law.

N.Y. Labor Law *240(1) (McKinney 1983).

[6] 1A PJI¶ 2:217 provides:

> **Injured Employee-Action Under Statute Imposing Absolute Liability.**
>
> Section 240 of the Labor Law requires all (contractors, owners) in the (erection, demolition, repairing, altering, painting, cleaning, pointing) of a (building, structure) to furnish or erect for the performance of such work ([*specify device such as:*] scaffolding, hoists, stays, ladders slings, hangers, blocks, pulleys, braces, irons, ropes, other devices), which shall be so (constructed, placed, operated, maintained) as to give proper protection to the person performing such work.
>
> Plaintiff was (employed, engaged) in the ([*state operation such as:*] erection, demolition, etc.) of a (building structure). If defendant breached this statutory duty and such breach was a substantial factor in causing plaintiff's injuries, the statute imposes liability whether or not defendant was at fault and whether or not there was any fault on the part of plaintiff that contributed to the injury.
>
> If you find that the (scaffolding, hoists, etc.) being used by plaintiff as so (constructed, placed, operated, maintained) as to give proper protection to plaintiff, you will find for defendant on this issue.

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> If you find that the (scaffolding, hoists, etc.) was not so (constructed, placed, operated, maintained) as to give proper protection to plaintiff in the performance of the work, and that the (construction, placement, operation, maintenance) of the (scaffolding, hoists, etc.) was a substantial factor in causing plaintiff's injury, you will find for plaintiff on this issue.

[7] 179 Msc. 29 566, 684 N.Y.S.2d 867, 871 (Monroe County 1999).

[8] *Id.*

[9] 98 A.D.2d 468, 470 N.Y.S.2d 664 (2nd Dept. 1984).

[10] *Id.* At 666.

[11] *Id.*

[12] *Id.*

[13] 65 N.Y.S.2d 513, 524, 493 N.YU.S.2d 102, 107 (1985).

[14] *Id.*

[15] *Jastrzebsky v. North Shore School District*, 233 A.D.2d 677, 680, 637 N.Y.S.2d 439, 442 (2nd Dept. 1996).

[16] *See Mack*, 470 N.Y.S.2d at 667.

[17] *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 500, 601 N.Y.S.2d 49,52 (1993).

[18] *Id.*

[19] 178 Misc.2d 948, 682 N.Y.S.2d 816, 821 (Monroe County 1998).

[20] *Id.*

[21] 253 A.D.2d 376, 676 N.Y.S.2d 174, 175 (1st Dept. 1998).

[22] *Id.* (citing *Zimmer*, 493 N.Y.S.2d at 107.)

[23] *See Weber*, 676 N.Y.S.2d at 175.

[24] *Id.*

[25] *Guite*, 682 N.Y.S.2d at 819.

[26] *Eitner v. 119 West 71st Street Owners Corp.*, 253 A.D.2d 641, 677 N.Y.S.2d 555 (1st Dept. 1998); *Alava v. City of New York*, 246 A.D.2d 614, 668 N.Y.S.2d 624 (2nd Dept. 1998); *Zgoba v. Easy Shopping Corp.*, 246 A.D.2d 539, 667 N.Y.S.2d 426 (2nd Dept. 1998); *Kahn v. Convention Overlook, Inc.*, 232 A.D.2d 529, 648 N.Y.S.2d 946 (2nd Dept. 1996); *Romano v. Hotel Carlyle Owners Corp.*, 226 A.D.2d 441, 641 N.Y.S.2d 50 (2nd Dept. 1996); *Gange v. Tilles Investment Co.*, 220 A.D.2d 556, 632 N.Y.S.2d 808 (2nd Dept. 1995); *Briggs v. Halterman*, 699 N.Y.S.2d 795 (3rd Dept. 1999); *Spenard v. Gregware General Contracting*, 248 A.D.2d 868, 669 N.Y.S.2d 772 (3rd Dept. 1998); *Karas v. Corning Hospital*, 262 A.D.2d 1039, 692 N.Y.S.2d 626 (4th Dept. 1999).

[27] 697 N.Y.S.2d 739 (3rd Dept. 1999).

[28] *See id.* at 740.

[29] *See id.* at 741.

[30] *See id.* at 740 n. 2.

[31] 77 A.D.2d 619, 430 N.Y.S.2d 115 (2nd Dept. 1980).

[32] *See id.* at 116.

[33] *See id.*

[34] *See id.*

[35] *See id.* at 117.

[36] 430 N.Y.S.2d at 117 ;(citations omitted).

[37] 235 A.D.2d 744, 652 N.Y.S.2d 374 (3rd Dept. 1997).

[38] *See id.* at 374.

[39] *See id.*

[40] *Id.* at 375.

[41] *Id.* (citations omitted).

[42] 250 A.D.2d 570, 672 N.Y.S.2d 409 (2nd Dept. 1998).

[43] *See id.* at 410.

[44] *See id.*

[45] *Id.*

[46] 260 A.D.2d 877, 688 N.Y.S.2d 788 (3rd Dept. 1999).

[47] *See id.* at 789.

[48] *See id.*

[49] *Id.*

[50] *Id.* at 790.

