DEFENDANT

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

President's Column

*By John McDonough**

Since taking office in June of this year, the new offices of your associates have moved forward on several initiatives which will add significantly to the benefits of your membership in the Defense Association of New York.

Now that continuing legal education is a requirement for new lawyers in New York, and to be gradually implemented for the rest of us, we are in the process of qualifying DANY to offer CLE credits through the many fine seminars we give throughout the year. After an absence of two years, we will again be offering our mock trial seminar series for the young lawyer early next year. We anticipate being able to offer full CLE credits for participation in this program.

We are monitoring the progress of the latest piece of anti-lawyer legislation, the so-called auto-choice bill pending in Congress and in New Jersey. This bill purports to offer a premium discount to those individuals who relinquish their seventh amendment rights to a jury trial for auto tort claims at the policy's inception. Needless to say, were this legislation to be put into law in its present form, the integrity of the civil justice system in the auto tort area would be severely undermined.

For the first time since DANY was created we have established a committee to identify significant defense bar issues in appellate cases and submit recommendations to the Board regarding the desirability of submitting an *amicus curiae* brief to weigh in on such issues. I am very proud to report that our first effort in this regard, in the Court of Appeals case of Trincere v. County of Suffolk, a sidewalk defect case, has resulted in an important victory for the defense bar and casualty insurance industry. The holding of this case is treated elsewhere in this issue by the new co-chairpeople of the Committee on the Development of the Law Frank Kelly and Andrew Zajor.

We anticipate having the amicus brief of DANY in Trincere, and all future briefs prepared by the committee, available through yet another membership benefit - DANY's new Web page on the internet. As a member of DANY you will be able to access our brief bank, check the status of your DANY CLE credits, view upcoming seminar dates or contact a DANY

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Athletic Facility Owner/ Operator Duty to the Participant

*by Gail L. Ritzert **

Interest in athletic events has become heighten with the growth of youth activities and adult participation. In light of this increase, the obligation of the facility owner and operator to provide a safe environment for the participant to enjoy the competition has received an increase in public attention as the number of lawsuits increase. The facility operator's obligation to provide a safe environment has emerged from the backdrop of the assumption of risk. The scope of this article will address the duty of the facility owner and operator to the participant.[1]

Whether an athletic facility is owned or operated by a municipal corporation, school district or private entrepreneur, the facility operator has an obligation to maintain the premises and playing field in a reasonably safe condition. Encompassed in this duty is the obligation to warn the participant of dangerous or defective conditions on the premises, as would any other landowner. While the sporting event participant assumes all risks known and inherent to the activity, they do not assume the risk of harm from unknown or concealed dangers. The duty of the would be defendant is balanced against the participant's knowledge, experience and skills.[2] Thus, it is recognized that the operators of athletic facilities are not insurers of the safety of the participant.

In its recent decisions, the Court of Appeals re-examined the continued viability and application of the defense of assumption of risk and its use to defeat claims by participants against athletic facility owners and operators. In the decision rendered on July 2, 1997, in Morgan v. State of New York, Beck v. Scimeca d/b/a Hwrang-Do Center - Long Island Hwa Rang Do Karate Academy, Siegal v. City of New York, Chimerine v. World Champion John Chung Tae Kwon Do Institute, Judge Bellacosa wrote that the assumption of risk doctrine "still helps and serves to define the standard of care under which a defendant's duty is defined and circumscribed because assumption of risk in this form is really a principle of no duty, or no negligence and so denies the existence of any underlying cause of action."3 The Court affirmed three decisions which granted summary judgment to the defendant, and reversed the decision in Siegal, finding a distinct and

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General Municipal Law 205-e: Right of Action to Certain Injured or Representatives of Certain Deceased Police Officers ("Fireman's Rule")

*by Margaret L. Pezzino, Esq. **

Enacted in 1989, New York State General Municipal Law 205-e created a new cause of action for police officers injured in the course of their duties. It imposes *absolute liability* where a police officer is injured in the line-of-duty by reason of neglect, omission, willful or culpable negligence of any person or persons in failing to comply with applicable statutes, codes, ordinances, rules, order or requirements. Liability is imposed regardless of whether the injury or death is caused *directly* or *indirectly* by the lack of compliance.[1]

HISTORY:

Under the common law rule, firefighters injured in the line of duty could NOT recover against the property owners or occupants whose negligence occasioned the fire emergency to which they were responding.[2] A limited avenue of relief was made available in 1935, when a legislature enacted General Municipal Law **205-a**, which provided firefighters and their survivors a statutory cause of action for a line of duty injuries "occur(ring)... as a result of any ... culpable negligence of any person or persons who in failing to comply with the requirements, related to maintenance of premises in a safe condition, of any of the statutes, ordinances, rules, orders and requirements" of any level of government and or any governmental department, division or bureau.[3]

In Santangelo v. State of New York, (I988) the Court of Appeals applied the common law "firefighter's rule" to police officers injured in the line of duty. They reasoned that the members of the uniformed services were employed "precisely because the special skills and expertise are required to confront certain hazards . . ., these hazards often arise from negligence, and as a matter of public policy, firefighters (and police officers) trained and compensated to confront such dangers must be precluded from recovering damages from the very situation that created a need for their services".[4]

As a result of the Santangelo decision, the legislature swiftly enacted General Municipal Law Section **205-e** in a deliberate effort to afford police officers parity with firefighters. The new law essentially utilized the same language as General Municipal Law Section 205-a, and was intended to be construed and applied identically to that statute "whenever practicable and sensible". Provisions of the General Municipal Law must be construed and applied in light of their specific history and purpose, as well as their language.[5]

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Update on CLE

by Jeanne A. Cygan

As you may have heard, New York State Administrative Board of the Courts has issued new rules requiring all attorneys to complete Mandatory Continuing Legal Legal Education (CLE).

The State's CLE Board will consist of 16 members appointed by the Chief Judge and presiding justices of the four Appellate Divisions.

All attorneys admitted to practice after October 1, 1997 will be required to complete 32 hours of mandatory "Bridge the Gap" (BTG) programs within two years of ther admission to the Bar. Reportedly, this will include 6 hours of ethics and professionalism, 12 hours of skills and 14 hours of practice management and areas of professional practice.

The intentions is for CLE to also apply to all attorneys commencing next year.

In keeping with DANY's tradition of presenting informative seminars, it is anticipated that future presentations will be developed under guidelines that will permit attendees to receive CLE credit.

It is hoped that the first course that will be approved for CLE credit will be our popular Trial Advocacy Course in which a mock personal injury trial is conducted over several nights. A distinguished panel of practicioners serve as judges, witnesses (including experts) and faculty members. All join to give our participating counsel the experience of thinking on their feet.

We anticipate presenting this program in early 1998. Watch for further information in our membership mailings.

** Ms. Cygan is a member of the Board of Directors of the Defense Association of New York and practices law in New York City.*

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Report from Committee on the Development of the Law for DANY

*by Andrew Zajac * and Frank V. Kelly +*

The Defense Association has made great strides in establishing itself as a voice for the Defense Bar and the business community in our jurisdiction. The committee's formation meeting and charge occurred in the latter part of July and resulted in a motion to the Court of Appeals on August 18, 1997 for leave to file the amicus brief in the case of Trincere v. County of Suffolk, ____ A.D.2d ___, 648 N.Y.S.2d 126 (2nd Dept. 1996). The motion was granted and the brief filed with the Court. Oral argument was scheduled for September 11, 1997. The Defense Association appeared and was recognized by the bench for its efforts. The New York State Trial Lawyers and the City of New York also filed amicus briefs.

The Court obviously appreciated our submission, as many questions from the bench came directly from our brief. Any other questions came from the Trial Lawyer's brief. Thus, two distinct positions polarized the questions on a public policy basis with the actual merits of the underlying case garnering somewhat lesser treatment.

The appearance at the Court of Appeals was precipitated over a simple trip and fall accident wherein plaintiff, Esther Trincere, tripped and fell on defective paving slabs at the North Plaza of the H. Lee Dennison building in Hauppauge, New York. The County of Suffolk, owner of the premises, took the position at the trial of liability that although the paving slab may not have been perfectly flush, the County was not required to maintain it in a perfect condition. The County maintained that it was required only to maintain the paving slab in a reasonable condition so that it was not a trap, snare or nuisance. The County further argued that the defect was merely trivial and that the only negligence was plaintiff's failure to observe the paving slab and to watch where she was walking.

The plaintiff stated quite clearly that she fell on the northside of the Dennison building as she was entering the building from a large plaza, which consisted of cement paving slabs. She was looking straight ahead and did not observe any obstacles in her way at the time of the accident.

Plaintiff described the slab as being raised from the surrounding slabs by "a half inch. A little over a half inch". She first noticed this allegedly defective condition after she had fallen and was on the ground, stating that there was

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Structured Judgements and Inflation

*by James P. O'Connor and Sam M. Mazen **

On June 10, 1997 the court of Appeals finally reached the question of whether the structured judgment statutes preclude evidence of inflation in the calculation of future damages[1]. The court, in a surprisingly unanimous opinion by Judge Smith, held that plaintiff may present expert testimony on the effect of inflation on awards for future damages and also receive the 4% addition pursuant to the structured judgment statutes[2].

The unanimity of the decision is surprising in that the Court first heard oral argument on the case on February 4, 1997. At that session, Judges Levine and Wesley took no part. It is believed that after the initial argument in February, the Court was split 3-2 in a particular direction, because Judge Francis T. Murphy (1st Department) and Judge James White (3rd Department) sat with the Court on reargument on April 29, 1997. The Court of Appeals rules require at least four judges in the majority in order for an opinion to be issued[3]. By adding Judges White and Murphy, the Court assured at least a four person majority. However, the court decision was strangely unanimous.

In its opinion, the court rejected defendants argument that the 4.% rate in CPLR 5041(e) was meant to be the exclusive adjustment for inflation where an award of future damages is subject to the structured payment scheme, pointing out that prior to the enactment of article 50-B, juries were permitted to consider expert testimony relating to inflation in reaching their verdicts, and that nothing in CPLR 5041 explicitly dispenses with this commonlaw rule.

As the purpose behind the 4% adjustment structured payments provided in article 50-B is not evident from the fact of the statute, the Court turned to the legislative history to try to discern its intent. Acknowledging, some materials arguably favoring defendant's contention that the Legislation intended the 4% rate in CPLR 5041(e) to account for inflation, the Court said nevertheless, "nothing in any of the legislative history indicates that the 4% rate was intended to be the exclusive measure or that the fact finder should be prohibited from considering the effects of inflation in reaching a damages award."Addressing the Governor's approval memorandum for article 50-B, which refers to the 4% rate as an "interest factors the court believed that the term "interest" was not precisely defined in the memorandum as it did not expressly include "inflation" as one of its components. Therefore, the court reasoned that "precluding expert testimony on inflation would erode the compensatory function of damages awards

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Worthy of Note

Compiled by John J. Moore

EVIDENCE-Prior Similar Acts. In *(Coopersmith vs. Gold, 89 N.Y.2d 957, 655 N.Y.S.2d 857)* it was indicated that evidence of prior similar acts would be inadmissible to prove that the defendant perpetrated the same act on a later unrelated occasion. The testimony of four former patients of the psychiatrist, who claimed to have been sexually involved with the psychiatrist, was inadmissible to prove that the psychiatrist later perpetrated the same act on an unrelated occasion in an action brought by a patient who alleged that the psychologist improperly engaged in a sexual relationship with her during the course of her treatment.

