VOL. 2 NO. 3

WINTER 2000

DEFENDANT

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

FEATURING:

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THE DRAM SHOP ACT AND THE VISIBLE INTOXICATION STANDARD

PHOTOS FROM THE 1999 PAST PRESIDENT'S DINNER

DEFENDANT

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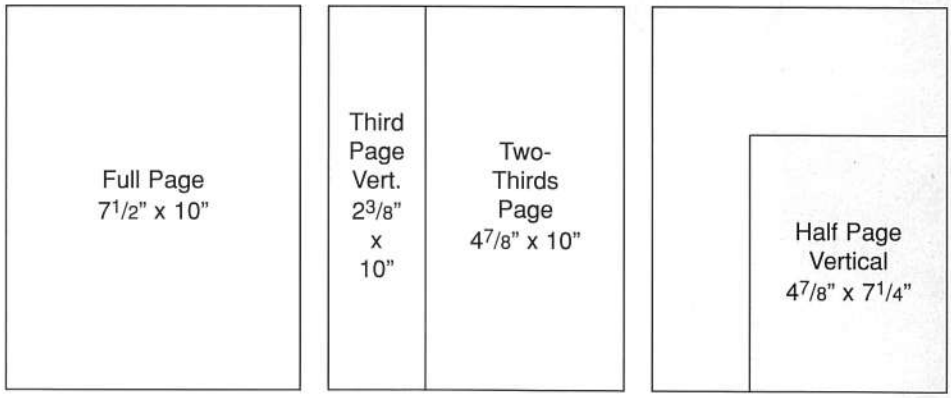

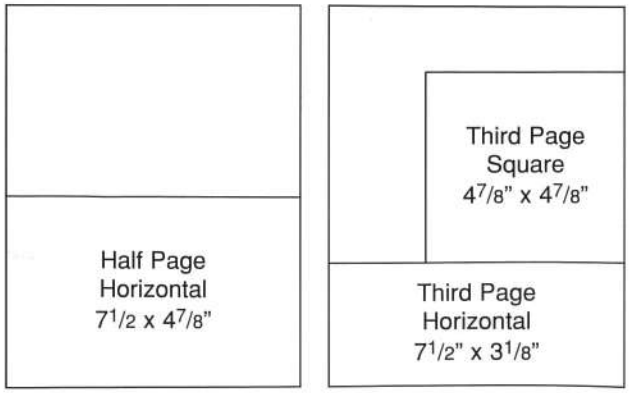

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PRESIDENT'S MESSAGE

*by Gail L. Ritzert**

As we face the new millennium, we have an opportunity to look back at what we have accomplished individually, and collectively as professionals. It also provides us with the opportunity to plan for the future. In the past the profession has faced many changes that were projected to "destroy" the livelihood of the defense attorney. These challenges ranged from the decision in **Dole v. Dow**, the passage of "no-fault," Labor Law 240, and most recently enactment of the 1996 Workers' Compensation Reform Act. Notwithstanding the concern and "doomsday" forecast, the profession has survived, and thrived as we worked through each road block.

We face similar challenges with the changing economic environment, the advent of litigation and billing guidelines, and third party billing audits. As we have in the past, we must rise to the occasion and change the way we run our practice. With technology shaping the way we communicate with our clients, the world has become smaller. Clients now have immediate access to counsel across the country, and may be instantly kept abreast of the change sin the law. Thus, we must look to the horizon to see how we can adapt to the changes and prosper in the future. We can no longer only be concerned with events in New York and ignore what is happening across the country. While our concerns have stayed close to home, counsel in Montana, California and Illinois have filed suits against a number of insurers arguing that the billing and litigation guidelines impede their ability to properly defend their clients. Attorneys in Texas, Indiana and Illinois have filed law suits against Staff Counsel Programs, arguing that the use of in-house counsel by an insurance company is the unauthorized practice of law. While you may ask why we should care about these lawsuits, these lawsuits will ultimately impact how we do business in New York. Our membership comprises insurance company representatives, staff

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** Counsel with the law firm Ohrenstein & Brown.*

TOXIC TORTS: Medical Monitoring Damages

*by John J. McDonough **

Though not a theory of liability so much as a type of damages an increasing number of states are permitting damage awards for monitoring a plaintiff's health where no present injury or disease process exits. New York joined this trend recently when the Honorable Judge Helen Freedman permitted such an award to plaintiffs in the Phen-Fen litigation.

Historically, New York courts have required some type of physical injury or "rational basis" to sustain an award to a plaintiff with claimed psychological distress and no present manifestation of an injury or illness. Indeed, in this regard Judge Freedman herself denied claims by a plaintiff who asserted a "fear of contracting cancer" claim in **Rittenhouse v. St. Regis**, 565 NYS2d 365, affirmed 579 NYS2d 100, based on there being no "rational basis" for the claim. Judge Freedman concluded that the proof necessary to show a "rational basis" included the clinical presence of asbestos fibers in the lung.

Plaintiffs who have requested medical monitoring damages find a basis for same in the 1936 Court of Appeals decision in **Schmidt v. Merchants**, 270 NY 287 which allowed damages upon exposure to a toxin for all "reasonably anticipated" future damages. This proposition was reiterated by the Fourth Department in **Ashey v. Occidental**, 477 NYS2d 242 (1984) which allowed recovery for al "reasonably anticipated" future damages. The Court of Appeals has required a "guaranty of genuineness" to sustain a damage award based on contracting an illness in the future. In **Ferrera v. Galluchio**, 5 NY2d 16 (1958) the plaintiff was burned during the course of undergoing radiation treatment. Based on these facts the plaintiff's fear of contracting cancer had a "guaranty of genuineness" the Court of Appeals said New York Law required under such circumstances.

The Second Department addressed the medical monitoring issue recently in **Abusio v. Con Ed**, 656 NYS2d 371 (1997). In **Abusio**, the Second Department affirmed the lower court ruling which set aside a verdict in favor of the plaintiff. Mr. Abusio sought damages for the future cost of

TOXIC TORTS: Medical Monitoring Damages

monitoring his alleged exposure to Polychlorinated Biphenyl ("PCB"). In agreeing to set aside the verdict the Second Department stated that in order to uphold such a verdict a plaintiff must show both: 1) exposure to a toxin, and 2) a "rational basis" for the fear of contracting an illness or disease in the future. Echoing Judge Freedman's decision seven years earlier in **Rittenhouse**, the Second Department defined "rational basis" as the clinically demonstrable presence of PCBs in the body or other physical manifestation of PCB contamination.

Recently, Western District Federal Court in New York rejected the "rational basis" and "guaranty of genuineness" cases and held that a plaintiff claiming medical monitoring damages need only allege and prove the requirement for same with a "reasonable degree of medical certainty." **Patton v. General Signal**, 984 F. Supp. 666 (1997 WDNY).

Judge Freedman apparently broke new ground in New York in **Cunningham v. American Home Products Corp.**, N.Y.L.J. Sept. 21 @26 (N.Y. Sup. Ct. Sept. 16, 1999) in allowing damages for the future cost of medical monitoring of Plaintiffs who each claimed to have ingested various quantities of diet drugs ("Phen-Fen") Phentermine Fenfluramine. Reaching this conclusion Judge Freedman set forth a four-part test which she said had to be met by a plaintiff to succeed on such a claim. To prevail on the merits of a medical monitoring claim a plaintiff must:

1) Plead and prove that he/she was exposed to hazardous substance thought the defendant's negligence.
2) The plaintiff must prove an increased risk of contracting a disease or illness or a result of such exposure; and
3) The increased health risk to the plaintiff makes periodic diagnostic medical exams reasonably necessary; and
4) Monitoring and testing procedures exist making early detection and treatment possible.

Judge Freedman did not address either the "guaranty of genuineness" or "rational basis" tests established by the Court of Appeals or the Appellate Division of the First and Second Department. Further appellate review of the "increased risk" standard enunciated by Judge Freedman will be necessary before it will be possible to determine whether the case represents a more readily available source of potential damages for plaintiffs and a concomitant source of exposure for defendants.

WORTHY OF NOTE

*by John J. Moore **
*Christine Moore ***

SUMMARY JUDGMENT - WAIVER OF IMPERSONAM JURISDICTION

The Second Department recently held that a defendant in an action for summary judgment in lieu of a complaint based upon a judgment entered in a foreign country waived any objection to personal jurisdiction he might otherwise have had where the defendant through counsel executed a stipulation expressly appearing in the action and subsequently interposed papers in opposition, which were the functional equivalent of an answer, and in which he did not move to dismiss or interpose any relevant jurisdictional defense based upon improper service (Yihye vs. Blumenberg, ____A.D.2d____, 687 N.Y.S.2d 703).

PLEADING - FAILURE TO PLEAD - RES IPSA LOQUITUR - SCOPE

In Cole vs. Mandell Food Stores, Inc., (93 N.Y.S.34, 587 N.Y.S.2d 598), the Court of Appeals held that a customer's recovery of non-economic damages from a supermarket from injuries sustained when a metal roll up security gate fell and struck him was limited by the supermarket's equitable share of fault in the action in which the jury found the supermarket twenty (20%) percent at fault and the manufacturer of the gate eight (80%) percent at fault, where the customer failed to plead, or to seek leave to amend the complaint so as to plead, the supermarket's alleged non-delegable duty to provide a reasonably safe means of ingress to the premises open to the public.

The primary function of a pleading is to apprize an adverse party of the pleader's claims and to prevent surprise, Absent such notice the defendant is prejudice by its inability to prepare the defense to the plaintiff's allegations.

The Res Ipsa Loquitur instruction by the Court was proper in the matter as against the supermarket.

EVIDENCE - PRIOR SIMILAR ACCIDENTS

In Rigano vs. Windham Corp., (____A.D.2d____, 688 N.Y.S. 157), the Second Department ruled that in a wrongful death action against the Ski Lodge, arising out of a fatal skiing accident, reports of accidents during the same ski season were relevant to the allegations of dangerous conditions on

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

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the slope.

INDEMNIFICATION - LESSEE'S RESPONSIBILITY

The Second Department recently held in Campbell vs. Annge (___A.D.2d____,688, N.Y.S.2d 233), that a lessor of an automobile was entitled to indemnification from the lessee, under the terms of a lease agreement for the amounts expended in a personal injury suit brought by a motorist injured in a collision with the lessee's girlfriend who was driving the leased vehicle in contravention of the lease agreement.

INSURANCE - PROCUREMENT - ELEMENTS

In Zito vs. Accidental Chemical Corp., (____A.D.2d____, 688 N.Y.S.2d 307), the Fourth Department ruled that an agreement that obligated one party to a construction contract to procure insurance for the other party does not violate the statute making void agreements, exempting owners and contractors from liability for negligence and is enforceable.