[51] 240 A.D.2d 392, 658 N.Y.S.2d 97 (2nd Dept. 1997).

[52] *See id.* at 98.

[53] *See id.*

[54] *See* Siracuse, *supra* note 2, at___.

[55] 257 A.D.2d 556, 683 N.Y.S.2d 284 (2nd Dept. 1999).

[56] *See id.* at 285.

[57] *See id.*

[58] *See id.* at 286.

[59] *See id.*

[60] 701 N.Y.S.2d 269 (N.Y.Sup. 1999).

[61] *See id.* at 270.

[62] *Id.*

[63] __A.D.2d__,__N.Y.S.2d__(1st Dept. 2000)(NYLJ May 15, 2000)

[64] *Id.* at__.

[65] *Id.*

[66] N.Y.L.J., October 26, 1999 at __(Sup. Ct. October __, 1999)

[67] N.Y.L.J., June 15, 1999, at 33 (Sup. Ct. June __, 1999)

[68] *See Adams*, 688 N.Y.S.2d at 789.

[69] 238 A.D.2d 47, 656 N.Y.S.2d 655 (2nd Dept. 1997).

[70] *See id.* at 656.

[71] *Id.* at 656 (citations omitted).

[72] 217 A.D.2d 568, 628 N.Y.S.2d 823 (2nd Dept. 1995).

[73] *See id.* at 824.

[74] *See id.*

[75] *Id. (citations omitted).*

[76] 262 A.D.2d 1012, 691 N.Y.S.2d 822 (4th Dept. 1999).

[77] *See id.* at 1013-14.

[78] *Id.* (citation omitted).

[79] *See id.*

[80] 258 A.D.2d 575, 686 N.Y.S.2d 448 (2nd Dept. 1999).

[81] *See id.* at 450.

[82] 194 A.D.2d 414, 599 N.Y.S.2d 234 (1st Dept. 1993).

[83] *See id.* at 234.

[84] *See id.*

[85] 210 A.D.3d 86, 620 N.Y.S.2d 337 (1st Dept. 1994).

[86] *See id.* at 338-39.

[87] *Id.*

[88] 257 A.D.2d 515, 684 N.Y.S.2d 523 (1st Dept. 1999).

[89] *See id.* at 524.

[90] *Id.* (citation omitted).

[91] 260 A.D.2d 821, 688 N.Y.S.2d 751 (3rd Dept. 1999).

[92] *See id.* at 754.

[93] *Id.*

[94] *See id.* at 753.

[95] 252 A.D.3d 569, 676 N.Y.S.2d 610, 611 (2nd Dept. 1998).

[96] *See id.*

[97] 94 N.Y.2d 839, 702 N.Y.S.2d 574 (1999).

[98] *See id.*

[99] *See id.*

[100] *See id.*

[101] 702 N.Y.S.2d at 576.

[102] *See id.*

[103] Siegel, *Court of Appeals Grant Summary Judgment in Negligence Case After Lower Court Ruled Against It Raises Again the Use of Summary Judgment in Tort Cases,* New York State Law Digest, No. 482 February 2000.

[104] 235 A.D.2d248, 652 N.Y.S.2d 33 (1st Dept. 1997).

[105] *See id.* at 34.

[106] *See id.*

[107] 251 A.D.2d 541, 674 N.Y.S.2d 742 (2nd Dept. 1998).

[108] *See id.* at 743.

[109] *See id.*

[110] *Id.* at 744.

[111] *Id.* at 743 (citation omitted).

[112] *See Mack,* 470 N.Y.s.2d at 666.

[113] *See id.*

[114] 227 A.D.2d 160, 641 N.Y.S.2d 848 (1st Dept. 1996).

[115] *See id.*

[116] *Weininger,* 672 N.Y.S.2d at 841.

[117] *See id.* (citation omitted).

[118] 212 A.D.2d 493, 622 N.Y.S.2d 310 (2nd Dept. 1995).

[119] *See id.*

[120] 262 A.D.2d 553, 693 N.Y.S.2d 59 (2nd Dept. 1999).

[121] *Id.* (citation omitted).

[122] 262 A.D.2d 537, 692 N.Y.S.2d 450 (2nd Dept. 1999).

[123] *See id.*

[124] *See id.*

[125] 206 A.D.2d 353, 614 N.Y.S.2d 424 (2nd Dept. 1994).

[126] *See id.* at 426

[127] *See id.*

[128] *Id.* at 425-26 (citation omitted).

[129] 251 A.D.2d 475, 675 N.Y.S.2d 360 (2nd Dept. 1998).

[130] *See id.*

[131] 232 A.D.2d 630, 648 N.Y.S.2d 685 (2nd Dept. 1996).

[132] *See id.*

[133] *See* Siracuse, *supra* n. 3, at p. 1.

[134] __A.D.2d__, 701 N.Y.S.2d 429 (1st Dept. 2000).

[135] *See id.*

[136] *Id.* (citation omitted).

[137] 262 A.D.2d 56, 691 N.Y.S.2d 446 (1st Dept. 1999).