NEGLIGENCE-Construction-Scaffolding-Excavation-Labor Law-Section 240. The Court of Appeals recently held that a worker who was injured when he fell approximately twenty feet from a backhoe into a trench while he was attempting to replace the hydraulic fluid in the backhoe was engaged in an activity protected under the scaffolding law, inasmuch as the work performed was part of the construction of a pipeline. Further, the workees fall from the backhoe into the fifteen-foot deep excavation after attempting to steady himself by grabbing an improperly secured handrail was the type of elevation-related risk for which the scaffolding law provides protection *(Covey vs. Iroquois Gas Transmission System, L.P., 89 N.Y.2d 952, 655 N.Y.S.2d 854).*

RES IPSA LOQUITUR-Elements. In *(Kambat vs. St. Francis Hosp., 89 N.Y. 655 N.Y.S.2d 844)* the court ruled that once the plaintiff's proof establishes the following three conditions, a *prima facie* case of negligence exists and plaintiff is entitled to have the doctrine of res *ipsa loquitur* charged to the jury: (1) the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

Where an actual or specific cause of an accident is unknown, under the doctrine of res *ipsa loquitur*, a jury may, in certain circumstances, infer negligence merely from the happening of the event and the defendant's relation to it. The plaintiff need not conclusively eliminate the possibility of all other causes of injury, and it is enough that the evidence supporting the conditions for such theory afford a rational basis for concluding that it is more likely than not that the injury was caused by the defendant's negligence.

DAMAGES-Inconsistent Award. It was recently held that a jury's award of $200,000 for plaintiff's future pain and suffering was irreconcilable and inconsistent with its failure to award any damages for past pain and suffering, so indicated the Second Department in *(Cadet vs. City of New York, _____ A.D.2d _____, 656 N.Y. S. 2d 331).*

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ITRI Brick and Antisubrogation: Time To Reevaluate *North Star*?

*by Gerry Mcarthy **

The Court of Appeals' recent decision in *the ITRI Brick & Concrete Corp. v. Aetna Casualty &, Surety Co.*[1] case highlights an inherent inequity that often results in construction litigation from the application of the antisubrogation doctrine enunciated by the Court of Appeals in *North Star Reinsurance Corp. v. Continental Ins. Co.*[2] A logical application of *ITRI Brick*, in conjunction with the *Pennsylvania General Ins. Co. v. Austin Powder Co.*[3] and *Hawthorne v. South Bronx Community Corp.*[4] decisions, suggests that a reevaluation of the *North Star* holding may be in order.

The underlying factual scenarios in the *ITRI Brick* and *Stollar* cases represent the typical situation in construction litigation. In each case, an employee of a subcontractor at a construction site is injured in an accident and sues the general contractor in common law negligence as well as for statutory violations of the Labor Law. The general contractor in turn impleads the subcontractor/employer, asserting causes of action for contribution and contractual and common law indemnification. In that posture, the employer's general liability carrier is obligated to defend the employer based upon the contractual indemnification claim (the general liability policy excludes coverage for the common law contribution and indemnification claims against the employer, pursuant to the employee bodily injury exclusion) and the workers compensation carrier (the "I B" coverage) is obligated to defend the employer based upon the common law causes of action (the workers compensation policy excludes coverage for claims based upon contractually assumed liability).

Whether either carrier will ultimately have an obligation to indemnify the employer must await a judicial (via motion) or factual (via jury verdict or stipulation) determination on the merits of each claim. If, for example, the general contractor is held absolutely liable under Labor Law Section 240 or vicariously liable under Section 241(6), but the employer is found to be solely responsible (100% negligent) for the accident, the general liability and workers compensation carriers are co-insurers for the resulting judgment against the third-party defendant employer.[5]

If the general contractor and employer are each found partially at fault, as were the cases in *ITRI Brick* and *Stollar*, then the 1B policy is solely responsible for that portion of liability against the employer. The employer's general liability carrier has no indemnity obligation to the employer since the liability finding against the general contractor extinguishes the contractual indemnity claim, where the contract calls for "full" indemnification[6]. Thus, in *ITRI Brick* and *Stollar*, the State Insurance Fund, the workers compensation carrier in both

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officer, all with a click of a mouse. This important service is expected to be on-line by early next year.

With the above member benefits, this quarterly journal, and other benefits being developed, it is clear that your membership in DANY can provide the business edge necessary to satisfy increasingly demanding clients and judiciary.

**Mr. McDonough is President of the Defense Association of New York, and a partner in the Manhattan office of the Philadelphia based Cozen & O'Connor.*

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separate duty existed under those circumstances.

When defending any of these cases, the first hurdle raised in opposition to a motion for summary judgment is the assertion that the enactment of Article 14-A of the CPLR eliminated the absolute defense of assumption of risk to a claim of negligence. To support their position, plaintiffs often cite Abergast v. Board of Education of South New Berlin Central School.[4] In Abergast, the Court of Appeals took great pains to address the applicability of the doctrine of implied and expressed assumption of risk as an absolute defense subsequent to the enactment of CPLR §1411. After reviewing the legislative history, the Court concluded:[5]
[T]hat CPLR §1411 requires a diminishment of damages in the case of an implied assumption of risk, but, except as public policy prescribes an agreement limiting liability, does not foreclose a complete defense that by express consent of the injured party no duty exists, and, therefore,no recovery may be had.

From this decision, the plaintiffs seemingly found a way to defeat the assumption of risk doctrine where the plaintiff's assumption was implied, and not expressed. This position, however, was addressed by the Court five months later in Maddox v. City of New York,[6] as the Court held that assumption of the risk is implied from participation in the sport where the risk was known and appreciated by the participant. Thereby finding the plaintiff expressly assumed the risk through participation.

The Courts have traditionally exercised great restraint in imposing liability for injuries to sport participants in the belief that the law should not place unreasonable burdens on the "free and vigorous participants in sports."[7] This position is well documented by the Courts in New York as Judge Cardoza in his decision in Murphy v. Steeple Chase Amusement Co., Inc., wrote:[8]
One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball.

To determine the validity of the assumption of risk defense, the Court must balance the defendant's duty of responsibility with the tort rules support of the social policy to facilitate "free and vigorous" participations.[9] Thus, the facility owner or operator has a duty to exercise care to make the condition as safe as they appear to be.[10] In order to be relieved of liability for an inherent risk of a sport, the owner or operator of the athletic facility must establish that the "participant is aware of the risks; has an appreciation of nature of the risks; and voluntarily assumed the risk."[11]

To assess the defendant's duty, the Courts "appreciate the fact that by engaging in an athletic activity, the participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation."[12] The scope of duty will be determined by the participant's overall knowledge and awareness, assessed against their experience and skill, since the duty cannot be determined in a vacuum.[13]

While a professional athlete is held to be more aware of the dangers of his/her sport, this does not preclude a finding that an "amateur" athlete assumed the risk inherent to his/her Sport.[14] However, neither the professional, nor the amateur assumed the risks of reckless or intentional acts.[15] Nor do they assume those risks that are concealed or unreasonably enhanced.[16] Consequently, if the risks of the activity are fully comprehended or perfectly obvious, by participating the plaintiff has consented to them and the defendant has fulfilled its duty.[17]

When reviewing a participant's knowledge and experience, it is not enough to simply look at the participant's age. With children engaging in organized sports at such an early age, to defeat a motion for summary judgment, it is not enough to assert that the plaintiff was of tender years and could not have appreciated the risks.[18] Therefore, no matter how young the participant, the court will assess how open and obvious the risk is, the participant's skill and experience, as well as his/her conduct under the circumstances.[19]

Faced with the uphill challenge to overcome the assumption of risk defense, plaintiffs often attempted to overcome their voluntary participation by alleging inherent compulsion. Under this theory, the argument is put forth that they had no choice but to obey the coach's order and play.[20] To sustain this claim, the plaintiff must establish that despite the injured party's knowledge of the risk, they were directed by a superior to do the act, and had an economic compulsion or other circumstances which equally impels compliance with the direction. [21] However, it is not enough to allege fear that if he/she did not play they would lose his/her athletic standing or chance for a scholarship to establish he/she had no choice to obey.[22] Often these claims will rise and fall by the instruction received from the coach and the ability to withdraw from the activity.[23]

Another potential hurdle that must be cleared is an alleged violation of sports or organizations governing rules. The participant plaintiff may find solace in the "rule book" when an injury is proximately caused by the failure to utilize required

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safety equipment.[24] A similar result will be reached if the coach or organization fails to adhere to participation guidelines established by the local or nation governing body.[25] Therefore, if a piece of protective gear is mandated by the "governing body", the failure to wear that particular piece of safety equipment, such as a mouth guard or face mask, may be sufficient grounds for the Court to deny the motion for summary judgment. Thereby, leaving the question of whether the defendant breached its duty for its failure to warn of the dangers and whether it was reasonable to practice without adhering to the safety guidelines and recommendations to the trier of facts.[26]

When the Court makes its determination of whether the defendant violated its duty of care within sport activities and their inherent risk, the applicable standard applied should include whether the conditions caused by this defendant are "unique and created a dangerous condition over and above the usual dangers that are inherent in the sport.[27] This question becomes heightened when it is alleged that the defendant was negligent in the maintenance, design or construction of the athletic facility. In Morgan v State, the plaintiff alleged that the defendants were negligent in the design of the exit chute to the bobsled run by creating an opening in the wall of the exit run. A similar position was expressed in Siegal , where it was asserted that the defendant was negligent in allowing the net dividing indoor tennis court to remain torn, creating a dangerous condition.

The Court of Appeals reaffirmed the distinction between structures and appurtenances that are ordinary and necessary to the sport, and those that are not.[28] In Morgan, there was extensive testimony introduced regarding the safety and design of bobsled runs. Through this evidence, the defendant was able to establish that the accident was the result of the dangers inherent to the highly dangerous sport of bobsledding and that alternative designs may have been more dangerous to the competitors. Since the plaintiff was aware of the risk that he might lose control of his sled on the course, and was thoroughly familiar with the course, the Court found the plaintiffs have assumed the inherent risk of the sport and those attendant with the design of the exit chute.[29]

This follows the line of decisions in which the courts have repeatedly held that where the structure or appurtenance is a part of the game or sport, and is open and obvious, the participant assumed the risk of injury when encountering the same.[30] These conditions include light poles[31], curbs,[32] wet and muddy playing surfaces,[33] geese droppings,[32] depressions, uneven playing surfaces and sewer lids.[34]

Conversely, where the alleged condition is not a "by product" of the game, the owner or operator, stands in the same shoes as any landowner. Using this distinction in Siegal, the Court of Appeals found that the dividing net is not by its nature " automatically an inherent risk of a sport as a matter

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General Municipal Law 205-e: Right of Action to Certain Injured or Representatives od Certain Decesead Police Officers ("Fireman's Rule")

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It is plain from the legislative history that GML Section 205-e was not enacted to give police officers an unrestricted right to recover for all negligently caused line of duty injuries. It was not intended to give police officers the right to sue for breaches of any and all governmental pronouncements of whatever type, regardless of how general or specific those pronouncements might be. Rather, the 1989 enactment of that section was intended to provide police officers with an avenue of recourse "where injury is the result of negligent non-compliance with well developed bodies of law and regulation, which impose clearer duties.[6]

Since 1989, the legislature has three times amended GML Section 205-e to ensure that the statute fully abrogated the harsh effects of the antiquated "fireman's rule", which was reiterated in Santangelo. Following the enactment of Section 205-e in August, 1989, the Courts differed on whether the statute should be applied retroactively for actions pending prior to its enactment. On July 22, 1990, the controversy was resolved by the legislature when it expressly declared that GML 205-e was remedial in nature, and amended the statute to add a new Section 2 which provi 'ded for its retroactive application to actions pending, or dismissed on or after July 2, 1987.[7] Following the 1990 retroactivity amendment to Section 205-e, new problems arose with respect to the scope of the statute. The Courts, construed GML Section 205-e like GML Section 205-a and were affording the right of action to police officers injured in the line of duty only where the defendant was alleged to have violated some statute, code, rule, ordinance, or regulation with respect to the safe maintenance and control of a premises.[8] This limitation therefore rendered the benefits and protection of 205-e useless to most injured police officers. The police officers were still being denied both common law and statutory causes of action. The inequity arose in those instances where the police officer was injured in the line of duty by reason of some statutory violation *unrelated* to the safe maintenance of the premises. In those instances, he had no common law or statutory right of recovery.[9]

Since police officer's duties are not as closely tied to the "premises", their duties often expose them to a host of non-premise related hazards. Accordingly, the legislature again acted swiftly to perserve the right of police officers to recover damages for in the line of duty injuries, and amended 205-e as a new section number I, effective July 17, 1992 and designates Subdivision 1 to apply to injuries and death in performance of duty "*at any time or place.*" This ensures that the benefits of 205-e are applied regardless of whether the officer is injured in a building, car, on foot patrol, in his or her car, or elsewhere. The legislature made perfectly clear their intent, thus, the Court of Appeals in Ruotolo v. State of New

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nothing to bring it to her attention prior to the accident.