The construction contractor who obtained insurance covering the owner of a construction site consistent with the contract clause requiring the contractor to indemnify the owner for any injuries or damages "in any way connected with the performance of the work," was obligated to provide a defense and indemnification to the owner in the action brought by the employee of the contractor after he was injured at the site.

COLLATERAL - ESTOPPEL - ELEMENTS

In the case of CRK Contracting of Suffolk, inc. vs. Jeffrey M. Brown & Associates, Inc., (____A.D.2d____, 688 N.Y.S.2d 249), the Second Department ruled that two basic requirements of the collateral estoppel doctrine are that the parties seeking to invoke the doctrine must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action, and that the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination.

TRIAL - CROSS EXAMINATION - IMPROPER

The trial court properly sustained the personal injury of plaintiff's objection when the defendant asked whether he reported any income on tax returns following the accident. Although the court properly permitted the defendant to question the plaintiff as to whether he earned money after the accident, the defendant did not have a good faith basis to believe the plaintiff reported post accident work income on his income taxes; so indicated the Second Department in Bordes vs 170 East 106th Street Realty Corp. (____A.D.2d____, 688 N.Y.S.2d 241).

SETTLEMENT - IN COURT - ELEMENTS

The Second Department recently submitted in Avaltrioni vs. Gancer, (____A.D.2d____ 688 N.Y.S. 650), that a notation "SBT" appearing on a court's trial calendar, which purportedly meant "settled before trial," did not constitute a sufficient memoralization of the terms of the alleged settlement to satisfy the open court requirement and thusly, the alleged settlement was not enforceable , as it was never reduced to writing and signed by the parties and was not made in open court.

INSURANCE - PROCUREMENT - ELEMENTS

An agreement to purchase insurance coverage is clearly distinct and treated differently from the agreement to indemnify.

A ladder owner and electrical subcontractor breached their contracts with a general contractor and site owner by failing to purchase general liability insurance, and they were liable to the site owner and general contractor for all resulting damages including their liability to the injured electrical worker who fell from the ladder.

Because the insurance procurement clause was entirely independent of the indemnification provisions in the ladder owner's and electrical subcontractors contracts with the site owner NGC, a final determination of the liability of the ladder owner and the electrical subcontractor for their failure to procure need not await a factual determination as to who's negligence, if any caused the electrical workers injuries, so indicated the Second Department in Kennelty vs. Darlind Const. Inc. (____A.D.2d____, 688 N.Y.S.2d 584).

PROCUREMENT - ATTORNEY FEES

In Amoco Oil Co. vs Gino Lucadamo & Sons, Inc. (____A.D.2d____,688 N.Y.S.2d 632), the Second Department ruled that a property owner was entitled to reimbursement to the legal fees incurred in defending the underlying negligence action, where the contractor breached its contractual obligation to maintain a general liability insurance in a specified amount protecting the parties from any damages in connection with their contract for construction work.

NEGLIGENCE - A-FRAME LADDER -DUTY - LABOR LAW SECTION 240

In Wasilewski vs Museum of Modern Art, (____A.D.2d____, 688 N.Y.S.2d547), the First Department ruled that a failure to properly secure an A- Frame ladder, by securing it to something stable, chocking or wedging it in place, or having someone hold the ladder while in use, to insure that it remained steady and erect, constituted a violation of the scaffolding law.

DISCLOSURE - FAILURE TO COMPLY - EXCLUSION OF MATERIAL

It was recently indicated by the Second Department in

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Hubbard vs. Platzer (____A.D.2d____, 688 N.Y.S.2d672), that a personal injury plaintiff's failure to comply with a discovery request to disclose expert witnesses, until after the trial began and, even then, without disclosing the substance of the expert's testimony, warranted exclusion of the expert medical testimony, absent a showing of good cause for the non-compliance.

LIMITATIONS - COUNTERCLAIM - RELATION BACK

The Second Department recently held that a counterclaim to recover damages for injury to property, filed in an action for breach of contract, did not relate back to the time of the filing of the original complaint for limitation purposes, where the counterclaim did not relate to the same transactions or occurrences referred to in the original complaint or the original answer (Boccone vs. Island Federal Mortgage Corp., ____A.D.2d____, 689 N.Y.S. 2d 184).

NEGLIGENCE - SLIP AND FALL - SPECIAL USE - ELEMENTS

In Tyree vs. Seneca Center-Home Attendant Program, Inc. (____A.D.2d____, 689 N.Y.S.2d 61), the Second Department ruled that the mere receipt of ordinary deliveries of office supplies did not suffice to show a "special use" of a sidewalk by the tenant so as to impose sidewalk maintenance responsibilities on the tenants and thus, they were not liable to a pedestrian who fell on the sidewalk, regardless of whether she stripped on a hole or slipped on leaves or whether she fell near the curb or closer to the loading dock.

The owner or occupier of the land abutting the public sidewalk does not owe a duty to the public solely arising from the location of the premises, to maintain the sidewalk in a safe condition, but rather , liability arises only, if the abutting owner or lessee created the defect or used the sidewalk for a special purpose, such as when an appurtenance was installed for its benefit or at its request, contemplating a purpose different from that of the general public. Such a special use would then give rise to maintenance responsibilities.

NEGLIGENCE - SLIPPERY FLOOR - ELEMENTS

In Lee vs. Rite Aid of New York, Inc., (____A.D.2d____, 689 N.Y.S.2d 199), the Second Department ruled that in the absence of evidence of a negligent application of floor wax or polish, the mere fact that a smooth floor may be shinny or slippery does not support a cause of action to recovery damages for negligence, nor does it given rise to any reference of negligence.

A retail store was not liable in negligence for injuries sustained by a customer as a result of a slip and fall based upon mere speculation that the condition was caused by improper waxing. The customer did not notice any wax build up or observe any wax stain on her clothing after fall.

RESTORATION TO CALENDAR - ELEMENTS

The Second Department recently held that a plaintiff seeking to vacate a dismissal for abandonment and to restore the case to the trial calendar must establish 1) the merits of the case, 2) a reasonable excuse for the delay, 3) the absence of an intent to abandon the matter and 4) a lack of prejudice to the non-moving party if the case is restored (Rudy vs. Chasky, ____A.D.2d____, 689 N.Y.S.2d 176).

It is to be borne in mind that law office failure was not a reasonable excuse for a plaintiff seeking a restoration to the trial calendar.

INSURANCE - NOTICE TO BROKER - NOTICE BY INJURED PARTY

In Serravillo vs. Sterling Insurance Inc., Co. (____A.D.2d____, 689 N.Y.S.2d 521), the Second Department ruled that an insureds alleged act of notifying the broker of the accident and the underlying personal injury action was not notice to the liability insurer, since the broker was the agent of the insured.

The injured party has the burden of proving that she or her counsel acted diligently in attempting to ascertain the identity of the liability insurer and expeditiously notified it of the claim.

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ASSUMPTION OF RISK - ELEMENTS

In Taylor vs. Massapequa Intern. Little League (____A.D.2d____, 689 N.Y.S.2d 523), the Second Department ruled that generally the doctrine of "Assumption of Risk" provides that by engaging in a sport or recreational activity, the participant consents to the commonly appreciated risks which are inherent in and arise out of the nature an the sport and generally flow from such participation.

A defendant may be relieved from liability for injuries to a participant which arise from risk inherent in such activities when a consenting participant is aware of the risks, has an appreciation of nature of the risk and voluntarily assumes the risk.

Whether a participant had the awareness, appreciation and assumption of risk known, apparent, or reasonably foreseeable to support the application of the assumption of risk doctrine is not to be determined in a vacuum, but rather to be assessed against the background of the skill and experience of the specific participant.

DISCLOSURE - INTERNAL MEMORANDUM - PRIVILEGE

The First Department recently held in Newman vs. Lotewin, (____A.D.2d____, 689 N.Y.S.2d 462), that an internal office memorandum outlining possible litigation strategy and including potential witnesses, which defendant law firm inadvertently produced during discovery in a legal malpractice action was privileged.

DAMAGES - PUNITATIVE ELEMENTS

In Seynaeve vs. Hudson Moving and Storage, Inc. (____A.D.2d____, 690 N.Y.S.2d 16), The First Department ruled that in order to support a claim for punitive damages, the alleged conduct must be 1) egregious, 2) directed at the plaintiff and 3) part of a pattern of similar conduct directed that the public at large.

INSURANCE - USE - INTENTIONAL ACT

The Second Department recently concluded that the conduct of a vehicle passenger who leaned out of a moving vehicle placed his hands on a bicyclist back and shoved the bicyclist from the bicycle amounted to an intentional and was thus excluded from coverage under an automobile policy.

The passenger also was not "using the vehicle within the meaning of the automobile policy when said passenger leaned out of the vehicle and performed the act of pushing the bicyclist from the bicycle, thus, the passenger was not an insured person. (Morris vs. Allstate Insurance Inc., Co. ____A.D.2d____, 690 N.Y.S.2d 102).

NEGLIGENCE - DUTY OF CARE - ASSUMPTION OF RISK - ELEMENTS

In Pitkewicz vs. Boy Scouts of America, Inc. - Suffolk County Council. (____A.D.2d____, 690 N.Y.S.2d119), the Second Department ruled that absent evidence that a County Council of the Boy Scouts of America had supervision or control over the day to day activities of either a scout troop or the troop leader, the council could not be held liable for any alleged negligent supervision by the leader in connection with injury sustained by a boy scout while skiing.

Voluntary participants in the recreational event are presumed by their participation to have consented to those injury causing events which are known, apparent, or reasonably foreseeable consequences of their participation. If the risks of the activity are fully comprehended or perfectly obvious, the plaintiff has consented to them.

A boy scout injured while skiing as a result of alleged negligent supervision by the scout master assumed the risk of falling on a patch of ice and sliding on the trial. He testified that he had skied on two prior occasions, that on one of those occasions, he was able to appreciate that rain fall caused the surface of the slopes to become slippery, making it more difficult to control skis and that after he noticed that the ski slopes were becoming increasingly icy due to rainfall, he continued to ski.

DISCLOSURE - STRIKING OF PLEADINGS - ELEMENTS

The First Department recently ruled that the striking of pleadings is too drastic a remedy for a discovery violation where the parties default was not willful (First Bank of America vs. Motor Car Funding, Inc. (____A.D.2d____, 690N.Y.S.2d17).

PRODUCTS LIABILITY - DEFECTIVE PRODUCT - IDENTIFICATION OF PRODUCT

In Escarria vs. American Gage and Mfg. Co., (____A.D.2d____, 690 N.Y.S.2d 86), the Second Department ruled that the circumstantial evidence of the identity of the manufacturer of a defective product causing personal injury must establish that it is reasonably probably, not merely possible or evenly balanced, that the defendant was the source of the offending product.

The evidence submitted was insufficient to establish that it was reasonably probable that the manufacturer had manufactured an allegedly defective winch puller or that the retailer was the source of their product, where the winch puller had been discarded and plaintiffs offered no other circumstantial evidence of its origin.