[138] *See id.*

[139] 212 A.D.2d 979, 623 N.Y.S.2d 457 (4th Dept. 1995).

[140] *See id.* at 458.

[141] 214 A.D.2d 882, 624 N.Y.S.2d 685 (3rd Dept. 1995).

[142] *Id.* at 687.

[143] 264 A.D.2d 364, 694 N.Y.S.2d 371 (1st Dept. 1999).

[144] *See id.* at 373

[145] *See id.*

[146] *See id.* at 374.

[147] 694 N.Y.S.2d at 374.

[148] *Id.* (citations omitted).

[149] 251 A.D.2d 152, 675 N.Y.S.2d 341, 342 (1st Dept. 1998).

[150] *See id.*

[151] *Id.*

[152] 207 A.d.2d 1007, 616 N.Y.S.2d 822 (4th Dept. 1994).

[153] *Id.*

[154] *Id.*

[155] 171 A.D.2d 292, 575 N.Y.S.2d 832, 833-4(1st Dept. 1991).

[156] *See id.* at 834-355.

[157] *See id.*

[158] 81 A.D. 500, 501 601 N.Y.S.2d 49, 52 (1993).

[159] N.Y.L.J., Jan. 11, 2000 at __(Sup. Ct. Jan.__, 2000.

[160] *See id.*

[161] *See id.*

[162] *Id.*

[163] 256 A.D.2d 1134, 682 N.Y.S.2d 749 (4th Dept. 1998).

[164] *See id.* at 750.

[165] *See id.*

[166] N.Y.L.J., Feb. 3, 2000 at __(Sup. Ct. Feb.__, 2000.

[167] *See id.*

[168] *Id.*

[169] *See Wasilewski v. Museum of Modern Art,* 260 A.D.2d 271, 688 N.Y.S.2d 547 (1st Dept. 1999).

PRESIDENT'S MESSAGE

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public trust and confidence. To compound the potential loss of confidentiality, the lawyer's fundamental obligation of loyalty to the client would likely be significantly diminished if the lawyer is supervised by a non-lawyer.

In response to the strong opposition and concern expressed by many state and local Bar associations, this past March, the ABA apparently heeded the concerns and issued Draft Recommendations to be considered if-and when the Model Rules are amended. While the draft recommendations seem to track the language adopted in the District of Columbia, it does not appear that the new recommendations have quelled the professions' concerns.

To date the civil defense bar, including DRI, has been slow to react, and the true impact of the MDP on the profession has yet to be fully identified. Little effort has been undertaken to determine if or, how the MDP will impact the civil defense bar. What is clear, however, is that the MDP will impact all facets of the legal profession. The question is, will the change be good?

We, individually and collectively, need to take an active role in identifying those areas of the practice that will be impacted by the MDP. No matter what side of the issue you take we must assess the effect of the MDP on the practice of law. This is not an issue that will go away, and it is not an issue that we can afford to let others decide. We have a unique opportunity to shape how law will be practiced for decades to come. Let's take the opportunity to join the debate. In July the ABA will hold a meeting in New York, take the opportunity to participate in the roundtable discussion scheduled to take place. Also contact the DANY Board of Directors to let them know that this is an issue that must be addressed and discussed.

LETTERS

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ing cause of his injury depends ultimately upon the circumstances surrounding the exit and the plaintiff's awareness of the danger. Where a plaintiff's exit from a stalled elevator is not necessitated by emergency circumstances and yet a plaintiff does so with full awareness of the danger, it was held in **Egan**, **Antonik**, and **Jackson V. Green**, 201 NY 76, 93 N.W. 1107 (1911) to be a superseding cause of the injury.

Conversely, a plaintiff's exit from a staffed elevator which was necessitated by an emergency will not be a superseding cause of the injury. Thus, in **Humbach v. Goldstein**, 225 AD2d 420, 686 NYS2d 54 (2d Dep't 1999) where the elevator stalled at midnight and plaintiff "pressed the buttons for other floors, pushed the alarm button, pounded on the walls and screamed for help" but no one responded, it was a question of fact whether plaintiff's conduct in jumping from the elevator was a foreseeable consequence of an emergency situation created by the defendant's alleged negligence.

Even in the absence of an emergency situation, summary judgment for defendant has been denied where plaintiff's awareness of the danger was questionable. In **Lopez V. New York City Housing Auth.**, 159 AD2d 236, 552 NYS2d 216 (1st Dep't 1990) and **Bowers v. New York City Housing Auth.**, 210 AD2d 278, 620 NYS2d 290 (2d Dep't 1994), both cases in which plaintiffs were infants, summary judgment was denied. The courts reliance on **Boltax v. Joy Day Camp**, 67 NY2d 617, 499 NYS2d 660 (1986) in both **Egan** and **Lopez** makes clear that in order for the defendant to be insulated from liability, not only must the plaintiff's exit from the elevator be voluntary, it must be undertaken with the knowledge of the risks inherent in such conduct.

The case law evinces a dichotomy based merely upon a plaintiff's status as an employee in the building. Rather, the critical inquiry` in these cases is simply whether the plaintiff's exit from the elevator was necessitated by an emergency and, if so whether he or she was aware of the danger.

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