Following the plaintiff's testimony the County moved for a directed verdict, dismissing the complaint and/or summary judgment asserting that: 1) the raised slab was not an actual defect or dangerous condition, but was a trivial defect which does not constitute a trap, snare or nuisance; and 2) the raised slab is an open and obvious condition for which the County does not owe a duty to warn and which plaintiff should have seen had she employed the reasonable use of her own senses.

Plaintiff obviously opposed the motion, asserting that there was no rule that a defect had to be of a certain minimum dimension in order to render it actionable and that the question of whether or not a defect is trivial is for the jury.

The Trial Court reserved its decision and the plaintiff submitted its proof at trial. Essentially, the defendant simply read portions of the plaintiff's deposition to the effect that the plaintiff's foot was not caught in any manner and that she did not see the raised slab at any time prior to failing. The defendants then rested.

The defense renewed its prior motion for a directed verdict and/or summary judgment for the same reasons as previously stated. Additionally, the County asserted that the plaintiff failed to show notice of any claimed defect. The Court granted the County's motion, stating -

The Court in Mascaro v. State, (46 A.D.2d 941, 362 N.Y.S.2d 78 (3rd Dept. 1974), affirmed 38 N.Y.2d 870, 382 N.Y.S.2d 742 (1976) the case here says that "where defect in sidewalk curb, which allegedly was raised about two inches above adjacent sidewalk, was trivial and slight in nature and possessed none of the characteristics of a trap or snare, and there was no evidence to show actual or constructive notice, State was not liable for injuries sustained by pedestrian when she fell while walking across sidewalk curb and out onto pavement of a State highway". Now, here the witness' testimony was that this level was less than two inches. As a matter of fact, she indicated a half inch. And here there was no indication of any notice of defect in the record, either actual or constructive. The Court is of the opinion that the defendant's motion has merit.

Plaintiff countered that there was no such thing as a minimum dimensional requirement for an actionable defect and that the law did not require any minimal dimensions be shown for dismissal of the action. After sufficient argument, the Court granted the defendant's motion to dismiss the case.

The matter wound its way to the Appellate Division, Second Department which in a 3-2 decision, affirmed the judgment. The majority held the defect was slight and trivial and did not constitute an otherwise dangerous condition.

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Structured Judgements and Inflation

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since inflation would be entirely removed from the calculation of future damages".

In Rohring v. Niagara Falls, 84 NY2d 60 (1994), the Court examined CPLR article 50-B and described article 50-B's features as closely paralleling CPLR article 50-A, which had been enacted a year earlier in response to concerns about the increasing size of verdicts in medical and dental malpractice actions. However the Rohring Court was explicit in its complaint that article 50-B fails to make clear the sequence of calculations to be followed by a trial court in applying subdivision (c) and subdivision (e). Because the statute is patently ambiguous and impossible to apply as written, the Rohring Court turned for guidance to the underlying intent of the statutory scheme for articles 50-A and 50-B, and found the scheme to be of a technical, administrative nature intended to regulate and structure payment, and also indicates it "should not be construed in such a way as to increase the underlying liability owed by defendants."

Now, three years later, the court returns to subdivision (e) to find that "since neither the statute nor the legislative history behind the enactment of the 4% adjustment disclosed any intent as to whether the Legislature meant the rate to be exclusive, or a post-verdict adjustment for inflation, the purpose of the 4% adjustment remains unclear." However, it seems the court ignored its own advice from Rohring, and in Schultz, did interpret 50-B, in such a way as to increase the underlying liability owed by defendants.

The Schultz jury, said the Court, had properly heard plaintiff's economist testify that inflation would cause medical expenses to increase at a rate of 7.75% per year, and that wages and fringe benefits would grow at the rate of 3.37% per year[4]. And the trial Court then properly adjusted the jury's verdict, which reflected acceptance of this testimony, Ly adding the 4% annual adjustment required by 5041(e)[5]. This end result becomes a windfall or 'double' recovery to plaintiff, and is inconsistent with the recommendations of Insuring Our Future[6].

The Structured Judgment statutes have troubled New York courts frequently over the last decade, causing one trial court judge to pen the memorable phrase, "every judge's nightmare", to describe a case that requires a Court to apply the provisions of CPLR Section 5041[7]. The Schultz court is startling in its failure even to acknowledge the work of New York's lower courts in this difficult area[8], let alone to criticique the analytic output of any decision. In addition, the Court could have availed itself of a sizable body of professional literature[9] focused on structured judgements; and their valuation. Instead, the Court reasoned, as described, to a conclusion that the Supreme Court was not foreclosed from permitting expert testimony on inflation for the consideration of a jury.[10]

The Court itself, in almost a plaintive voice, says "until the

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Athletic Facility Owner/ Operator Duty to the Participant

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of law."[34] Therefore, the owner or operator's duty will be adjudicated under the principles of an ordinary premise's owner, subject to the same principle of comparative negligence.

Therefore, in Morgan and its accompanying cases, the Court of Appeals firmly outlined the principles under which sport related claims will be adjudicated. In upholding the long standing tenant pronounced by Judge Cardoza, the assumption of risk doctrine is firmly ensconced as a weapon to defeat these claims. In order to lay the ground work for a motion for summary judgment, the defending attorney must become familiar with the sport, its risks, current trends, and governing rules. These elements will serve as a guide as you probe into the plaintiff's claim. When investigating the plaintiff's prior history in athletics, their experience, whether as a participant or spectator, can offer a great deal to establish their knowledge and awareness of the risks. As we proceed and defend these claims, we can continue to find reassurance in the words of Judge Cardoza:[35]

"The plaintiff was not seeking a retrial for mediation ... He took a chance of a like fate, with whatever damages to his body might ensue from such a fall. The timorous may stay at home."

FOOTNOTES

[1] *The scope of this article will not address the impact of General Obligation Law* **S** *9-103 New York's Recreational Use Statute.*
[2] *Maddox v. City of New Yew York, 66 N.Y.2d 270, 278 496 N.Y.S.2d 726, 487 N.E.2d 553 (1985).*
[3] *1997 N.Y. Lexis 1400, 1414.*
[4] *65 N.Y.2d 161, 490 N.Y.S.2d 751, 480 N.E.2d 368 (1985).*
[5] *Id. at 170.*
[6] *66 N.Y.2d 270, 276 496 N.Y.S.2d 726, 487 N.E.2d 553 (1985).*
[7] *Benitez v. New York City Board of Ed,73N.Y.2d 659, 543N.Y.S.2d 29 541 N.E.2d 29(1989); Turcott v.Fell, 68N.Y.2d 432, 439, 510 N. Y.S.2d149, 502 N.E.2d 964 (1986) (Citationsomitted).*
[8] *250 N.Y. 479, 482-483, (1929).*
[9] *Morgan v. State et al, N.Y.L.J., July 3, 1997, page 25, 26 (citations omitted).*
[10] *Id; Turcott, supra; Bailey v. Town of Oyster Bay, 227 A.D.2d 427, 642 N.Y. S.2d 903 (2d Dept. 1996).*
[11] *Id..*
[12] *Morgan, supra.*
[13] *Id.; Maddox, supra.*
[14] *Reilly v. Long Island Jr. Soccer League, 216 A.D.2d 281, 627 N.Y. S.2d 784 (2d Dept. 1995); Strauss v. Town of Oyster Bay, 201 A.D.2d 553, 607 N.Y. S.2d 730 (2d Dept. 1994).*
[15] *Turcott supra; Nabozny v. Barnhill, 31 I11. App. 3d2I2, 334 N.E.2d 250 (Ist Dept. 1975).*
[16] *Morgan, supra; Benitez supra; Zayas v. Half Hollow Central School District, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996) see also, Owen v. R.J.S. Safety Equipment, Inc., 79 N.Y.2d 967, 582 N.Y.S.2d 998, 591 N.E.2d 1184 (1992).*
[17] *Morgan, supra (citations omitted).*
[18] *Reilly, supra; Straus, supra.*
[19] *Rubenstein v. Woodstock Riding Academy, 208 A.D.2d 1160, 617 N.YS.2d 60 (3rd Dept. 1994).*
[20] *Maddox, supra.*
[21] *Benetiz, supra at 658.*
[22] *Id.*
[23] *Rich v. West Shore Little League, 209 A.D.2d 396, 618 N.Y. S. 2d 106 (2d Dept. 1994).*
[24] *Baker v Briarcliff Manor School District, 205 A.D.2d 652, 613 N.Y.S.2d 660 (2d Dept. 1994); Parisi v. Harpurville Central School District, 160 A.D.2d 1079,\ 553 N.Y.S.2d 566 (3rd Dept. 1990).*
[25] *DeGala v. Xavier High School, 203 A.D.2d 187, 610 N.Y.S.2d 270 (1st Dept. 1994).*
[26] *Parisi, supra; Baker, supra.*
[27] *Morgan, supra (citations omitted).*
[28] *Lamay v. Foley, et al, 188 A.D.2d 157, 594 N.Y.S.2d 490 (4th Dept. 1993); see also, Cole v. NYRA, 17 N.Y.2d 761, 270 N.Y.S.2d 421; 217 N.E.2d 144 (1966)*
[29] *Morgan, supra.*
[30] *Id.,.; Maddox, supra.*
[31] *Bailey, supra;*
[32] *Brown v. City of Peekskill, 622 N.Y.S.2d 772 (2d Dept. 1995)*
[33] *Maddox; Morales v. N.Y. Housing Authority, 187 A.D.2d 295, 589 N.Y.S.2d 456 (1st Dept. 1992)*
[34] *Conway v. Deer Park Union Free School District, __A.D.2d__, 651 N.Y.S.2d 96 (2d Dept. 1996); cf. Zayas, supra.*
[35] *Murphy, supra at 483.*

General Municipal Law 205-e: Right of Action to Certain Injured or Representatives od Certain Decesead Police Officers ("Fireman's Rule")

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York (II)[11] held 205-e constitutional, and also upheld its retroactive operation.

GML Section 205-e, as amended on July 17, 1992 has been held to include violations of the Vehicle and Traffic Law[12] violations of Penal Law[13] , violations of Mental Hygiene Law[14], and violations of Executive Law[15].