EVIDENCE - CREDIBILITY OF WITNESS

It was recently held by the First Department that evidence of malpractice plaintiff psychiatric history was inadmissible as collateral to the extent that it was proffered on the issue of the plaintiff's credibility (LS. vs. Harouche, ____A.D.2d____, 690 N.Y.S.2d 1).

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APPEAL - ERROR HARMLESS - SUBSEQUENT TORT FEASOR

In Lebron vs. St. Vincent's Hospital and Medical Center, (____A.D.2d____, 690 N.Y.S.2d228), the First Department ruled that error, if any, was harmless as to the Trial Court's failure to give the patients requested instruction in a medical malpractice action that the original tort feasor is liable for any subsequent aggravation of the injury due to subsequent medical treatment or subsequent medical malpractice, where the jury found that no defendant was negligent.

SCAFFOLD - LESSOR - DUTY

It was recently indicated by the First Department in Yong Hwan Chae vs. Lee National Corp., (____A.D.2d____, 690 N.Y.S.2d 238), that a scaffold lessor had no duty to worn an experienced scaffold laborer who was acutely aware of the dangers of working upon a scaffold without a guardrail of the relevant risks.

MALPRACTICE - HOSPITAL - NEGLIGENT DISCHARGE

A patients failure to adduce any expert testimony showing that the allegedly negligent discharge from the hospital proximately caused the patient's injury, precluded the patient from recovering pursuant to a negligent discharge claim, so indicated the First Department in Lebron vs. St. Vincent's Hospital and Medical Center, (____A.D.2d____, 690 N.Y.S.2d228).

NEGLIGENCE - SERVANT - CONTROL BY THIRD PERSON

In Langsan Property Services Corp. vs. McCarthy, (____A.D.2d____, 690 N.Y.S.2d 208), the First Department ruled that as a general proposition, a party who assumes direction and control over persons employed by another is answerable for the acts of those employees, subject to a presumption that control remains in the original employer.

NEGLIGENCE - DUTY TO WARN - ELEMENTS

It was recently held by the First Department where the injured party is already aware of the specific hazard, the duty to warn does not even arise (Yong Hwan Chae vs. Lee National Corp., (____A.D.2d____, 690 N.Y.S.2d 238).

DISMISSAL - FAILURE TO SHOW FACTS

In Argyle Capital Management Corp. vs Lowenthal, Landau, Fisher & Bring, P.C., (____A.D.2d____, 690 N.Y.S.2d 256), the First Department ruled that a failure to state any facts showing that the plaintiff suffered any actual, ascertainable damages as a result of defendants' conduct supported a dismissal of the complaint.

MALPRACTICE - LEGAL - ELEMENTS

In McCoy vs. Tepper, (____A.D.2d____, 690 N.Y.S.2d 678), the Second Department indicated that an attorney is liable in a malpractice action if the plaintiff can prove that the attorney failed to exercise the skill commonly exercised by an ordinary member of the legal community, that such negligence was the proximate cause of damages, and that "but for" such negligence the plaintiff would have prevailed in the underlying action.

The attorney may be liable in a malpractice suit for his ignorance of the rules of practice, for his failure to comply with conditions precedent to the suit, for his neglect to prosecute or defend and action, or for his failure to conduct adequate research.

DAMAGES - AMPUTATION - FINGERS

The First Department recently hold that the damages awarded in the amount Eight Hundred Ten Thousand ($810,000) Dollars for past pain and suffering and Five Hundred Forty Thousand ($540,000) Dollars for future pain and suffering payable over a seventeen (17) year period to a carpenter who had four fingers of his dominant hand fully amputated and reattached did not deviate from a reasonable compensation (McKeon vs. Sears Roebuck & Co., (____A.D.2d____, 690 N.Y.S.2d 566).

INDEMNIFICATION - CONTRACTUAL

In Pope vs. Supreme-K.R.W. Construction Corp., (____A.D.2d____, 690 N.Y.S.2d 632), the Second Department held that a contractual agreement entered into by the subcontractor on a construction project which required the subcontractor to defend and indemnify the general contractor, and the site owner, for any claims arising from work performed pursuant to the contract, whether performed by the subcontractor or the sub-subcontractor and did not condition the duty to defend and indemnify on findings that the subcontractor was negligent, obligated the subcontractor to indemnify the general contractor and the site owner with respect to a Scaffold Law claim by an employee of the sub-subcontractor.

GENERAL MUNICIPAL LAW - NOTICE OF CLAIM - ELEMENTS

The notice of claim statute is not meant as a sword to cut down honest claims, but merely as a shield to protect municipalities against serious ones, so indicated the First Department in Lomax vs. New York City Health and Hospitals Corp., (____A.D.2d____, 690 N.Y.S.2d 548).

The purpose of the notice is to allow the municipal defendant to make a prompt investigation of the facts and preserve the relevant evidence.

If the municipality had timely access to the necessary information by other means, the complaint should not be dismissed merely because the facts in the notice of claim were partially deficient. The municipal hospital had

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possession and control over the records of the hospital which treated the patient, as well as the hospital improperly named on her notice of claim and could have looked for the patient's file to definitively ascertain which hospital treated her foot on the dates in question and, thus, was not prejudice by the defect in the patient's notice of claim.

NEGLIGENCE - SCAFFOLD - ELEMENTS - LABOR LAW §240

In Martinez vs. City of New York, (93 N.Y.S.3d322, 690 N.Y.S.2d 524), the Court of Appeals ruled that the Scaffolding Law is designed to minimize injuries to employees by placing ultimate responsibility for the safety practices on owners and contractors rather than on the workers, who as a practical matter lack the means of protecting themselves from accidents.

The language of the Scaffolding Law must not be strained in order to encompass what the Legislature did not intend to include. Its applicability to a personal injury claim should not be determined based on whether the plaintiff's work was an integral or necessary part of a larger project falling within the purview of this statute. Such a test would improperly enlarge the scope of the statute beyond its clear terms.

DISMISSAL - VACATING - ELEMENTS

In Welch vs. Good Samaritan Hosp. (____A.D.2d____, 690 N.Y.S.2d722), the Second Department submitted that a party seeking to restore an action which has been dismissed for neglect to prosecute must demonstrate a reasonable excuse for the delay in moving to restore the case to the calendar, the existence of a meritorious cause of action, an absence of intent to abandon the action, and a lack of prejudice to the non-moving party. All four components of the test must be satisfied prior to the possibility of vacating the dismissal.

PRODUCTS - LIABILITY - DUTY TO WARN

The Second Department recently held that the duty to warn of a product's danger does not arise when the injured party is already aware of the specific hazard. A plaintiff injured as a result of his misuse of the product may not recover on the basis of defendant's failure to provide adequate warnings unless he is able to prove that if adequate warnings had been provided, the product in question might not have been misused. (Mangano vs. United Flushing Service Corp., ____A.D.2d____, 690 N.Y.S.2d 680).

ATTORNEYS - SETTLEMENT - NOTICE TO APPELLATE COURT

The Second Department recently concluded in Piteo vs. Pechter-Fields Baking Corp., (____A.D.2d____, 691 N.Y.S.2d 154), that counsel for the parties to an appeal which had been withdrawn after settlement had to show cause why they should not be sanctioned under the rule obligating the parties to an appeal to "immediately notify" the Appellate Court upon settlement, where notice had been provided five days before the appeal's calendar date and approximately eleven (11) months after the order being appealed was entered.

INDEMNIFICATION - CONTRACTUAL - RENTAL AGREEMENT

The Second Department recently ruled that a vehicle rental agreement obligating the lessee to indemnify the lessor for all claims arising out of the use of the vehicle was enforceable and absolved the lessor from providing a defense or primary liability insurance coverage to the lessee in an underlying action arising out of an accident involving the vehicle (Federal Ins. Co., vs ELRAC, INC.,____A.D.2d____, 691 N.Y.S.2d 115).

NEGLIGENCE - RES IPSA LOQUITUR - ELEMENTS

In Thompson vs. Pizza Hut of America, Inc., ____A.D.2d____, 691 N.Y.S.2d 99), the Second Department ruled that in order for the doctrine of Res Ipsa Loquitur to be applied, three conditions must be met: (1) the event must be of a kind that ordinarily does not occur I the absence of someone's negligence; (2) it must be caused by an instrumentality within the exclusive control of the defendant; and (3) it must not have been due to a voluntary action or contribution on the part of the plaintiff.

INSURANCE - AMBIGUITY

In Federal Inc. Co. vs. American Ins. Co., (____A.D.2d____, 691 N.Y.S. 2d 508), the First Department ruled that a parent company's business auto policy was ambiguous as to whether a broadly worded "subsidiary enforcement" was intended to cover a particular subsidiary's vehicle for which the subsidiary had obtained its own coverage, and thus the extrinsic evidence was admissible to determine that the intent, where many other aspects of the policy, including the schedule of the covered vehicles and the amount of the premium were inconsistent with the motion that the subsidiary's vehicles were covered.

INSURANCE - ANTISUBROGATION RULE - ELEMENTS

In Alinkofsky vs. Countrywide Insurance Co., (____A.D.2d____, 691 N.Y.S.2d 479), the First Department concluded that a vendor's liability insurer whose policy provided the lessor with One million ($1,000,000) Dollars in coverage were purported to limit the lessee's coverage to Ten Thousand ($10,000) Dollars via a step down endorsement sought a declaration that the lessee's own insurer was responsible for the second layer of coverage after the lessee's coverage under the lessor's policy was exhausted, that the lessor's coverage under the lessor's policy was the third

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layer. The trial court ruled that the lessee's insurer provided the second layer of coverage and the lessee's insurer appealed therefrom. On appeal, the Court ruled that the anti-subrogation rule precluded the lessor's insurer from shifting the second layer of coverage to the lessee's insurer. The lessor's insurer could not proceed to attempt to secure coverage from the lessee's insurer.

INSURANCE - BAD FAITH - ELEMENTS

The First Department recently held that an insurer is prohibited from placing its own financial interest above those of its insured, (Ansonia Associates, Ltd. Partnership vs. Public Service Mutual Ins. Co., ____A.D.2d____, 692 N.Y.S.2d 5).

SUMMARY JUDGEMENT - BURDEN - ELEMENTS

In Ansonia Associates, Ltd. Partnership vs. Public Service Mutual Ins., Co., ____A.D.2d____, 692 N.Y.S.2d 5), the First Department submitted that on a motion for summary judgment attacking the sufficiency of the complaint, the facts are construed in a light most favorable to the party opposing the motion, which is entitled to all reasonable inferences that can be derived therefrom.

GENERAL MUNICIPAL LAW - NOTICE OF CLAIM PURPOSE

In Adrian vs. Town of Oyster Bay, (____A.D.2d____, 692 N.Y.S.2d 140), the Second Department submitted that the purpose of the notice of claim requirement under the General Municipal Law is to afford the municipality and adequate opportunity to timely investigate and defend the claim.