Consistent with its broad scope, Courts have repeatedly held that GML Section 205-e cause of action may be premised upon statutes which, are declarative of the common law in which standing alone do not otherwise give rise to a private cause of action. The Second Department held that 205-e cause of action may be premised upon violation of City charter [16]. The Fourth Department held that a 205-e claim may encompass statutes which clarify common law duties.[17] However, the Second Department has held in Hurley v. State of Connecticut [18], that "statutes creating negligence cause of actions in favor of police officers for duty related injuries resulting from violations of federal laws, laws of states, or subdivisions, must be strictly construed since it creates a cause of action where none existed a common law." The Court of Appeals in Desmond v. City of New York,[19] found that 205-e was not enacted to give police officers an unrestricted right to recover for all negligently caused line of duty injuries, nor was it intended to give police officers right to sue for breaches of any and all governmental pronouncements of whatever type, and regardless of how general or specific those pronouncements might be. Rather, 205-e's provisions were intended to provide police officers with avenues of recourse for injuries as the result of negligence and non-compliance with well developed bodies of law and regulation. In Desmond, a police officer sought to recover for injuries he sustained as a result of a high speed automobile chase that was allegedly conducted by his partner, in violation of internal police department guidelines. The Court of Appeals reversed the Appellate Division's rulings stating it erred in upholding plaintiff s judgment under 205-e based on a claimed violation of governmental "requirement." They found that the departmental directives did not impose any "requirements" or tc clear duties".[20]

Most recently in 1996 the Legislature again amended GML 205-e adding Section 3, to firmly establish that the Section 205-e clearly provides a right of action regardless of whether the violation is of a provision which codifies a common-law duty and regardless of whether the violation is of a provision prohibiting activities or conditions which increases the danger inherent in the work of any officer.[21]

APPLICATION AND EFFECT:

Issues to be considered by the practitioner, therefore, are

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Report from Committee on the Development of the Law for DANY

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Thus, the majority's holding was that minimal differences in elevation without more are non-actionable.

The "more" that is implied in the decision are circumstances in the nature of a trap or a snare. Those circumstances may be discerned from cases like Taylor v. New York City Transit Authority, 63 A.D.2d 63, 405 N.Y. S.2d 95 (1st Dept. 1978), affirmed, 48 N.Y.2d 903, 424 N.Y.S.2d 888 (1979). In Taylor, the plaintiff fell when her heel was caught in a crevice on a stairway. It was the opinion of the Appellate Division majority that with respect to that defective condition the "nature and location of the crevice, obscured from view by the riser of the step above, made it a trap (citation omitted) (emphasis supplied)". Id. at 63 A.D.2d, 630 N.Y.S.2d 96.

The briefs submitted for the plaintiff and the Trial Lawyers Association relied heavily Brannigan v. City of Plattsburgh, 3 A.D.2d 637, 157 N.Y.S.2d 1017 (3rd Dept. 1956) which stated that there was "no requirement that a defect in a public sidewalk be of any particular de in order to give rise to liability on the part of the municipality".

The two Judge dissent at the Appellate Division, disagreed with the majority conclusion which was that the defect which caused plaintiff's fall was slight and trivial and did not, as a matter of law, constitute a dangerous condition. The Court stated in relevant part:

The majority finds that the case law "reflects the prevailing view" that differences in elevation of about one inch are non-actionable and, therefore, that the half inch rise in the paving slab over which the plaintiff tripped cannot be considered a dangerous or defective condition. Although some cases have found a relatively slight elevation difference or small roadway depression to be non-actionable, there is no hard and fast rule that a (sic) elevation difference of less than one inch cannot constitute-negligence. Indeed, the issue of whether or not a dangerous and defective condition exist generally "depends upon the peculiar facts and circumstances of each case and is a question of fact for the jury". (Schechtman v. Lappin, 161 A.D.2d II 8, 121; see also, Varrone v. Dinaro, 209 A.D.2d 508; Guerrieri v. Summa, (193 A.D.2d 647). Thus, while it has been held that "the owner of a public passageway may not be cast in damages for negligent maintenance by reason of trivial defects on the walkway... as a consequence of which a pedestrian might merely stumble, stub his toe, or trip over a raised projection". (Guerrieri v. Summa, supra at 647; see also, Liebel v. Metropolitan Jockey Club, 10 A.D.2d 1006), the question of whether a defect is so trivial that no negligence can arise from either its creation or the failure to repair it "cannot be determined merely on the basis of the depth of the particular sidewalk depression or difference in elevation". (Evans v. Pyramid Co. of Ithaca, 184 A.D.2d 960). Moreover, this Court has repeatedly observed that there is no rule that a pavement defect be of a certain

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Structured Judgements and Inflation

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legislature provides some other definitive indication, we must apply the term of the statute as written and in a manner that comports with the policy and practical considerations reflected in this opinion.113-1. Corrective legislature is now required to address the situation wherein plaintiffs now receive compounding inflation - having expert testimony before juries on inflatiormry value then getting the 4% automatic additur by statute.

Both James P. O'Connor and Sam M. Mazen are attorneys for theNew York State Insurance Fund. Both Schultz v. Harrison Radiator and Rohring v. Niagara Falls were New York State Insurance Fund cases.

FOOTNOTES

1. *Schultz v. Harrison Radiator, 89 NY2d _____, Slip Opinion June 10, 1997*
2. *Civil Practice Law and Rules Article 50-A and 50-B, §§5031-5039, adn §§5041-5049. For Article 50-B, see ch 682, McKinney's 1986 Session Laws of New York, Sec. 9*
3. *CLS NY Const. Art. VI §2 Subd. a. (Five members of the Court constitute a quorum, and the concurrence of four is necessary to a decision.)*
4. *Schultz, supra at p.2*
5. *Ibid.*
6. *Insuring Our Future, April 7, 1996 Report of Governor's Advisory Commission on Liability Insurance, p. 156-158.*
7. *Rohring v. Niagara Falls, 153 Misc. 2d 100 (Sup. Ct., Niagara County, 1992)*
8. *See Alisandrelli v. Kenwood, 724 F. Supp. 235 (S.D.N.Y.) aff'd without opinion 923 F2d 844 (2d Cir. 1990); Andrialis v. Snyder, 159 Misc. 2d 419603 NYS2d 670 (Sup. Ct., New York County, 1993); Brown v. New York, 184 AD2d 126, 592 NYS2d 533 (4th Dept., 1992); Gambardelli v. Allstate Overhead Garage Doors, 150 Misc. 2d 395, 576 NYS2d 770 (Sup. Ct., New York County, 1991); Peterson v. Zuckerman, 152 Misc. 2d 684, 584 NYS2d 968 (Sup. Ct., Erie County, 1991)*
9. *See Michael J. Wolkoff & Eric A. Hanushek, The Economics of Structured Judgements Under CPLR Article 50-B, 43 Buffalo L. Rev. 563 (1995); Patrick J. McKeena, A Four Percent Solution to the "Judge's Nightmare", NYS Bar Journal, January, 1995*
10. *Schultz, supra at p. 10*
11. *Ibid.*

Worthy of Note

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MALPRACTICE-Continuous Treatment-Elements. In *(Fauci vs. Wolan, _____ A.D.2d _____, 656 N.Y.S.2d 298)* the Second Department ruled that a patient who had undergone a cerciage procedure to assist in her pregnancy, and who at the end of the following month while in labor had the cerciage sutures removed, was not in a continuing relationship with the physician, as would allow the application of the continuous treatment doctrine for statute of limitations purposes. At most, the record established that the patient had returned to have her condition checked, which did not establish continuous treatment. Essential to the application of the continuous treatment doctrine is that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit, ard neither a mere continuing relationship between patient and physician nor the continuing nature of a diagnosis is sufficient to satisfy the requirements of the doctrine.

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whether or not the plaintiff has alleged in the complaint and bill of particulars that the tortfeasor's action violated, or failed to comply with"requirements", and whether those "requirements" are "well developed bodies of law" and "requirements" which "impose clear duties". The issue of whether or not the claimed statute, or ordinance, et al, imposes a "clear duty" and thus triggers 205-e is a question of law for the Court to decide, However, whether or not the alleged act or omission of the defendant violates a 205-e "requirement" is a question of fact for the jury to decide.

What if the plaintiff falls to specify and identify the "requirement" which the defendant violated? First Appellate Department has held that the plaintiff would be given opportunity to cure the defect before dismissal.[22] Second Department has held that such failure rendered an action under 205-e legally insufficient.[23]

Should a GML 205-e cause of action be properly pleaded and deemed applicable, it should be noted that it imposes *strict hahility*. As in any statutory cause of action, assumption of risk and culpable conduct of the plaintiff are not defenses. Common law notice principles (notice of defects, actual or constructive) do not apply to a GML Section 205-c cause of action. A lesser degree of proof on causation will suffice.[24] The rationale behind the imposition of absolute liability and diminished notice requirement in a Section 205-e claim was fully set forth by the First Department in Johnson v. Riggio Realty Corp.[25] There, the Appellate Division held that comparative negligence is not a defense, and that proof of proximate cause is not required under 205-a. They elaborated that because the provision is not grounded in the traditional standards of negligence and proximate cause, but instead imposed a strict liability standard, in any case where there is a "*practical or reasonable connection*" between the violation of the statute and the injury sustained. The Court went on to compare GML Section 205-a to Section 240 of the Labor Law. Their similarity being special statutes which apply a standard of absolute liability on the tortfeasor for an violation which is reasonably connected to the firefighter's injury. It was the legislature's intent to protect firefighters from special hazards.[26]

The same rationales apply with equal force to causes of action under Section 205-e of GML. If the defense of comparative negligence and common law notice requirements were applicable to Section 205-e claims, causes of action under Section 205-e would be rendered indistinguishable from common law negligence claims. Thus, this would be wholly contrary to the legislature's intent to provide police officers with enhanced protection against the hazards inherent in police work and to bring police officers into "parity" with firefighters. Accordingly, GML Section 205-e imposes absolute liability in any case where there is a "practical or reasonable connection" between a violation and the injury or death of a police officer, and does not require the same burden of proof with respect to notice.[27]

COMMON LAW:

Often, police officers, injured in the line of duty, commence causes of action also based upon common law claims of negligence. Although, Santangelo precluded recoveries for injuries incurred by police officers during such functions which were within the scope of the police officer's duties, and where the injury was inherent to that task and risk, it did not bar all common law negligence claims by police officers (nor was that its intent). The Court of Appeals adopted the rule set forth in Pascarella v. City of New York ,[28] which states that the determinate factor was whether the injury sustained is related to the particular dangers which a police officer is expected to assume as part of their duties.

Under the police officer's claim of common law negligence the plaintiff need not plead or prove any statutory or "requirement" violations. Culpable conduct, comparative and contributory negligences, and assumption of risk are all viable defenses, and are questions of fact for the jury to decide. Unlike GML Section 205-e, where strict liability is imposed, here the ordinary negligence requirements must be met, such as proof of the existence of a defect or negligence, proof of causation, proof of actual or constructive notice of a defect, when applicable.

In conjunction with the **1996** amendment to GML 205-e, the New York Legislature created a new section of the **General Obligations Law (Section 11-106)** titled "Compensation for injury or death to police officers and firefighters or their estates".[29] Keeping with their finding that the nature of modern police officers and firefighters work in this State has exposed them to an unprecedented risk of death and physical injury and their intent to provide police officers and firefighters with right of recover for injuries sustained during the course of their duties due to the negligence of others, they have essentially abolished the Santangelo test for the right of recovery.

GOL 11-106 creates a cause of action for police officers and firefighters who suffer injury, disease or death while in the lawful discharge of their official duties when the injury, death or disease is proximately caused by the neglect, willful omission, or intentional, wilful or culpable conduct of another, other than their employer or co-employee. Nothing in this Section effects the existing liability of an employer or co-employee at common law or under Section 205-a or 205-e of GML.[30]

From a mere examination of the plain wording of GOL 11-106, it appears that the Legislature was attempting to broaden the police officer and firefighters right to bring an action based on common law negligence and obviate the Santangelo test. However, a review of the Legislative Intent [31] states that this act was intended to ensure once and for all that 205-e of GML is applied in accordance with its original

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Past President's Dinner

Congratulations to the senior past president.

Is there a message?

Eileen makes her point.

Take the picture.

The focus of attention?

The last course.