NEGLIGENCE - RES ISPA LOQUITA - ELEMENTS

In Roundtree vs. Manhattan and Bronx Surface Transit Operating Authority, (____A.D.2d____.692 N.Y.S.2d 13), the First Department submitted that in order to be entitled to the instruction on Res Ispa Loquita doctrine, the plaintiff must establish; (1) the type of accident ordinarily does not occur in the absence if negligence; (2)the instrumentality causing the accident was in defendants exclusive control; and (3) the accident was not due to any voluntary action or contribution by the plaintiff.

The exclusive control is not an inflexible or absolute requirement for the application of the doctrine, its purpose is to confine the application to situations where it is more likely than not that the defendant caused the accident.

Plaintiff need not prove the preclusion of every other possible cause in order to be entitled to the instruction regarding the doctrine. With the presence of the doctrine, the jury may infer negligence from the occurrence of the accident and the defendant's relationship to it.

MALPRACTICE - UNNECESSARY SURGERY - INFORMED CONSENT

In Koffler vs. Biller (____A.D.2d____, 692 N.Y.S.2d 48), the First Department submitted that evidence supporting a jury verdict finding that the patient would not have agreed to the surgery if he had been properly advised of the attendant risk, and that the treatment was a substantial cause of the deterioration in patient's condition, thus allowing recovery pursuant to an absence informed consent.

INDEMNIFICATION - PUNITATIVE DAMAGES

It was submitted by the First Department in Biondi vs. Beekman Hill House Apartment Corp., (____A.D.2d____, 692 N.Y.S.2d 304), that public policy prohibits indemnification for punitive damages.

DISCLOSURE - STUDENT'S RECORDS

In Graham vs. West Babylon Union Free School District, (____A.D.2d____,692 N.Y.S.2d 460), the Second Department submitted that a student who-sued the school district for its alleged failure to adequately supervise another student who committed an assault in which the first student was injured was entitled to discovery, in redacted form, of the school disciplinary records pertaining to prior incidents involving the other student. The records were not privileged and the records of any past assaultive behavior by the other student would be clearly relevant.

PRODUCT LIABILITY - DEFECTIVE PRODUCT - ELEMENTS

The Second Department recently indicated that a quick drying, solvent based lacquer sealer, which injured a user when the lacquer vapors came into contact with a pilot light of a kitchen stove and ignited, was not defectively designed as the volatile solvent in the sealer was critical to the product's performance, such that there was no safer, alternative design, absent evidence that the water base sealers could match a solvent based lacquer with respect to appearance of finish, hardness, scratch resistance surface, price or drying time. (Felix vs. Akzo Nobel Coatings, Inc., ____A.D.2d____, 692 N.Y.S.2d 413).

AUTOMOBILE - HIT IN THE REAR - PRIMA FACIE CASE

In Sheeler vs. Blade Contracting, Inc. (____A.D.2d____, 692 N.Y.S.2d 669), the Second Department ruled that a rear end collision with a stationary vehicle creates a Prima Facie case of liability in favor of the operator of the stationary vehicle, unless the operator of a moving vehicle can come forward with an adequate non-negligent explanation for the accident.

A truck driver who struck the rear of an automobile on a entrance ramp to the expressway had the burden of proving that the collision was not due to his negligence where it was undisputed that the automobile was not moving at the time of impact, even if the jury rejected the automobile driver's testimony that his vehicle never moved after first stopping, at

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a stop sign on the ramp and accepted the driver's version of events in which the automobile slowly moved forward after the initial impact.

INSURANCE - PROCUREMENT- ADDITIONAL INSURED

In Consolidated Edison Co. of New York, Inc. vs. U.S. Fidelity and Guar. Co., (____A.D.2d____, 693 N.Y.S.2d31), the First Department held that the liability of an additional insured in an underlying personal injury action brought by a pedestrian who fell in a depression that had formed in a paved road which the insured contractor was repaving under a contract with the additional insured arose out of work performed on the additional insured's behalf by the insured and thus was within the scope of additional insured endorsement of liability policy.

Any negligence by the additional insured in causing the accident was not material to the application of the additional insured endorsement. The language of the additional insured endorsement did not operate to exclude coverage for injuries arising out of additional insured negligence.

NEGLIGENCE - SIDEWALK - TRIVIAL DEFECT

In Santiago vs United Artist Communications, Inc. (____A.D.2d____, 693 N.Y.S.2d 44), the First Department ruled that a one half inch gradual depression in a step which allegedly caused a pedestrian to lose her balance and fall, was to trivial to constitute a dangerous or defective condition, and thus the landowner was entitled to a dismissal of the pedestrian's trip and fall claim.

NEGLIGENCE - CAUSATION - QUESTION OF LAW

The Second Department recently indicated that although the issue of proximate cause is generally one to be determined by the finder of fact, it is the function of the Court to determine if a Prima Facie case of causation has been established in the first instance. (Rubinfeld vs. City of New York, ____A.D.2d____, 692 N.Y.S.2d 706).

MALPRACTICE - NEGLIGENCE - DISTINCTION - ELEMENTS

In Rey vs. Parkview Nursing Home, Inc. (____A.D.2d____, 692 N.Y.S.2d 686), the Second Department submitted that the distinction between medical malpractice an negligence is a subtle one, for medical malpractice is but a species of negligence and no ridget analytical line separates the two.

An action against a physician to recover for a fall by a nursing home resident from a recliner to which the physician had ordered her confined was governed by the limitations period for medical malpractice, as opposed to that for simple negligence, where the claim alleged liability based upon an improper assessment of the resident's mental and physical condition and the degree of supervision required.

The claim sounds in medical malpractice, for the purposes of determining the applicable limitations period when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician. By contrast when the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the failure in fulfilling a different duty, the claim sounds in negligence.

CONDITIONAL ORDER OF PRECLUSION - ELEMENTS

The Second Department recently held that a conditional order of preclusion barring the plaintiff from presenting expert testimony became absolute as a result of plaintiff's failure to comply with the order. The plaintiff failed to either comply with the order or demonstrate an excusable default and the existence of a meritorious claim as required to avoid the adverse impact of an order, so indicated the Second Department in Askenazi vs. Hymil Mfg. Co., Inc. ____A.D.2d____, 692 N.Y.S.2d 705).

INSURANCE - FAILURE TO GIVE TIMELY NOTICE - NO COVERAGE

In Excelsior Inc., Co. vs. Antretter Contracting Corp., (____A.D.2d____, 693 N.Y.S.2d 100), the First Department ruled that the failure of a construction contractor's liability insurer to give the site owner notice of its denial of coverage for a brick layer's injuries at the site did not make it liable for injuries which were not covered under the policy, where the contractor's insurance had given notice of denial to the owner's own insurers who were the real parties in interest.

The purpose of the statute obligating a liability insurer to send notice of its denial of coverage to the insured and the injured person or any other claimant is to protect the insured, the injured person and any other interested party who has a real stake in the outcome from being prejudiced by a belated denial of coverage. It is not intended to be a technical trap that would allow interested parties to obtain more than the coverage contracted for pursuant to the policy.

RESPONDEAT SUPERIOR - ELEMENTS

In Judith M. vs. Sister's of Charity Hospital, (93 N.Y.S.2d932,693 N.Y.S.2d67), the Court of Appeals ruled that the doctrine of "Respondent Superior" renders an employer vicariously liable for torts committed by an employee acting within the scope of his employment.

Under the doctrine, the employer may be held liable when the employee acts negligently or intentionally, so long as the tortuous conduct is generally foreseeable and a natural incident of the employment.

If an employee for purposes of his own departs from the line of duty so that for the time being his act constitute an abandonment of his service, the employer is not liable for the employees action under the doctrine of "Respondeat Superior".

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RESPONDEAT SUPERIOR - INDEPENDENT CONTRACT - DISTINCTION

In Maristany vs. Patient Support Services, Inc. (____A.D.2d____, 693 N.Y.S.2d 143), the First Department indicated that while an employer is generally not liable for the torts or negligent acts of an independent contractor under the doctrine of "Respondeat Superior", there exists three categories of recognized exceptions to that rule: (1)negligence of an employer in selecting, instructing or supervising the contractor; (2) employment for work that is especially or inherently dangerous; and (3) instances in which the employer is under a non-delegable duty.

DISCLOSURE - FAILURE TO COMPLY - DISCRETION OF COURT

In Krajca vs. Panza, (____A.D.2d____, 693 N.Y.S.2d 185), the Second Department indicated that the nature and degree of the penalty to be imposed on the party that refuses to comply with the order to provide discovery is a matter within the discretion of the trial court.

The drastic remedy of striking a pleading for failure to provide discovery should not be imposed unless the parties failure to comply was the result of willful, deliberate, a contumacious conduct or its equivalent.

DISMISSAL - 90 DAY NOTICE - DUTY OF PLAINTIFF

The Second Department recently held that having been served with a 90 day notice regarding a want of prosecution, it was incumbent upon the plaintiff who brought the action to comply with a notice by filing a note of issue or by moving before the default date, either to vacate the notice or extend the 90 day period.

In order to avoid the sanction of dismissal of the action the plaintiff was required to demonstrate a justifiable excuse for the delay in properly responding to the 90 day notice and to demonstrate a meritorious cause of action. (Timko vs Equitable Life Assur. Soc. Of U.S. (____A.D.2d____,. 693 N.Y.S. 2d 218)

APPEAL - AMBIGUITY - LOSS OF SIGHT

The Second Department recently ruled that the phrase "loss of sight" in a disability income policy was ambiguous as to whether it required that both eyes or just one eye be affected. Accordingly, the phrase had to be construed in favor of the insured who was injured when a baseball bat broke and struck him in the eye, (Scalia vs. Equitable Life Assur. Cos. Of U.S. (____A.D.2d____, 693 N.Y.S.2d 218).

APPEAL - FAILURE TO OBJECT

The First Department recently ruled that a plaintiff's failure to object to the introduction of evidence of her character in testimony from the defendant's psychiatrist expert, in a Civil action for assault and battery waived her claim or error to respect to the admission thereof (Holtz vs. Wildenstein & Co., Inc. ____A.D.2d____,693 N.Y.S.2d 516).

AUTOMOBILE LOADING AND UNLOADING - VICARIOUS LIABILITY

In Argentina vs. Emery Worldwide Delivery Corp. (93 N.Y.2d 554, 693 N.Y.S.2d 493), the Court of Appeals submitted that the loading and unloading of a vehicle constitutes "use or operation" of the vehicle for the purpose of the statute providing for vicarious liability of the vehicle owner for the negligence in the use or operation of the vehicle by a permissive user.