General Municipal Law 205-e: Right of Action to Certain Injured or Representatives od Certain Decesead Police Officers ("Fireman's Rule")

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legislative intent to offer an umbrella of protection for police officers, who, in the course of their many and varied duties, are injured by the negligence of anyone who violates any relevant statute, ordinance, code, rule and/or regulation. They re-emphasize that the liability imposed should not be limited to violations pertaining to the safe maintenance and control of premises since there is a need to ensure a right of action regardless of where the violation causing injury or death occurs. They further conclude that the right of action should exist regardless of whether the person whose negligence leads directly or indirectly to the violation causing injury or death owns or controls the premises where such violation occurs.

There is nothing in the statute itself that limits the right to recovery under this Section to violations of any relevant statutes, et al. Further, unlike GML 205-e it applies the proximate causation standard. Thus, it is less clear that in fact it was the legistlature's intent to eliminate the whole Santangelo test in cases based upon common law negligence. They make no reference to that specific goal in their Legislative Intent. However, in view of the legislatures overall intent to broaden police officers and firefighters right to recover, and the plain reading of the statute, the total elimination of the Santangelo restriction, would be consistent with the previously stated legislative goals.

Thus, we can expect a whole new onslaught of case law to follow as to the application of GOL 11-106 and whether or not it completely obviated the Santangelo test. Already the Appellate Division of the Second Department in Sikes v Reliance Federal Savings[32] among other things, denied the defendants reliance upon Santangelo in light of the newly enacted GOL 11-106.

OBSERVATION:

Initially, in 1989, the New York State Legislature sought to reduce the so-called harsh effect of the Santangelo test by creating a statutory right of recovery by police officers injured while on duty by another's negligence in failing to comply with applicable "requirements". Once certain standards are met the plaintiff's burden of proof and causation are reduced. The Legislature clarified and enlarged the injured officers right to recovery in the subsequent amendments of 205-e (i.e., 1990, 1992 and most recently 1996).

Now, in combination with the newly created GOL 11-106, it appears that the police officer has an unhindered right of action under common law, abolishing the Santangelo test and its logic and reasoning. The Court of Appeals in Santangelo concluded that police officers, like firefighters, are the experts engaged, trained and compensated by the public to deal on its behalf with emergencies and hazards often created by negligence of others, and therefore should generally not be able to recover damages for negligence in the very situations that create the occasion of their services.[33]

Consequently, an injured officer can receive compensation from his employer (municipality) for on the job injuries and commence legal action against the person whose negligence caused his injury. GML 205-e and GOL 11-106 clearly stated that they do not alter the officer's right to do so. Presumably, the employer would then have a right of subrogation and claim a lien on the officer's recovery from his private lawsuit. While this lessens the burden on the municipality to compensate its injured officers, it creates a further burden on the Court system in creating and permitting new causes ofaction to be litigated.

FOOTNOTES

[1] *General Municipal Law 205-e, Ch. 346, L 1989*
[2] *Kenavan v City of New York, 70 N.Y.2d 558, 523 N.Y.S.2d6O, 517 N.E.2d 872 (1987)*
[3] *General Municipal Law 205-a, Ch. 800 L. 1935, amd., Ch. 251, L. 1935.*
[4] *Santangelo v State of New York, 71 N.Y.2d 393, 526 N.Y.S. 2d 812, 521 N.E.2d 770 (1988)*
[5] *Sponsor's Mem. in Support, 1989 N.Y. Legis.Ann., at 180; Governor's Mem. approving L. 1989, ch. 346, 1989 N.Y.Legis.Ann., at 182*
[6] *Mem. of State Executive Dept., reprinted in 1989 McKinney's Session Laws of N.Y., at 2140, 2141. See also Desmond v City of New York, 88 N.Y.2d 455, 646 N.Y.S.2d 492 (1996)*
[7] *Mem. of State Executive Dept., (l990)*
[8] *Buckley v City, 575 N.Y.S.2d 329 (1st Dept., 1990)*
[9] *Sciarrotta v Valenzuela, 182 A.D.2d 443, 581 N.Y.S 351 (1st Dept. 1992)*
[10] *Ch. 474, L. 1992, GML 205-e*
[11] *Ruotolo v State 187 A.D.2d 160, 593 N.Y.S.2d 198 (1st Dept. 1993)*
[12] *Vertucci v Diaz, 92 A.D.2d 703 (2d Dept. 1993) and Costantini v Benedetto, 190 A.D.2d 888 (3rd Dept. 1993)*
[13] *Mahalsky v Towner, 196 A.D.2d 532 (2d Dept. 1993) and Baiamonte v Buongiovanni, 207A.D.2d 324, 615 N.Y.S.2d 415 (2d Dept, 1994)*
[14] *Santangelo, id.*
[15] *Ruotolo, id.*
[16] *Del Casino v City of New Rochelle, 176 A.D.2d 282, 574 N.Y.S.2d 514 (2d Dept. 1991)*
[17] *Alberti v Eastman Kodak, 204 A.D.2d 1022, 612 N.Y.S.2d 729 (4th Dept. 1994)*
[18] *Hurley v State of Conn., __ A.D.2d__ 649 N.Y.S.2d 602 (2d Dept., 1996)*
[19] *Desmond, id.*
[20] *Also see Madonna v American Airlines, 82 F3d 59 (CA2 NY, 1996) and Shepherd v Werwaiss, 947 F.Supp 71, (ED NY, 1996)*
[21] *NY CLS Gen Mun 205-e (1997), Ch. 703, L.1996*
[22] *Maisch v New York, 181 A.D.2d 467, 581 N.Y.S.2d 181 (Ist Dept., 1992)*
[23] *MacKay v Misrok, 215 A.D.2d 734, 627 N.Y.S.2d 430 (2d Dept., 1995)*
[24] *Carroll v Pellicio Bros., 44 Misc.2d 831, 255 N.Y.S.2d 771, aff'd 26 A.D.2d 552, 271 N.Y.S.2d 1444, 220 N.E.2d 793 (2d Dept., 1960)*
[25] *Johnson v Riggio Realty Corp., 153 A.D.2d 485, app. dismd without op. 74 N.Y.2d 945 (1989)*
[26] *See also Plunkett v Emergency Medical Service, 165 Misc.2d 418, 627 N.Y.S.2d 237 (Supp.,1995)*
[27] *Ruotola, id., Johnson, id, Lusenskas v Axelrod, 592 N.Y.S. 685 (1st Dept., 1992) app. dism. 593 N.Y.S.2d 199 (1993).*
[28] *Pascarella v City of New York, 146 A.D. 2d 61, 1v. den. 74 N.Y. 2d 610 (1989)*
[29] *Ch. 703, L. 1996, GOL 11-106*
[30] *Ch. 703, L. 1996, GOL 11-106(2)*
[31] *Ch. 703, L. 1996, Legislative Intent*
[32] *Sikes v Reliance Federal Savings, __ A.D.2d __ (2d Dept., 1996)*
[33] *Santangelo, id.*

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minimum dimension, or constitute a trap, in order to render a municipality liable for injuries sustained thereby (see, Giniger v. Held, 127 A.D.2d 562; Marcus v. County of Nassau, 95 A.D.2d 846; Smith v. City of New York, 38 A.D.2d 965; Caldicott v. of New York, 32 A.D.2d 832.

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In adopting a view that a difference in elevation of one inch or less cannot be considered actionable, the majority relies upon several cases in which the Appellate Courts have declined to impose liability upon property owners for slight and insignificant defects. However, these fact specific cases do not support the imposition of a general rule that defects which are one inch or less in height are not actionable as a matter of law.

At argument, the appellant began the proceedings with an indictment of the majority decision in Trincere which was cut short immediately by Judge Kaye, who flatly refuted that position by reference to our argument and the plain reading of the majority's decision. It was Judge Kaye's pointed remark that the majority left open other considerations than height differentials in analyzing the characteristics of a defect for purposes of sounding liability. The appellant sideslipped this stumbling block artfully. Nonetheless, the point was resoundingly made for all concerned and was a singular victory for the Defense Association brief. It was widely recognized at the Court of Appeals that the majority opinion below did not establish a "not less than" rule. It was consistently and persistently maintained that no parties sought the imposition of a mechanistic minimal dimensions rule, but that all of the circumstances attendant upon a height differential were to be considered in ascertaining the nature of the defect. The seminal issue, obviously, was whether or not the Court had the power to dismiss cases as a matter of law which showed no further circumstances other than a height differential alone. It was the appellant's and the Trial Lawyer's position that the Court had no such power and that all cases in controversy of this kind were to be submitted to the jury.

The Defense Association argued pointedly that the Court has the power to direct verdicts as a matter of law and that the jury was not established for de novo consideration of all matters, including whether or not there exists a cause of action. In fact, the Defense Association brief was the only one to discuss CPLR 4401 allowing Courts to grant directed verdicts in cases where essential elements have not been made out. The Court took the appellant to task head on and inquired directly whether or not the appellants thought Trial Courts had the power to refuse to submit a case to the jury. At this juncture, the appellant conceded the point and agreed to the general proposition that the Court had the power to dismiss a case. For the wider concerns of the Defense Bar as a whole, this concession was worth all of the time and the effort for the brief. Had this issue not been raised by the Defense Association and consequently brought to the attention of the Court, the implied result of the Trincere case would be that all matters of this nature were to be submitted to a jury for consideration of all elements and that no cases would be dismissed at the close of the evidence for failure of essential legal elements.

The appellant, wisely chose to narrow his argument to the simple facts of the Trincere case and avoid the wider policy issue. This was obviously, his only available tack and the Court politely entertained the argument that the Trincere case was fact specific and limited. Though a decision from the Court of Appeals, has yet to be rendered, significant gains were attained by DANY as a result of the production of an excellent product in an enormously compressed timeframe which was well received by the Court. It was apparent from the tone and tenor of the questions that the Court posed to appellant and respondent that the Court was sensitive to the issues raised in our brief and vital groundwork has been laid for making our voices heard.

The Committee on the Development of Law meets quarterly. We are open to requests to join the committee and seek a diverse and varied constituency for the three to four projects we intend on an annual basis. In the interests of pursuing further endeavors, we have established some criteria so as to provide "talking points" for meetings. Specifically, we are asking that any issues presented for committee consideration succinctly state the facts, the procedural history and the Defense Association position to be served by the presentation of a brief. As co-chairs of the committee any questions or comments can be addressed to Frank V. Kelly or Andrew Zajac.

** Mr. Zajag is associated with the firm of Fiedlman & McCard.*
+ Mr. Kelly is associated with the firm of Magid, Cunning & Slattery.

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LIMITATIONS-Commencement. The Second Department recently indicated that the time within which to commence an action based upon exposure to a toxic substance begins to run when the injured party discovers the primary condition on which the claim is based *(Perry vs. City of New York, _____ A.D.2d _____, 656 N.Y.S.2d 301).*

APPEAL-Exclusion of Evidence-Deposition. In *(Razzaque vs. Krakow Taxi, Inc., _____ A.D.2d _____, 656 N.Y.S.2d 208)* the First Department ruled that a taxicab driver and taxicab owner who were-defendants in an action brought by a pedestrian who was struck by the taxicab were not prejudiced by the trial court's refusal to allow the owner to read additional portions of the drivees deposition testimony into evidence. There was a failure to identify any portion of the deposition which would have materially aided their defense.