The vehicle need not be the proximate cause of an injury before the vehicle's owner may be held vicariously liable under the statute providing for the vicarious liability of a vehicle owner for negligence in the use or operation of the vehicle by a permissive user. To require that the vehicle itself be the instrumentality or a proximate cause of a plaintiff's injury would tend to circumvent the statute's negligence requirement and unduly limit its intended beneficial purpose.

JURISDICTION - IMPERSONAM - WAIVER

The Second Department recently held that a defendant waived the defense of lack of personal jurisdiction by failing to move to dismiss on that ground within sixty (60) days of the accident (Amerasia Bank vs. Saiko Enterprises, Inc., ____A.D./2d____, 693 N.Y.S.2d 628).

INDEMNIFICATION - SCAFFOLDING LAW - ELEMENTS

In Correia vs. Professional Data Management, Inc. (____A.D.2d____, 693 N.Y.S.2d 596), the First Department submitted that a party who has been held liable to an injured worker solely on the basis of a statutory liability imposed by the Scaffolding Law, without any fault on its part is entitled to recovery under a contract of indemnity. In the context of contractual indemnification from liability under a scaffolding law, the negligence of the indemnitor is irrelevant, whereas the negligence of the indemnitee is critical and if established, would preclude indemnification.

NEGLIGENCE - VIOLATION OF INDUSTRIAL CODE

The Fourth Department recently submitted in Puckett vs. County of Erie, (____A.D.2d____, 693 N.Y.S.2d 780), that a violation of an Industrial Code, even if admitted by defendants, does not establish negligence as a matter of law, for the purposes of an action pursuant to the Labor Law, but is merely some evidence to be considered on the question of the defendant's negligence.

INDEX NUMBER - FAILURE TO PURCHASE

In Rybka vs. New York Health and Hospital Corp., (____A.D.2d____, 693 N.Y.S.2d 566), the First Department

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held that a medical malpractice plaintiff's failure to timely purchase a new index number for his suit after previously purchasing an index number in a prior related proceeding on motion to file a late notice of claim did not have jurisdictional consequences, but was a correctable defect, thus precluding dismissal on limitation grounds.

ANIMALS - VICIOUS PROPENSITIES - ELEMENTS

In Rivers vs. New York City Housing Authority, (____A.D.2d____, 694 N.Y.S.2d 57), the First Department ruled that in order to be held liable for injuries sustained as a result of an attack of a tenant's dog, it must be demonstrated that the animal had vicious propensities and that the landlord know or should have known of those propensities.

GENERAL MUNICIPAL LAW - GOVERNMENTAL IMMUNITY

In Vasquez vs. Figueroa, (____A.D.2d____, 694 N.Y.S.2d 6), the First Department ruled that jury verdict for the plaintiff in a personal injury matter against the City could not be set aside on the basis of governmental immunity where the City never raised the defense in its answer and it was not submitted to a jury.

CONDITIONAL ORDER OF PRECLUSION - SO ORDERED STIPULATION

The Second Department recently indicated that a "So Ordered" stipulation in a medical malpractice action which granted the defendant's motion to preclude the plaintiff's from offering any evidence at the trial relevant to the items for which the particulars had been demanded, unless plaintiff served separate bills of particulars upon each defendant within sixty (60) days functioned as a conditional order of preclusion which became absolute upon the plaintiff's failure to comply, (Tirone vs. Staten Island University Hospital, ____A.D.2d____, 694 N.Y.S.2d 117).

CONSTRUCTION - VIOLATION OF SCAFFOLDING STATUTE - WAIVER

In Ortega vs. Catamount Construction Corp., (____A.D.2d____, 694 N.Y.S.2d 367), the First Department ruled that a construction manager's claim that it was not a party potentially liable for a violation of a scaffolding statute was unpreserved for Appellate review, where the manager did not raise such an argument either in moving to dismiss at the close of the laborer's case or in moving for a directed verdict at the close of the evidence, and never requested that the jury be instructed to determine whether it was a "contractor" or "agent" of the owner within the meaning of the statute.

MALPRACTICE - HOSPITALS - FAILURE TO ACT

In Ciceron vs. Jamaica Hospital, (____A.D.2d____, 694 N.Y.S.2d 459), the Second Department submitted that a mother of an infant child who is afflicted with spinal bifida had a valid cause of action against the hospital and other defendants to recover extraordinary cost in raising a child with such disability, where the expert affidavits tendered to show that the defendants were negligent in various ways and that their negligence resulted in a failure to perform a repeat sonogram which would have revealed the presence of the child's spina bifida in time to allow the mother to have an abortion.

NEGLIGENCE - SIDEWALK - DUTY OF LANDOWNER

The First Department recently held that a landowner owed no duty to the public to maintain an abutting sidewalk in a safe condition unless the owner had used the sidewalk for a special purpose or created an unsafe condition (Wu vs. Landau, ____A.D.2d____, 694 N.Y.S.2d 381).

PARTIES - PLEADINGS - IMPROPER NAMES

In Sahinis vs. Brunswick Hospital Center, (____A.D.2d____, 694 N.Y.S.2d 450) The Second Department ruled that an error in the original summons and complaint on file in a medical malpractice action, which incorrectly listed "Patrick" as the physician's first name rather than "Patricia" was simply a misnomer subject to correction, given the context of the original complaint, and thus, the original summons and complaint sufficiently conformed with the complaint letter served which properly named the physician.

PLEADINGS - AMENDMENT - IMPROPER

It was submitted by the Second Department that a worker was improperly granted leave to amend the complaint and bill of particulars in a personal injury matter to allege violation of safety regulation concerning hazardous openings, where the hazardous condition contemplated by the regulation and the safety precautions mandated therein were clearly inapplicable to the situation presented in the workers case. (Perrini vs. City of New York, ____A.D.2d____, 694 N.Y.S.2d401).

1999 PAST PRESIDENT'S DINNER

President Ritzert congratulates outgoing Chairman of the Board John McDonough.

President Gail Ritzert congratulates former president Ed Hayes

DANY past presidents Roger P. McTiernan and George Siracuse

Guest of honor, New York State Senator Michael Balboni (left) and New York State Insurance Fund General Attorney James P. O'Connor

DANY President Gail Ritzert congratulates past DANY president James Conway.

(clockwise from the center) Eileen M. Carroll, Kristin G. Shea, Maureen Sullivan, Eileen Hawkins and Angela Pantony

REPORT FROM THE COMMITTEE ON THE DEVELOPMENT OF THE LAW

*by Andrew Zajac**

*Frank V. Kelly***

THE COURT OF APPEALS' DECISION IN BRYANT vs. NEW YORK CITY HEALTH & HOSPITALS CORP.

In the previous issue of The Defendant (Summer 1999, Vol. 2, No. 2), we reported on our amicus submission in Bryant v. New York City Health & Hospitals Corp., a case which involved significant issues concerning New York's structured judgment statutes (CPLR Article 50-A and 50-B), and collateral source offsets in wrongful death actions. On July 1, 1999, the Court of Appeals issued its opinion, which is reported at 93 N.Y.2d 592, 695 N.Y.S.2d 39. As will be more fully set forth below, the result was a partial victory for both defendants and plaintiffs.

The facts in Bryant were fully set forth in our previous report. Briefly, however, this was an action for damages for medial malpractice and wrongful death stamming from the death of the infant plaintiff's mother during childbirth. The plaintiff recovered a substantial judgment against the defendant, which, as reduced by the trial court, totaled $3,968,333. The judgment included awards of $1,800,000 for further loss of maternal care and guidance for 36 years, $308,888 for further loss or earnings for 37 years, and $450,000 for further loss of household services for 23 years.

Evidence was presented which indicated that the infant plaintiff received $288 per month in Social Security and survivor benefits.

The collateral source issue which the Court addressed was whether the Social Security survivor benefits constituted a collateral source within the meaning of CPLR 4545, thus entitling defendants to offset such benefits against awards for future loss of earnings. The Court of Appeals found for defendants on this issue. The Court accepted the arguments set forth in the Defense Association's brief that one need look no further than the very wording of CPLR 4545 to reach this conclusion. That statute explicitly provides that defendants are entitled to offsets from any collateral source (with stated exceptions which were inapplicable here) with specific reference to Social Security benefits (with the exception of Medicare payments). The Court held that by specifying that only Social Security benefits under Medicare cannot offset a recovery, the statute necessarily identifies all other types of Social Security benefits, including survivor benefits, as collateral source reductions. The Court also stated that allowing an offset for Social Security survivor benefits against an award for future lost earnings satisfied its prior holding in Oden v. Chemung County Industrial Development Agency, 87 N.Y.2d 81,89,637 N.Y.S.2d 670, 674 (1995) which requires a "close correspondence between the collateral source payment and the item of pecuniary loss to be replaced." The Court held that Social Security survivor benefits are clearly intended to compensate for the loss of a parent's earnings, and that disallowance of the offset would amount to a double recovery for the plaintiff.

In reaching its conclusion, the Court rejected the plaintiff's argument that Social Security benefits could never qualify as a collateral source. The plaintiff's argument was premised upon the language in CPLR 4545, which sets forth the prerequisite that a collateral source must be received pursuant to "a contract or otherwise enforceable agreement." The plaintiff maintained that Social Security benefits do not meet that requirement. The Court held that the plaintiff's interpretation would impermissibly result in the removal of the plain words of the statute which provide that Social Security benefits (except for Medicare) are to be afforded collateral source status. The Court held that application of the "contract or otherwise enforceable agreement" requirement is limited to situations where plaintiffs do not have a protected

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interest in a government entitlement.

As indicated above, the judgment in Bryant contained awards for future damages totaling $2,558,333. Thus, the provisions of CPLR Articles 50-A were implicated, since the statute requires that future damages in excess of $250,000 be structured. CPLR Article 50-A is applicable to actions for medical and dental malpractice. CPLR Article 50-B contains comparable provisions applicable to all actions for personal injury, property damage and wrongful death. This case presented two issues concerning CPLR Articles 50-A and 50-B, which the Court of Appeals resolved in favor of plaintiffs. The first issue was whether the annuity that defendants are required to purchase for future damages in excess of $250,000 should be based upon the present value of such damages, as opposed to the undiscounted amount of such damages. It was the position of the Defense Association that since the statutes are ambiguous, and since they were enacted to ameliorate a liability crisis affecting not only liability insurers, but, self-insured entities and individuals with little or no insurance, they should be construed so as to require that the annuity be based upon the present value of the future damages. The Defense Association argued that such a construction would advance the statute's curative purpose. Despite describing the statutes as "mind-numbing, circuitous, vexing, every Judge's nightmare, and at best ambiguous which can lead to inexplicable results" the Court found support for its position favoring plaintiffs from the "language, history and context of the structured judgment statutes." In so doing, the Court pointed to language in the statutes which refer to payment of "future damages in periodic installments' and compensation for the 'full amount of the remaining future damages'" (Court's emphasis). The Court also relied upon its prior decision in Schulz v. Harrison Radiator Division General Motors Corp., 90 N.Y. 311, 316-317, 660 N.Y.S.2d 685, 687 (1997) where the Court stated that in actions in which Articles 50-A or 50-B apply, in computing future damages, "the jury shall be instructed to award the full amount of future damages, as calculated, without reduction to present value" (Court's emphasis).