CANCERPHOBIA-Elements. The Second Department recently indicated that in order to maintain a cause of action for fear of developing cancer or for future medical monitoring costs following exposure to a toxic substance like polychlorinated biphenyis (PCB's), the plaintiff must establish

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both that he or she was in fact exposed to the disease-causing agent and that there is urational basis" for his or her fear of contracting the disease. A rational basis has been construed to mean clinically demonstrable presence of PCB's in the plaintiffs body, or some indication of PCB-induced disease, i.e., some physical manifestation of PCB contamination *(Abusio vs. Consolidated Edison Co. of New York. Inc., _____ A.D.2d _____, 656 N.Y.S.2d 371).*

NEGLIGENCE-Wedding Reception-Liability of Guest and Owner-Proximate Cause. The Second Department recently held that as a matter of law, wedding guests who participated in a human wheelbarrow race across a crowded dance floor at a reception were negligent and liable for injuries sustained by an unsuspecting guest who was dancing at the time the human wheelbarrow collided with her. Similarly, the owner of the restaurant at which the reception was held was not liable, as there was no evidence that the restaurant owner could have done anything to stop what was clearly a spontaneous and inappropriate race *(Lee vs. Durow's Restaurant Inc., _____ A.D.2d _____, 656 N.Y.S.2d 321).*

EVIDENCE-Police Officer Testimony. In *(Mead vs. Reilly, _____ A.D.2d _____, 656 N.Y.S.2d 653)* the Second Department ruled that a police officer was properly allowed to testify in an auto accident matter that he observed the road was wet and that this was a contributing factor in the accident, even though the court did not have the officer qualified as an expert. The testimony consisted of observations not requiring any particular expertise.

MEDICAL MALPRACTICE-Hospital-Scope of Duty. It was recently submitted by the First Department that a hospital's resident was entitled to rely upon a private surgeon's assertion that a distal screw affixed to a femoral rod had been removed and that the resident was under no duty to inquire or to seek additional x-rays, such that the hospital was not liable in the medical malpractice action brought by a patient whose femur was fractured during a surgical procedure to remove a femoral rod *(Beeler vs. Adler, _____ A.D.2d _____, 656 N.Y.S.2d 615).*

INSURANCE-Broker-Failure to Procure. A broker who negligently fails to procure a policy stands in the shoes of the insurer and is liable to indemnify the applicant for any judgment which would have been covered by the policy *(Gorgone vs. Regency Agency, Inc., _____ A.D.2d _____, 656 N.Y.S.2d 622).*

LIMITATIONS-Malpractice-Tolling. In *(Carmona vs. Lutheran Medical Center, _____ A.D.2d _____, 656 N.Y.S.2d 693)* the Second Department ruled that a surgical drain implanted in, but having failed to be removed from a patient's body was a "foreign object" such that the limitations period applicable to the action was tolled until the date the drain was or reasonably should have been discovered.

GENERAL MUNICIPAL LAW-Automobile Collision-Notice of Defect. In *(Field vs. Stubelek, _____ A.D.2d _____, 657 N.Y.S.2d 58)* the Second Department ruled that an automobile collision cause of action based on a town's failure to maintain or- trim roadside vegetation was subject to the town lavis prior notice requirement and was properly dismissed in view of an undisputed absence of prior written notice and due to plaintiffs failure to produce evidence that the written notice requirement was excused on the ground that the town had knowledge of the defect either through inspecting or performing work at the site.

GENERAL MUNICIPAL LAW-Notice of Claim-Untimely-Elements. The Second Department recently ruled that plaintiffs notice of claim with regard to injuries sustained on a community college campus failed to comply with the General Municipal Law. The notice did not identify with sufficient particularity the location of the underlying incident, merely alleging that plaintiff sustained his injuries on campus. The appellate court said the court was justified in denying plaintiffs' motion to amend the notice of claim to cure the deficiency as to the location of the incident. The information originally provided misled the defendants for several years, and a walkway that was in fact the location of the incident had been renovated in the interim *(Flanagan vs. County of Westchester, _____ A.D.2d _____, 657 N.Y.S. 2d 59).*

AUTOMOBILE-Expert-Scope. In *(Brullo vs. Schiro, _____ A.D.2d _____, 657 N.Y.S.2d 92)* the Second Department concluded that the testimony of a reconstruction expert that a motorist was not wearing his seat belt at the time of the accident and that he would not have sustained facial injuries had he utilized the available restrain system was sufficiently based upon the facts in the record and therefore was admissible.

INDEMNIFICATION-Owner-Failure to Procure Insurance. The First Department recently submitted that a property-owner was entitled, pursuant to insurance and indemnification clauses of its contract with a general contractor, to indemnification from a general contractor for damages owing to an injured employee of a subcontractor, regardless of whether any negligence on the owner's part had contributed to the employee's injury and whether the general contractor had actually procured insurance for the owner as required by the contract. Even if the general contractor failed to procure the insurance, it did not constitute a waiver of its contractual right to indemnification, absent evidence that the owner knew that the general contractor had failed to provide the required insurance coverage or that the owner did anything to manifest an intention to relinquish its contractual right to seek indemnification *(Santamaria vs. 1125 Park Avenue Corp., _____ A.D.2d _____, 657 N.Y.S.2d 20).*

INSURANCE-Late Notice of Disclaimer. A liability insurer's delay of approximately two and one-half months before disclaiming coverage based on the insured's failure to provide timely notice was unreasonable. The liability insurer's reservation of rights letter maintaining the right to disclaim based on untimely notice of the incident did not satisfy the statutory requirement of written notice of disclaimer as soon as reasonably possible, so indicated the Second Department in

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cases, was solely responsible for the apportionment of liability against the third-party defendant/employer (75% in *ITRI Brick*[7] and 35% in Stollar).

Because of the liability assessment against the general contractor in each case, neither Aetna (the GL carrier in *ITRI Brick*) nor CNA (the GL carrier in *Stollar* had any obligation to indemnify the subcontractor/employer.
Change the facts slightly. What if the construction contract in *ITRI Brick* also contained a provision requiring the subcontractor/employer to procure insurance for the general contractor's benefit and to have the general contractor named as an additional insured on the subcontractor's policy, and that the subcontractor complied with this requirement? Assume also that Aetna acknowledged it's defense obligation and assumed the defense of the general contractor.

Under these circumstances, will the result be any different? *North Star* teaches that a different result would almost certainly obtain because the third-party action would be subject to dismissal on antisubrogation grounds, since Aetna would afford coverage to both the third-party plaintiff general contractor and the third-party defendant subcontractor/employer (though only for the contractual indemnification claim, not the common law causes of action). A motion to dismiss the third-party action as barred by antisubrogation in these circumstances would most likely be granted.[8]

Without the ability to prosecute the third-party action in this real-world *ITRI Brick* hypothetical, Aetna would now be responsible for the entire loss. The State Insurance Fund would owe nothing, notwithstanding the fact that the employer was actually 75% responsible for the accident and, with the apportionment of liability against the general contractor thus extinguishing the contractual indemnity cause of action, Aetna would otherwise have had no indemnification obligation to the employer. *ITRI Brick* strongly suggests that any antisubrogation determination is at the very least premature until there has been a factual finding on the issue of liability. Absent *North Star*, Aetna would be responsible for, at most, the 25% assessed against the general contractor, it's additional insured9, and the State Insurance Fund would be responsible for the 75% share against the employer/subcontractor.

The more appropriate question seems to be whether such a result *should* obtain. The application of the antisubrogation doctrine in these circumstances is inequitable to the employer's general liability carrier and a windfall for the workers compensation carrier. Ironically, the *North Star* decision was grounded upon equitable considerations.

The fundamental premise underlying the Court's decision in *North Star* was a concern that an insurer should not be permitted to subrogate against it's own insured on a claim covered by the insurance policy[10]. This concern, though justifiable and equitable in appropriate factual circumstances, was more imagined than real as applied to the facts of the cases decided in *North Star*. Such equitable consideration, however, did appear to be present in *Penn General*, the principal case relied upon by the Court of Appeals in the *North Star* decision.

In *Penn General*, Liberty Mutual provided primary auto coverage on a truck owned by Bison Ford and leased to Austin Powder, both of whom were insured under Liberty's policy. Austin Powder also had an excess policy for non-owned business vehicles as well as a general liability policy, both issued by Aetna. While using the truck to transport dynamite an explosion occurred, causing, inter alia, $2,200 in damage to a car insured by Penn. General Insurance Co. It paid the loss and commenced a subrogation action against Bison Ford, Austin Powder and it's driver. Liberty settled the claim on behalf of Bison Ford and sought to subroaate against Austin Powder based upon an indemnification clause in the rental contract. The Court of Appeals dismissed the claim, holding that it would be inequitable and against public policy to permit Liberty to recover directly from Austin Powder on the very loss for which Austin Powder was covered under the insurance policy with Liberty.

Although not stated specifically in the opinion, it appears that Liberty Mutual was seeking to recover *literally* from Austin Powder, it's insured. Austin's excess auto policy would not be implicated, nor would the general liability policy have provided coverage to Austin Powder for this auto claim. Thus, Liberty was seeking to subrogate against and to recover directly from Austin Powder itself, not from any other insurer. When viewed in that light and applied to those facts, the antisubrogation doctrine could certainly be deemed an appropriate remedy to prevent an inequitable result.

Such a factual scenario, however, was not present in any of the three cases decided in *North Star*,[11] as was pointed out by Judge Simon in dissent. He noted that the majority's holding would be justified if, like Austin Powder in Penn General, the insured had no other insurance covering the claim and faced out-of-pocket liability. "That case," he noted, "is not before us today. In each of these cases ... the need for subrogation is apparent because the owner's insurer by suing the contractor ... is not suing itself, it is merely seeking to allocate the owner's loss among all insurers who have sold policies to the contractor."[12] It is submitted that such a distinction is critical to an objective and equitable application of the antisubrogation principle.

In the overwhelming majority of cases in the construction litigation context, the reality of the situation is that the subrogated insurer (most often the general liability carrier) is seekin- recovery from another insurer (most often the 1B carrier) that provides coverage to a mutual insured for certain of the claims. As set forth above, the two most frequent scenarios involve, 1.) a general contractor that is only statutorily liable and entitled to both common law and contractual indemnity from the subcontractor/employer, or; 2.) a general contractor that is partially at fault, but statutorily liable, and entitled to common law contribution from the subcontractor/employer.

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(Pennsylvania Millers Mut. Ins. Co. vs. Sorrentino, _____ A.D.2d _____, 657 N.Y.S. 2d 62).

DISCLOSURE-Noncompliance-Penalty. The Second Department recently indicated in *(Donovan vs. City of New York, _____ A.D.2d _____, 657 N.Y.S.2d 451)* that a motion to preclude the city from introducing proof of lack of prior notice of a defect in a paved walkway as a defense in a personal injury action should have been granted, in light of the city's more than yearlong noncompliance with the disclosure demands, preliminary conference order, and two stipulations, coupled with inadequate excuses for those defaults.

LIMITATIONS-Abuse of Process. The First Department recently ruled that the statute of limitations for abuse of process is one year *(Beninati vs. Nicotra, _____ A.D.2d _____, 657 N.Y.S.2d 414).*

ARBITRATION-Agreement-Question of Law. It was recently held that the question of whether claims are arbitable, i.e., or whether there isa clear, unequivocal and extant agreement to arbitrate such claims, is for the court and not the arbiter to decide *(Primex Intl. Corp. vs. Wal-Mart Stores, Inc., 89 N.Y.2d 594, 657 N.Y.S.2d 385).*

SERVICE STATION OWNER-Duty of. An owner of a self-service filling station was not in a master-servant or other similar relationship giving him legal authority over a patron who had left a vehicle running and unattended while filling his tank with gasoline, and thusly could not be held vicariously liable for the alleged negligence of the patron after his vehicle slipped out of the park gear and rolled away, pinning a second patron between the *vehicles (DiPonzio vs. Riordan, 89N.Y.2d 578, 657 N.Y.S.2d 377).*

SUBPOENA DUCES TECUM-Scope. In *(Pernice vs. Devora, _____ A.D.2d _____, 657 N.Y.S.2d 70)* the Second Department ruled that the purpose of a subpoena is to compel production of specific documents that are relevant and material to the facts at issue in a pending judicial proceeding. The plaintiff, who brought a personal injury action, was not entitled to a subpoena duces tecum to obtain virtually all the records of a non-party physician who examined the plaintiff on behalf of the defendant, since the plaintiff admittedly sought the requested records simply for the purpose of gleaning information to impeach the general credibility of the physician.