Interestingly, the Court did not address the Defense Association's argument that language in the prior Schulz opinion provided solid support for the Defense Association's position. In Schulz, the Court relied greatly upon statements made by Melvin Miller, a New York State Assembly member, in arriving at its holding that plaintiffs are entitled to present evidence of inflation at trial, notwithstanding that the trial court is also bound to add a four percent adjustment to the structured payments as required by Articles 50-A and 50-B. Mr. Miller's statements are part of the legislative history of the statutes. In its brief, the Defense Association highlighted the following passage from the Schulz opinion in support of its position:

> As stated by Mr. Miller, after a "gross verdict" is rendered, the jury's award would be reduced to present value by the court, then structured, and the 4 percent rate added to the periodic payments made from the annuity purchase by then defendant.

90 N.Y.2d at 318,660 N.Y.S.2d at 688 (underscoring supplied).

However, as stated above, the Court did not address that argument.

Interestingly, the Court also relied upon CPLR 5034 and 5044 in support of its holding. Those statutes provide that if a defendant defaults in making the required periodic payments, the plaintiff may then petition the court for entry of judgment for a lump sum of all remaining installments, not reduced to their present value. It is curious that the Court relied upon provisions pertaining to defaulting defendants as a foundation for a rule governing the obligations of non-defaulting defendants.

The Court concluded that reduction of the award for future damages to present value, and then payment of that award over time, as urged by the Defense Association, does not assure plaintiffs the full amount of their future damages.

The second issue involving Articles 50-A and 50-B was whether the annual four percent addition to the periodic payments, as provided in the statutes, should be added to the remaining future damages before those damages are reduced to their present value for the purposes of calculating attorney fees. On this point, the Defense Association argued that, since the statutes are also unclear on this point and given their remedial aim, they should be construed so as to advance their purpose of ameliorating the liability crisis. More over, the Defense Association argued that It defies reason to add the annual four percent award when calculating attorney fees, inasmuch as the addition is designed to compensate plaintiffs who receive payments over time, and yet, plaintiffs' attorneys receive their fee in a lump sum. Nevertheless, the Court held for plaintiffs' attorneys on this issue, finding support in statutory language. Additionally, the Court stated that since the four percent addition is part of the plaintiff's recovery and since plaintiffs' attorneys' compensation is based upon the amount of the recovery, plaintiffs' attorneys are entitled to the benefit of the four percent annual increase.

The Court concluded its opinion by inviting the Legislature to revisit Arti8cles 50-A and 50-B to determine whether or not the statutes are meeting their objectives.

The Committee continues to search for cases pending in the Court of Appeals, which merit amicus submissions on behalf on the Defense Association. Any suggestions forwarded to the authors will be given serious consideration by this committee.

*This articles was published in the **Defendant**, **The Journal of the Defense Association of New York**, Inc. in the Fall, 1995, but requires updating in light of recent decision such as **American Ref Fuel v. Resource Recycling**, 248 AD2d 480, 671 NYS2d 93; **Buccini v. 1568 Broadway Assocs**, 250 AD2d 466, 673 NYS2d 398, and **Horn v. Aetna**, 225 AD2d 443, 639 NYS2d 355.*

CERTIFICATES OF INSURANCE REVISITED

Not long ago it was not uncommon for a party to hire an independent contractor for a job and later learn, after an accident, that the independent contractor did not have insurance. To protect against this misfortune, hirers began to require the independent contractor to produce some proof of insurance before they were hired. This proof came in the form of a **Certificate of Insurance**.

A Certificate of Insurance is not an insurance policy; it is merely some evidence of insurance. (***Horn v. Aetna***, 225 AD2d 443, 639 NYS2d 355). The intent was to provide a standardized form of evidence of insurance. The use of such certificates, however, has evolved far beyond the intent of insurance professionals. Instead of just being evidence of the party's insurance, it often purports to add an additional insured, and/or incorporate a particular hold harmless clause, and/or alter various terms or conditions of the policy, including the "other insurance" clause. Understandably, increased zeal to protect against mounting liability exposure has fueled this evolution, but a misunderstanding of the nature and purpose of the certificates has caused it to go awry.

Ideally, an independent contractor would go to his insurance agent and request that the owner who hired him be added as an additional insured. The agent would get the approval of the insurer and arrange for an additional insured endorsement to be added to the policy. The agent would then issue a Certificate of Insurance to the owner as certificate holder and additional insured. Unfortunately, things do not usually happen, as they should. Sometimes the insured will forget to go to the agent, or the agent will fail to contact the insurer. Sometimes the insurer will failed to prepare the actual additional insured endorsement. Other insurers will sometimes fail to honor their obligations. Some people will think that merely being a certificate holder affords them insurance coverage. Some claim representatives will think that an additional insured is only covered if it is not negligent, notwithstanding the language of the endorsement. (See ***Dayton Beach Park v. National Union***, 175 AD2d 854, 573 NYSS2d 700; ***Consolidated Edison v. Hartford***, 203 Ad2d 83,610 NYS2d 219; standard additional insured endorsements broadly interpreted to provide coverage for liability arising out of named insured's work).

What was once a simple document evincing insurance coverage is often now so complicated and ambiguous that it takes the time and effort of a specialist to interpret it. Too often, the final interpretation is becoming a matter for the Courts.

The effectiveness of a Certificate of Insurance depends largely on who issued the Certificate, what the Certificate says, and, most importantly, what the insurance policy says.

WHO ISSUED THE CERTIFICATE

Certificates of insurance may come from an insurance broker, an agent, an insurance company, and in some cases even from an insured without the knowledge of the broker, agent, or insurer.

CERTIFICATE ISSUED BY A BROKER

A Certificate issued by a local broker does not create coverage. McKenzie v. New Jersey Transit Rail Operations, Inc., 772 F. Supp. 146. The broker generally binds the insured, not the insurer.

In ***McKenzie***, a local broker had issued an insurance certificate for Amtrak and New Jersey Transit. The insurance policy, however, did not mention them by endorsement or otherwise. The Court held that they were strangers to the policy and had no direct rights against the insurer. The Court hold that there was no estoppel and that the certificate was simply notice that a policy of insurance had been issued to the named insured.

CERTIFICATE ISSUED BY AN INSURER

A Certificate issued by an insurer, however, could estop the insurer from denying coverage. (See ***Bucon Inc. v. Pennsylvania Manufacturing Association Insurance Company***, 151 AD2d 207, 547 N.Y.S.2d 925; but also see ***Penski v. Home***, 74 N.Y.2d 400; a certificate

ostensibly issued by insurer is not conclusive evidence of insurance.)

In ***Bucon*** a subcontractor agreed to name its contractor as an additional insured. Its insurance policy as initially written appeared to exclude liability assumed under the subcontract. Therefore, the subcontractor obtained and paid for additional coverage, which was evidenced by an appropriate endorsement of the policy. The insurer prepared and executed a certificate of insurance that the subcontractor then forwarded to the contractor. The contractor rejected it as unsatisfactory because it did not name them as an additional insured. The insurer then issued a new certificate with a notation that the contractor was an additional insured. After an accident and lawsuit, the insurer claimed that the policy was never actually amended to add the contractor as an additional insured, and that the designation of the contractor as an additional insured on the certificate was due to a clerical error. The Court held that a question of fact existed as to whether the insurer had agreed to provide the contractor with insurance coverage and that the certificate was only some evidence of such insurance. It did not establish coverage as a matter of law. Nevertheless, the Court held that under the circumstances of the case, the insurer was estopped from denying coverage to the contractor.

On the other hand, however, in ***Penske***, it appears that a Certificate of Insurance was actually issued by the insurer stating that Penske was named both as an additional insured and loss payee as their interest may appear. The business auto policy contained an endorsement entitled "Additional insured-Lessor" which provided that a lessor was an additional insured where required by contract. The Court held that the certificate of insurance was not conclusive proof of coverage and that there were questions of fact as to whether Penske was an additional insured and whether such coverage was required by contract.

CERTIFICATE ISSUED BY AGENT

A certificate issued by an agent could create a question of fact as to whether it is binding on the insurer. (See ***Nojaim Bros. Inc. v. CNA Insurance Companies***, 113 AD2d 109, 496 N.Y.S.2d 113; but cf ***American Ref Fuel v. Resource Recycling***, 248 AD2d 420, 671 NYS2d 93, Second Department, 1988; even assuming agency authority, a Certificate does not create coverage by estoppel.)

In ***Nojaim***, an insurance agent "physically removed" a liquor law liability exclusion endorsement from the policy without prior approval of the insurer. The preferred agency agreement between the insurer and the agent provided that the agency had no authority to bind CNA without CNA's written authorization. It also provided that the agent agreed "not to alter, modify, waive or change any of the provision or conditions of CNA insurance contracts, bonds, rates, rating rules or rating plans." The Court held that there was an issue of fact whether the insurance agency had actual or implied authority to modify or alter the insurance policy.

Nevertheless, the trend of recent case law remains against the creation coverage by estoppel. ***American Ref Fuel v. Resource Recycling***, is now the keystone case concerning certificates of insurance issued by an agent. ***American Ref Fuel***, as owner, contracted with ***Resource*** to provide a ferrous recovery system. ***Resource*** subcontracted with ***Universal*** to install the system, and the subcontract required ***Universal*** to also name ***American Ref Fuel*** as an additional insured. Accordingly, ***Universal*** went to its insurance broker, Donald Miller of the Jack O. A. Nelson Agency, and requested that ***American Ref Fuel*** be added as an additional insured on its policies with Minnesota Fire & Casualty. The insurance agency in turn issued a Certificate of Insurance naming ***American Ref Fuel*** as an additional insured on ***Universal's*** Minnesota Fire & Casualty policies. The Court found that "upon receiving the Certificate of Insurance (***American Ref Fuel***) permitted ***Universal*** to proceed with its performance under the subcontract."

Notwithstanding the certificate, however, ***American Ref Fuel*** was not actually added to the Minnesota Fire & Casualty policy as an additional insured, for unknown reasons.

The Appellate Court held that since the Minnesota F & C insurance policies conclusively establish that ***American Ref Fuel*** was never named as an additional insured, Minnesota is not obligated to defend or indemnify them. The Court further stated that even if the subject insurance agency were an agent of Minnesota and Minnesota was liable for the acts of their agent, "the doctrine of estoppel may not be invoked to create coverage where none exists under the policy."

Ironically, ***American Ref Fuel*** was granted summary judgment against ***Universal*** for breach of the insurance procurement requirement, which is not covered by insurance. Worse for ***Universal***, they had not cross-moved below for summary judgment over against their insurance agent for failing to obtain the required additional insurance coverage.