DISCLOSURE-Deposition-Documents for Refreshing Recollection. The First Department recently indicated that a plaintiff waived any privilege protecting a document from disclosure by using it to refresh his recollection at the deposition. As a result of said procedure, defendant was entitled to full discovery of the document *(McDonough vs. Pinsley, _____ A.D.2d _____, 657 N.Y.S.2d 33).*

COLLATERAL ESTOPPEL-Burden of Proof-Elements. In *(Juan C. vs Cortines, 89 N.Y.2cd 659, 657 N.Y.S.2d 581)* the court ruled that essential ingredients of the doctrine of collateral estoppel are, first, identical issues necessarily must have been decided in a prior action and be decisive of the present action, and second, the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest the prior determination.

A prior determination that is binding on one agency and its officials may not be binding on another agency and its officials. If the second action involves an agency or official whose functions and responsibilities are so distinct from those of the agency or official in the first action that applying preclusion would interfere with the proper allocation of authority between them, either judgment should not be given preclusive effect in the second action.

The party seeking the benefit of collateral estoppei'has the burden of demonstrating identity of issues in the present litigation and prior determination, whereas the party attempting to defeat its application has the burden of establishing an absence of full and fair opportunity to litigate the issues in a prior action.

NEGLIGENCE-Construction-Scaffold-Labor Law Section 240. It was recently submitted by the First Department that a claim by a worker that he was injured while attempting to carry a 200-pound hot water circulating pump down a ladder from an engine room for purposes of repairing the pump was sufficient to state a cause of action under the scaffold law, even though the worker neither fell from a height nor was struck by a falling object. The removal of the pump constituted repair of a structure rather than routine maintenance, and posed an elevation-related hazard for which the ladder proved inadequate *(Skow vs. Jones, Lang & Wooton Corp., _____ A.D.2d _____, 657 N.Y.S.2d 709).*

NEGLIGENCE-Construction-Elevation Related-Labor Law Section 240-Light Bulb. The First Department recently held that an electrician who fell from a ladder after placing a light bulb in an empty fixture stated a cause of action pursuant to the scaffolding law. The electrician was not merely changing the light bulb in conjunction with ordinary maintenance activities; it was the responsibility of his employer to provide a system of temporary lighting to assist the workers on a construction site, and it was while performing this function that the electrician was injured *(Binetti vs. MK West Street Co., _____ A.D.2d _____, 657 N.Y.S. 2d 648).*

NEGLIGENCE-Landowner-Duty of Care-Foreseeabilitv-Elements. In *(DiPonzio vs. Riordan, 89 N.Y.2d 578, 657 N.Y.S.2d 377)* it was held that the duty of a landowner or other tort defendant is not limitless, and the risk reasonably to be perceived defines the duty to be obeyed.

In analyzing questions regarding the scope of duty, the courts looked to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was within reasonably foreseeable risk. The nature of inquiry into the scope of the duty depends upon the particular facts and

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In the former instance, the subrogating general liability carrier is seeking to obtain 50% reimbursement from the co-insuring IB carrier.[13] In the latter, the general liability carrier is seeking to obtain
contribution from the IB carrier for the subcontractor/ employer's apportionment of liability.[14] In neither case is the subrogating carrier seeking to have the insured pay any portion of the loss from it's own pocket.
As a practical matter, it would not be a wise business strategy and would be in many cases an exercise in futility, the equivalent of attempting to draw blood
from a stone.

When limited to the factual circumstances present in *Penn General*, all of the foregoing cases are reconcilable with the antisubrogation doctrine and notions of fundamental fairness. An insurer should not be permitted to extract from it's insured's pocket recovery of a claim for which the insured is otherwise covered by the insurance policy. That is the essence of antisubrogation: equity wi 'll not permit an insurer to pass the incidence of a covered loss from itself to it's insured. On the other hand, an insurer should not be precluded from pursuing subrogation when the target of the subrogation is in reality another insurer that obtained a premium from and agreed to provide coverage to the insured for such a claim. Perhaps the Court of Appeals will reconsider the *North Star* holding in a future case in light of the inequitable results that have developed in the construction litigation arena.

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FOOTNOTES

[1] *89 N.Y.2d 786 (decided May 13, 1997, also deciding Stollar v. Ginsburg Development Corp.).*

[2] *82 N.Y.2d 281, 604 N.Y.S.2d 510 (1993).*

[3] *68 N.Y.2d 465, 51 0 N.Y.S.2d 67 (1986).*

[4] *78 N.Y.2d 433, 576 N.Y.S.2d 203 (199 1).*

[5] *Hawthorne, id.; see also Felker v. Corning, Inc., ____ N.Y.2d ____, 1997 WL 325492.*

[6] *ITRI Brick, stipra; Gen. Obligations Law, Sec. 5-322. 1.*

[7] *Actually, 75.24%.*

[8] *North Star, sitpra; see also, National Casualty Co. v. State Ins. Fund, A.D.2d 641 N.Y.S. 2d 665 (1st Dep'. 1996); Washington v. New York City Industrial Development Agency, 215 A.D.2d297, 627N. Y.S.2d343 (1st Dep't 1995),- National Union Fire Ins. Co. of Pittsburgh, Pa v. State Ins. Fund, 213 A.D.2d 164, 623 N. Y.S.2d.558 (1st Dep't 1995); Avalanche Wrecking Co. v. State Ins. Fund, 211 A.D.2d 551, 621 N. Y&2d 74 (1st Dep't 1995); Tempesta v. City of New York 214.A.D.2d 723, 626N. YS.2d2O9 (2nd Dep't 1995); Hailey v. New York State Electrical & Gas Co., 214 A.D.2d 986, 626 N.Y.S.2d 9I2 (4th Dep't 1995).*

[9] *Tile issue concernin- the potential co-insurance that may exist between the general contractor's own GL policy and the additional insured coveraae afforded by Aetna, while recognized, is not being, explored in this article.*

[10] *The other concem addressed by the Court, the potential conflict of interest that may affect the carrier's incentive to vi-orously defend it's insureds, will be discussed in a subsequent article.*

[11] *In Valetitin (Natl. Union) and Pi-ince (CNA), the general liability carriers for the vicariously liable City of New Yoi-k were seekin- to obtain co-inSLli-aiice for the common law indemnification obli-ation from the third-party defendant/employer's I B carrier, in both instances the State Insurance Fund. In North Star, the dispute involved a declaratory judament action aiiion,, the ceneral liability (Continental), the excess (North Star) and the workers' compensation (U.S. Fit-e) carriers over the appropriate allocation of the $3 million settlement paid on behalf of their Mutual insured.*

[12] *North Star, 82 N.Y.2d at 299,*

[13] *Hawthorne, supra.*

[14] *ITRI Brick, supra.*

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circumstances in which the duty question arises and the analysis is also driven by consideration of public policy. Foreseeability is an essential element of fault because the community deems a person at fault only when the injury-producing occurrence is one that could have been anticipated.

Conduct is considered negligent when it tends to subject another to an unreasonable risk of harm arising from one or more particular foreseeable hazards. When a person is harmed by an occurrence resulting from one of those hazards, the negligent actor may be held liable, but where the harm was caused by an occurrence that was not part of the risk or recognized hazard involved in the actor's conduct, the actor is not liable.

VENUE-Residence of Party. In *(Burstein vs. Fazzari, ____ A.D.2d ____, N.Y.S.2d 428)* the Second Department ndicated that a personal injury plaintiff selected an improper venue by placing the action in a county in which neither party resided, such that the defendant was entitled to a change of venue to a county in which the defendant resided, where the defendant properly served with his answer a demand for a change of venue. defendant moved within fifteen days thereafter for the change, and plaintiff failed to serve an affidavit showing that the county specified by the defendant was improper or that the county specified by the plaintiff was proper.

JURISDICTION-Subiect Matter May Not Be Conferred. In *(Morrison vs. Budget Rent A Car Systems, Inc., ____ A.D.2d ____, 657 N.Y.S.2d 721)* the Second Department held that parties may not confer subject matter jurisdiction on the court. Subject matter jurisdiction may not be created by laches or estoppel, and the court may not acquire this type of jurisdiction by waiver.

DISCLOSURE-Non-Party Witness-Failure to Answer Questions. In *(Fristrom vs. Peekskill Community Hosp., ____ A.D.2d ____, 657 N.Y.S.2d 732)* the Second Department directed that a plaintiff in a medical malpractice action could not compel non-party witnesses to answer questions at their depositions which sought their expert opinions.

ARBITRATION-Award-Excessive-Waiver of Objection. The Second Department recently concluded that arbitrators exceeded their authority by awarding $75,000 in an uninsured motorist arbitration where the underlying policy contained uninsured liability limits of $10,000 per person and $20,000 per accident *(Brijmohan vs. State Farm Ins. Co., ____ A.D.2d ____, 658 N.Y.S.2d 52).*

The insurer did not waive its objection as to the excessiveness by waiting to make the objection at the time of confirmation of the award, though it would have been preferable for the insurer to have submitted evidence of the limitation at the arbitration hearing.

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NEGLIGENCE-Scaffold Law-Construction-Elements-Labor Law Section 241. In *(Sioragues vs. Peckham Materials Corp., _____ A.D.2d _____, 658 N.Y.S.2d 97)* the Second Department ruled that a worker who fell from a ladder while repairing an air conditioner which was built into the wall of a telephone company cell site was engaged in "construction work" within the purview of the Labor Law imposing on owners and contractors a duty to provide reasonable and adequate protection and safety to persons employed in construction, excavation and demolition work. To establish a violation of the scaffold law, a plaintiff must establish that the statute was violated and the violation was the proximate cause of the injuries.

PROCESS-Filing Requirement. In *(Fry vs. Village of Tarrytown, 89 N.Y.2d 714, 658 N.Y.S.2d 205)* the court ruled that strict compliance with filing requirements for a civil action or special proceeding is not required before the Supreme Court has subject matter jurisdiction over that action. The legislature's main reason for converting from a commencement by service to a commencement by filing system was to raise money for the state's coffers, which is accomplished by requiring payment of a filing fee when the action is commenced. Strict compliance with the statute governing commencement of an action by filing is mandatory, and the extremely seriousresuit of noncompliance, so long as an objection is timely raised by an appearing party, is an outright dismissal of the proceeding.

INSURANCE-Motor Scooter. The First Department recently submitted that a portable scooter which weighed nineteen pounds and was started by muscle power for the first fifteen to twenty feet, at which point a 1.2 horsepower motor capable of a speed of twenty miles per hour took over, and which was described as "motorized skateboard" by the ticketing offer, was a "motor vehicle" for which insurance was required under the Vehicle and Traffic Law *(Reilley vs. Dept. of Motor Vehicles of the State of New York, _____ A.D.2d _____, N.Y.S.2d 316).*

JURISDICTION-Subject Matter. The court's lack of subject matter jurisdiction is not waivable, but may be raised at any stage of the action and the court may ex mero motu at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action *(Fry vs. Village of Tarrytown, 89 N.Y.2d 714, 658 N.Y.S.2d 205).*

MALPRACTICE-Res Ipsa Loquitur-Damages-Foreign Object. The Second Department recently held that on a medical negligence claim against a hospital arising out of a catheter tip breaking off and remaining in the patient's chest, the evidence was sufficient to support both a *prima facie* case of negligence and a charge to the jury concerning the doctrine of res *ipsa loquitur*. The patient's expert testified that such an occurrence was highly unusual and would not have resulted had proper technique been employed and good and accepted medical practice been followed, that x-rays revealed that the tip had been bent into an unusual v-shape, that the missing tip should have been detected immediately by examination of the removed portion of the catheter, and that the tip should have been retrieved *(Hawkins vs. Brooklyn-Caledonian Hosp., _____ A.D.2d _____, 658 N.Y.S. 2d 375).* The court further indicated that an award of $150,000 for past pain and suffering and $175,000 for future pain and suffering was not excessive.