American Ref Fuel has since been followed by the First Department in ***Buccini v 1568 Broadway Assocs.***, 250 AD2d 466, 673 NYS 2d 398, but questioned in a thoughtful opinion by Justice Lehner in ***St. George v. W.J. Barney Corp.***, Supreme Court, New York County. Index

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With all due respect to the particularly capable panel of judges that decided ***American Ref Fuel***, it is bad law and should be rejected. It is wrong on the facts, on the law, and on public policy.

Or course, it can not be gainsaid that, absent prejudice, insurance coverage is not created by estoppel. It is, however, established by agency authority under the long established doctrines of Principal and Agency. The same agent that has the power to bind an insurer for the named insured likewise has authority to bind the insurer for an additional insured; see for example, ***Gleason v. Temple Hill Assocs.***, 159 AD2d 682, 553 N.Y.S.2d 430 (2d Dept. 1990); ***Neil Plumbing & Heating Constr. Corp. v. Providence Washington Ins. Co.***, 125 AD2d 295, 508 NYS2d 580 (2d Dept. 1986).

Most insurers are inundated with requests for additional insurance coverage and often receive the requests without making any response. They choose not to devote the necessary time and effort to formally process the requests and to actually prepare an additional insured endorsement. Moreover, they would typically approve the standard additional insured endorsement without charge, if they went to the trouble of processing it. Unfortunately, however, after an accident some carriers selectively decide not to honor certain certificates issued by their own agents despite their prior acquiescence in such custom and practice. Somewhat reminiscent of Inspector Renaud, played by Claude Raines, in the movie Casablanca, they suddenly act shocked to hear that there is such a practice going on.

Under ***American Re Fuel***, the carrier would actually benefit from their own inadequate and dilatory processing of requests and could then selectively use their unresponsiveness as a shield.

Realistically, agents can not write construction insurance in New York City unless they can also accommodate the many daily requests for certificates of insurance and additional insurance. Insurers likewise can not underwrite construction insurance unless they also accommodate both their agent and insureds. It is unfair to permit certain insurers to accept the business without objection only later to protect the corresponding obligation after a loss.

BLANKET ADDITIONAL INSURED ENDORSEMENTS

Fortunately, the increased use of blanket additional insured endorsements will prevent many inadvertent breaches of insurance procurement provisions while also easing the insurer's administrative burden of processing the numerous requests. Nevertheless, the blanket endorsements vary widely and do not cover every situation, (e.g. a written contract executed before a loss may be a prerequisite to coverage). Moreover, many insureds do not have this blanket additional insurance endorsement. These insureds need protection to enable them to compete. Their agents also need protection from certain fickle insurers who would later deny the coverage when it suits them and thereby generate E & O claims. Putative, additional insureds also need protection from dishonored certificates. Finally, those carriers who honor their own agent's actions, taken within their authority, need protection from those insurers who unfairly evade their obligations.

One possible solution might be to require Certificates of Insurance to be signed or countersigned by the insurer rather than their agent, but even this strategy might not work; (see ***Penske v. Horn***, Supra). Alternatively, a diligent person could require the production of the actual additional insured endorsement before letting the contractor begin work, or perhaps before paying the contractor. Many carriers may not be able to respond to the ensuing volume, however, and might then formally and separately delegate this duty to the agent.

I would be better if the Courts would give due recognition to the authority of an agent to bind the insurer. (See ***Gleason*** supra; ***Neil Plumbing & Heating***, supra). Carriers who are not satisfied with the actions of their own agents can discipline the agents or terminate their agency; but they should not be able to repudiate their own agents actions ex post facto. The carriers benefit from their agents' writings; it is only fair that they also bear the corresponding burdens. They are also in the best position to monitor and control them.

Owners, GC's and others should be able to have some confidence in their own risk transfer programs and be able to rely on a certificate furnished by a reputable insurance agency.

Likewise, insured's who are required to procure additional insurance should be able to rely on their insurance agent's certificates rather than worry that they will later be confronted with an uncovered breach of contract claim while they are abandoned by their own insurer.

Agents who follow the custom and practice of issuing certificates and notifying their insurer should also not have to worry that every now and then a carrier will, perhaps on a whim, decide to repudiate a duly issued Certificate of Insurance after a claim is made.

Law should be fair, reasonable, and make sense. The rule propounded by ***American Ref Fuel*** is neither fair nor reasonable, and makes little sense. The insured ***Universal*** acted reasonably to get the additional insurance coverage, but was nevertheless found liable for breach of contract; and this liability was not covered by their insurance. The agent who ostensibly arranged for the addition insurance coverage as per custom and practice was faced with an E & O claim. The insurer, Minnesota F & C. was seemingly rewarded for not acknowledging the additional insurance and for denying coverage to its insured while leaving its own agent hanging.

It is a fundamental principle of equity that when one of various innocent parties must bear a loss, the loss should be borne by the party who was in the best position to have avoided it. With respect to certificates of insurance, that party is the insurer who appoints and regulates its agents and ultimately controls its business.

Law should also promote predictability and sound business practice. The rule of ***American Ref Fuel*** would undermine these legitimate interests, while generating uncertainty as well as litigation.

LIABILITY OF AGENT

Parenthetically, it has been uniformly held that because of lack of privity, a putative additional insured does not have a valid contractual claim against the agent or broker who issued the certificate. (See ***American Ref Fuel***, supra). The Courts, however, have not yet addressed the issue as to whether such agent or broker is liable for negligent misrepresentation base don the justifiable reliance of the certificate holder.

(See PJI 2:230).

CERTIFICATE PREPARED BY AN INSURED

Finally, a Certificate of Insurance prepared by an insured without the authority or knowledge of the insurer is obviously not binding on the insurer. Hopefully, this will not happen very often, but we should be aware than certain contractors can "doctor" their own certificates of insurance. Typically, these are photocopies altered with whiteout. A person relying on a Certificate of Insurance should at a minimum require an original singed by an insurer.

WHAT THE CERTIFICATE SAYS

The standard ACORD Certificate of Insurance includes three paragraphs that significantly limit coverage.

1. In the top right hand corner.

"This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below."

2.In the middle of the Certificate.

"This is to certify that policies of insurance listed below have been issued to the insured named above for the policy period indicated notwithstanding any requirement, term or condition of any contract or other document with respect to which this certificate may be issued or may pertain. The insurance afforded by the policies described herein is subject to all the terms, exclusions, and conditions of such policies."

3. At the bottom right hand corner.

"Should any of the above described policies be canceled before the expiration date thereof, the issuing company will endeavor to mail ___ days written notice to the certificate holder named to the left, but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives."

For the most part, the courts have given effect to this limiting language. (See ***American Ref Fuel***; supra, ***Taylor v Kinslla***, 742 F.2d 709; see also ***McKenzie***, supra and ***Bucon***, supra)

The use of Certificates continues to be abused, and attorneys are often necessary to decipher their meaning. It is inappropriate for Certificates of Insurance to include d language that incorporates hold harmless agreements or other clauses that would modify the language of the policy, such as the "other insurance" clause, because such alterations defeat the purpose of the "standard" Certificate of Insurance. Furthermore, an insurance policy cannot be unilaterally modified without the consent of the insurer. Agency Agreements typically preclude even agents from modifying the terms of a policy without the consent of the insurer. Moreover, such alterations may actually violate the insurance laws, which require approval of policy forms by the Superintendent of Insurance. (See *Insurance Law Section 2307 (b)*; see also New York State Department Circular Letter No. 8 dated June 7, 1995). In that letter, Edward Muhl, then the Superintendent of Insurance recognized the abuse of Certificates of Insurance wherein he stated:

> "TO ALL LICENSED PROPERTY AND CASUALTY INSURERS
>
> RE: THE USE OF CERTIFICATES OF INSURANCE.
>
> It has come to our attention that some cities, countries, and other organizations require as a condition of doing business that insured parties

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produce certificates of insurance on forms that appear to alter the terms of the actual policy. Some of these certificates incorporate "hold harmless" agreements or other clauses that later the language of the policy, or include statements that the wording of the certificate will control in the event of any inconsistency or conflict between the certificate and the policy.

Insurers are advised that certificates of insurance should be used only to provide evidence of insurance in lieu of an actual copy of the applicable insurance policy. Certificates should not be used to amend, expand, or otherwise alter the terms of the actual policy.

A certificate of insurance that lists the pertinent coverage terms as they appear in the actual policy is not considered a policy form that requires the Superintendent's prior approval. However, on that amends, expands or otherwise alters the terms of the applicable insurance policy constitutes a policy form, which must be filed with the Superintendent of Insurance in accordance with Section 2307(b) of the Insurance Law."

WHAT THE INSURANCE POLICY SAYS

The Courts continue to give due consideration tot he limiting language of the Certificate, which provides among other things, that is it "issued as a matter of information only and confers no rights upon the certificate holder" and "does not amend, extend or alter the coverage afforded by the policies below." The policy is generally controlling over a Certificate. (See ***America Ref Fuel***; ***Taylor***; ***Bucon*** and ***McKenzie*** supra). This actually worked against the insurer in ***BTR East Greenbush, Inc. et al v. General Accident Company et al***, 206 AD2d 791, where General Accident had issued a certificate of insurance naming BTR as an additional insure don the day **after** an accident. The Appellate Division, Third Department, held that the policy period, rather than the **certificate date** controlled. The Court noted that there was no extrinsic evidence of General Accident's intent that the issuance date was controlling or that the general language superseded the designation of plaintiffs as additional or that the general language superseded the designation of plaintiffs as additional insureds. At least to the Third Department, the only reasonable interpretation to be given the phrase "ADDITIONAL INSURED" followed by plaintiffs' names, is that General Accident meant to extend coverage to them under the terms of its policy. Because the certificate of insurance, like the policy, clearly and unambiguously states the effective dates and provides for coverage for claims (occurring) during the policy period, the claim against [plaintiffs] is covered as a matter of law citing (***Dryden Cent. School Dist. v. Dryden Aquatic Racing Team***, 195 AD2d 790, 793). Frankly, this appears to be a bizarre result since it is academic that you can not secure insurance after a loss. Insurance protects against fortuitous losses that may or may not occur. It is not meant to protect against things that have already happened. In any event, BTR's precedential value may be limited by its facts in that it involved a certificate issued by the insurer and the insurer presented no extrinsic evidence of its intent.

A mere certificate holder who is not named as an additional insured has no direct rights against the insurance company other than the hope that they give him notice of cancellation. The Certificate is evidence of the insured's coverage, not of the certificate holder's.

Even if the certificate indicates that the certificate holder is an additional insured, the policy might not actually have been so endorsed which would either not entitle the putative additional insured to coverage (***American Re Fuel***; ***Buccini***) or at most create a question of fact as to either actual additional insured status (see ***McKenzie*** and ***Najaim***, supra) or estoppel (see ***Bucon***, supra).