NEGLIGENCE-Slippery Floor-Elements. The Second Department recently ruled in *(Lathan vs. NCAS Realty Mgmt. Corp., _____ A.D.2d _____, 658 N.Y. S.2d 436)* that the fact that a floor is slippery by reason of its smoothness or polish, in the absence of a negligent application of the wax or polish, does not give rise to a cause of action or give rise to an inference of negligence.

DISCLOSURE-Post-Accident Repair. The First Department recently indicated that an elevator company was not required to disclose evidence of post-accident repairs or inspections in a personal injury matter arising out of the plaintiffs fall from the elevator shaft. Such evidence was not relevant on the issue of maintenance, control, existence of a dangerous condition or notice *(Steinel vs. 131/93 Owners Corp., _____ A.D.2d _____, 658 N.Y.S.2d 314).*

EVIDENCE-Hearsay-Exception. In *(Gstalder vs. State, _____ A.D.2d _____, 658 N.Y.S.2d 680)* the Second Department held that a hearsay statement of an agent is admissible against his employer under admissions exception to the hearsay rule only if the making of the statement is an activity within the scope of the agent's authority.

AUTOMOBILE-No-Fault-Serious Injury. The First Department recently concluded that a physician's report shortly after the accident diagnosing the insured with an avulsion fracture of the tibial tubercle was sufficient to support the arbitrators finding of "serious injury" within the meaning of the no-fault act, in an arbitration proceeding pursuant to the uninsured motorist endorsement of the policies *(Travelers Ins. Co. vs. Job, _____ A.D.2d _____, 658 N.Y.S.2d 585).*

PLEADINGS-Amendment-Delay-Discretion. In *(Cseh vs. NYC Transit Authority, _____ A.D.2d _____, 658 N.Y.S.2d 618)* the First Department concluded that where an amendment to pleadings is sought after a long delay and statement of readiness has been filed, judicial discretion in allowing the amendment should be discrete, circumspect, prudent and cautious.

INDEMNIFICATION-Full/Partial. In *(Itri Brick & Concrete Corp. vs. Aetna Cas. and Sur Co., 89 N.Y.2d 786, 658 N.Y.S.2d 903)* the court concerned itself with full as opposed to partial indemnification.The court indicated that the subcontractor's indemnity agreement to hold a generalcontractor harmless from liability for injuries or death from any cause while on or neara project, whether or not the general contractor contributed in whole or in part in another subcontractor's agreement to hold another general contractor harmless from liability in connection with or resulting from the work

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contemplated full rather than partial indemnification and, therefore, were unenforceable under the statute voiding the agreement in the construction contract to hold the promisee harmless from liability caused by or resulting from the negligence of the promisee.

ARBITRATION-interest. It was recently held by the Second Department in *(Aetna Cas. and Sur. Co. vs. Mantovani, _____ A.D.2d _____, 658 N.Y.S.2d 926)* that interest on an arbitration award is to be computed from the datelof the award.

NEGLIGENCE-Scaffold-Elements. An injured person need not fall completely off a scaffold to recover under the Scaffold Law so long as the injury resulted from an elevation-related hazard. The hazards contemplated by the Scaffold Law are those related to the effects of gravity where protective devices are called for because of either differences between the elevation level of required work and the lower level, or the difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured.

An injury suffered by a brick layer who was using a motorized scaffold to reach the work site when the scaffold which the brick layer and co-worker had manually maneuvered around an air conditioning unit they had to pass to reach the work site, precipitously swung back and struck the air conditioning unit, came within the scope of the Scaffold Law. The statutory require ment'lhaf -safety devices be construed-to give proper protection was compromised by the protruding air conditioner, and an expert testified that the accident was gravity-related, so indicated the First Department in *(Dominguez vs. Lafayette-Boynton Housing Corp., _____ A.D.2d _____, 659 N.Y.S.2d 21)*.

NEGLIGENCE-Scaffold-Non-Related-Elements. Routine maintenance activities which are not related to construction or renovation are not intended to be protected by the Scaffold Law. An incident wherein a worker suffered fatal injuries while preparing an elevator shaft for a routine visit from an exterminator contractor did not come within the scope of the Scaffold Law. Routine maintenance activities are not intended to be protected by the Scaffold Law and a worker who was struck by a descending elevator as he leaned into the shaft in an attempt to freeze the elevator for the exterminator did not fall from a height and was not struck by a falling object from an elevated work site, so indicated the Second Department in *(Vanerstrom vs. Strasser, _____ A.D.2d _____, 659 N.Y.S.2d 77)*.

WRONGFUL DEATH-Stillborn. The Second Department recently held that no cause of action to recover damages for wrongful death or personal injury exists on behalf of a stillborn infant *(Matter of Broadnax, _____ A.D.2d _____, 659 N.Y.S.2d 502)*.

EVIDENCE-Expert-Non-Examining Physician. In *(Meyer vs. Board of Trustees of New York City Fire Department, Article 1B Pension Fund by Safir, 90 N.Y.2d 139, 659 N.Y.S.2d 215)* it was held that a non-examining physician is competent to testify as a medical expert in a civil or criminal trial as to the cause of a particular medical condition based upon, for example, inspection of the patient's medical records or the expert's interpretation of diagnostic tools such as x-rays and magnetic resonance imaging (MRI) films.

INDEMNIFICATION-Control. The First Department recently held that a prime contractor and a construction manager, after being found liable under the Labor Law scaffolding provision for injuries sustained by an employee of a subcontractor, were entitled to indemnification from the subcontractor as there was no evidence that either the manager or the prime contractor had control of the employee's work *(Gravson vs. City of New York, _____ A.D.2d _____, 659 N.Y.S.2d 287)*.

INSURANCE-Untimely Disclaimer. In *(Central General Hosp. vs. Chubb Group of Ins. Companies, 90 N.Y.2d 195, 659 N.Y.S.2d 246)* the Court of Appeals submitted that an insurer's untimely disclaimer does not preclude it from denying liability on a strict lack of coverage ground.

PROXIMATE CAUSE-Elements. In *(Potter vs. Korfhage, _____ A.D.2d _____, 659 N.Y.S.2d 323)* the Second Department held that questions as to whether the defendant's negligence was the proximate cause of the accident is generally a question for a jury, whose determination should not be disturbed unless it could not have been reached under any fair interpretation of the evidence.

RES IPSA LOQUITUR-Elements-Discretion of Court. The First Department recently ruled that allowing a plaintiff at the close of the case to amend the pleading to conform to her proof of *res ipsa* loquitur would have been appropriate exercise of the discretion of the court in an action brought against a cemetery after a 100-pound marble cover of a crypt in which the plaintiffs brother was interred pending final burial simultaneously dislodged and struck the plaintiff in the face. The amendment could not have prejudiced the cemetery *(Diovisalvo vs. Woodlawn Cemetery, Inc., _____ A.D.2d _____, 659 N.Y.S. 2d 286)*.

NEGLIGENCE-Bicyclist-Five YearOld-Parental Liability. In *(Sorto vs. Flores, xxxxx A.D.2d xxxxx, 660 N.Y.S.2d 60)* the Second Department indicated that a five-year bicyclist was-not liable in negligence for injuries to a three-year old girl. The bicyclist collided with her and there was no evidence that the bicyclist's conduct deviated from the degree of care expected of a reasonably prudent child of that age.
The court further indicated that the mother and grandparent could not be held responsible for improper supervision where there was no evidence that the bicycle had any mechanical defect, that it was used improperly, or that it was unsuitable for the child and, lastly, that there was no proof that the child was physically impaired or lacked the basic skills of a child five years of age.

* *Mr. Moore is a partner of the firm of Barry McTiernan & Moore and a past president of the Defense Association of New York.*

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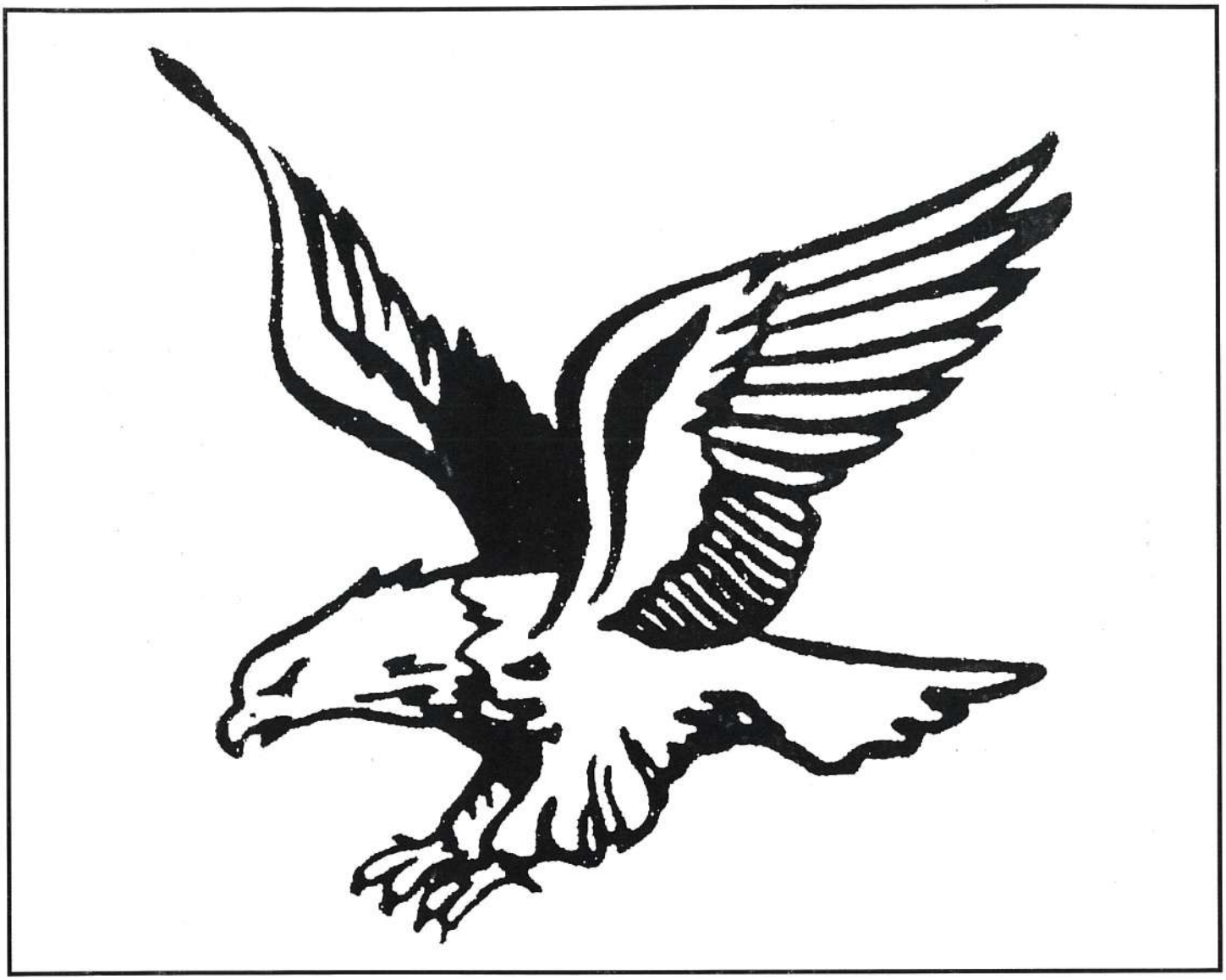

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