Moreover, the fact that a party is named as an additional insured does not suddenly vitiate its own insurance policy. Instead, the result will generally be concurrent coverage subject to the "other insurance' clauses of both policies. (See ***J.P. Realty v. Public Service Mutual***, 102 AD2d, 68 Aff'd, 64 NY2d 945). For example, a landlord who has insurance with company A, but is named as an additional insured on his tenant's policy with company B, is probably covered by both policies subject to their respective "other insurance" clauses. A certificate that purports to alter the "other insurance" clause of the policy would probably not be effective, absent an estoppel by the insurer. Such modification should instead be effected by an endorsement subject to the approval of the Insurance Department.

Finally, policy terms and conditions remain applicable, even to additional insureds, including reasonable notice to the insurer. (***Holmes v. Morgan Guaranty***, 233 AD2d 441, 636 NYS2d 778; the additional insured's 10 month delay justified a late notice disclaimer).

THE DRAM SHOP ACT AND THE VISIBLE INTOXICATION STANDARD

Drunk drivers insure, maim and kill hundreds of thousands of people in the Untied States each year. In 1997, 16,189 people were killed in crashes involving alcohol, an average of one every 21 minutes.[1] Additionally, 1,058,990 people were injured in alcohol related crashed, an average of one person injured every 30 seconds.[2] As part of the ongoing effort to decrease alcohol related injuries and deaths, New York State has sought to deter the sale of liquor to individuals who are already intoxicated. To this end, the legislature of the state of New York enacted Global Obligations law Section 11-101(1), colloquially referred to as the Dram Shop Act.

The Dram Shop Act, which in one form or another dates back to 1873,[3] provides that any person who is injured by an intoxicated person, or is injured by an intoxicated person, or is injured by reason of the intoxication of such a person, its entitled to a right of action against any person who caused or contributed to the intoxication by the ***unlawful*** sale to or by the ***unlawful*** procurement of liquor for the intoxicated person.[4]

In order to prove that a driver was ***visibly intoxicated*** for purposes of a G.O.L. Sec. 11-101 (1) action, sufficient evidence in admissible form must be submitted to the tier of fact to show that a reasonable person would have known that the driver was intoxicated at the time of the sale of procurement of the alcohol.

Rounding out the Dram Shop Act is Alcohol and Beverage Control Law Sec. 65 (2), which make it unlawful to <u>furnish</u> any alcoholic beverage to a ***visibly intoxicated person***.[5] Section 65 (2) was specifically designed to ensure that *alcoholic beverage licensees have sufficient notice of a customer's condition before they are subject to a potential loss of their license or to civil liability for injuries subsequently caused by an intoxicated person.*[6]

The "visibly intoxicated person" standard was further crafted to limit a tavern keeper's exposure and to preclude the imposition of regulatory or monetary penalty when he or she had no reasonable basis for knowing that the consumer was intoxicated.

Further, the Dram Shop Act only applies to commercial vendors and distributors of alcoholic beverages, and New York courts have held that private hosts and employers are not included within the Act's scope for purposes of civil tort liability.[7]

Simply stated, in New York a tavern or bar is liable to a person injured or killed by a drunk driver <u>only</u> when it is show that liquor was sold to the driver that driver was ***visibly intoxicated***. But what actually constitutes **visible** intoxication? And what type of proof is necessary to establish that a driver was ***visibly*** intoxicated when he was served alcohol by a tavern keeper for Dram Shop law purposes? These two questions, until recently, were subject to different interpretations by New York State courts.

In 1997 the Court of Appeals of the State of New York began to answer these question in the case of <u>Romano v. Stanley</u>.[8] However, as will be seen, the Romano case resulted in more confusion and debate then answers.

In 1998, in <u>Adamy v. Ziriakus</u>,[9] the Court of Appeals finally answered those questions.

The <u>Romano</u> case arose out of a motor vehicle accident occurring on January 18, 1991 in the Town of Colonie, New York when a car driven by Nancy Stanley crossed center line of the road and collided with plaintiff Marie Romano's automobile, Romano was seriously injured and Stanley died in the collision.[10]

Romano commenced a personal injury action against the Stanley estate, and against three taverns that has purportedly served alcohol to Stanley on the evening of the accident. Romano's Dram Shop Act cause of action alleged that taverns unlawfully sold alcoholic beverages to Stanley, a visibly intoxicated person in violation of ABC Law Sec. 65 (2).

Upon completion of discovery, two of the three defendant taverns moved for summary judgment asserting that Stanley was not visibly intoxicated while on the defendants' respective premises. In support of their assertions, the defendants submitted proof in the form of testimony from eyewitnesses that Stanley did not appear intoxicated while on their respective premises.

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Additionally, following ingestion of three drinks over the course of approximately two and one half-hours in the moving defendant's taverns, Stanley proceeded to the establishment owned by the third, non-moving defendant. It was in the third tavern that she was sold and imbibed alcohol to the point of what eyewitnesses described as visual intoxication. The fatal accident occurred soon after Stanley left the third tavern.

In opposing the summary judgment motion, the plaintiff submitted an affidavit from a forensic pathologist which relied on a toxicology report showing a blood alcohol level of 0.26% and a .33% level in the urine when Stanley died. Based on the recorded levels it was asserted that Stanley would have had a substantial amount of alcohol in her system four to five hours prior to the accident, at the time when Stanley would have been in each of the first two taverns.

Consequently, the pathologist concluded that it would be physically impossible to have reached the level of intoxication recorded in her body while drinking solely at the third establishment. In Dr. Oram's opinion, Stanley had to have been intoxicated prior to the time she reportedly arrived at the third establishment.

Based on those findings it was the doctor's opinion to a reasonable degree of medical certainty that Stanley would have, and did show, visible signs of intoxication while she was drinking at the first two establishments. The affidavit then went on to list the signs of intoxication that would have been exhibited by Stanley and that in his opinion should have been noticed by bartenders in the first two establishments.

However, the affidavit was silent as to the scientific or personal professional basis for the pathologist's conclusions about Stanley's blood alcohol count while a customer at the first two taverns and about how Stanley must have looked and acted in the first two taverns.

In reversing the lower court's denial of the summary judgment motions, the Court of Appeals began to define the level of proof necessary to sustain a Dram Shop Act cause of action. The Court rejected the defendants' contention that the statutory term ***visible*** required direct proof in the form of testimonial evidence from someone who actually observed the allegedly intoxicated person's demeanor at the time and place that the liquor was served.

The Court held that eyewitness testimony is not required to sustain a Dram Shop Act cause of action, and that circumstantial evidence may be used to establish visible intoxication. But in Romano, the Court refused to consider the plaintiff's expert's affidavit and the conclusions reported therein. The Court held that:

> Although the underlying facts on which the plaintiff's expert based his opinion – i.e. Stanley's blood and urine alcohol counts and her physical characteristics were set forth in detail (citations omitted) there was nothing in the expert's affidavit at all form which the validity of his ultimate conclusions about Stanley's appearance on the evening of the accident could be inferred.[11]
>
> Where an expert's affidavit is proffered, as the sole evidence to defeat summary judgment, such affidavit must contain sufficient allegations to demonstrate that the conclusion sit contains are more than mere speculation. If proffered alone at trial, such affidavit must suffice to support a verdict in proponent's favor.[12]

In Romano, the court of Appeals took painstaking care in pointing out that although the expert's affidavit was rejected, it was the spurious content of the affidavit and not the fact that a non-witness expert was used, that led to the dismissal of the action. The Court pointed to the fact that:

> The personal professional background of plaintiff's expert—a clinical forensic pathologist whose specialty is the performance of autopsies—is not alone sufficient to lend credence to his opinions, since individuals in his field are not ordinarily called upon to make judgments about the manifestations of intoxication in live individuals. Moreover, plaintiff's affidavit was devoid of any reference to a foundational scientific basis for its conclusions, and no reference was made either to Dr. Oram's own personal knowledge acquired through his practice or to studies or to other literature that might have provided the technical support for the opinion he expressed.[13]

The Court of Appeals did not discount the use of an affidavit by a properly qualified expert in a Dram Shop Act action, where such an expert's affidavit is part of a package of circumstantial evidence, and the expert has documented proper foundational scientific basis for his conclusions.

Adamy V. Ziriakus, is the most recent Court of Appeals decision to address these issues. Adamy involved a motor vehicle accident occurring in the early morning hours of

January 27, 1990 in the Town of Amherst, New York. The accident occurred shortly after the defendant drunk driver, Ziriakus, left T.G.I. Fridays, a nearby restaurant/bar.

In the hours preceding the incident, Ziriakus consumed a number of alcoholic beverages with friends at the bar. After failing field sobriety tests administered by police officers at the scene, Ziriakus was arrested and ultimately convicted of driving whole intoxicated and failure to yield. Lieutenant Joseph Adamy, a member of the town of Amherst Police Department, was killed in the accident.

Decedent's widow, plaintiff Candice Adamy, sued both Ziriakus and T.G.I. Friday, claiming that Fridays had violated the Dram Shop Act by serving Ziriakus alcohol while he was visibly intoxicated. A jury trial resulted in a verdict in favor of plaintiff, and a split of liability finding Ziriakus 40% liable, Friday's 30% liable and decedent 30% liable.

At trial, plaintiff presented several categories of circumstantial evidence along with the testimony of a forensic pathologist, Dr. Michael Baden, who testified that based on Ziriakus' blood alcohol content upon leaving Fridays, Ziriakus would have been visibly intoxicated when last served.

T.G.I. Friday's appealed the verdict asserting that there was insufficient evidence to find that Ziriakus was served alcohol by Friday's employees while he was visibly intoxicated. In an attempt to overturn the jury's verdict, appellant Friday's likened Dr. Baden's proffered testimony to that of the plaintiff's expert in Romano, and urges the Court to find that once again the expert's testimony and opinion were purely speculative and conclusory.

In affirming the Appellate Division's denial of Friday's appeal, the Court of Appeals further discussed the issue of what evidence is necessary to sustain a Dram Shop Act verdict against an establishment accused of selling alcohol to a visibly intoxicated patron. The Court held that "only where an expert's affidavit is proffered as the sole evidence to defeat a motion for summary judgment, that affidavit must contain sufficient allegation to demonstrate that the conclusions it contains are more than mere speculation, and would if offered alone at trial, support a verdict in the proponent's favor."[14] This was not the case in Adamy.

In Adamy, in stating his expertise for testifying at trial, the plaintiff's expert outlined his teaching career at several institutions, articles he had written germane to his understanding of alcohol and its effects, and his experience as a medical examiner.* Defendant Fridays made no objection to his qualifications to testify as an expert witness. Thus, the Court held that Friday's was precluded from arguing that the testimony was inadmissible as a matter of law, since Friday's had the opportunity to bring out weaknesses in the expert's qualifications and foundational support on cross-examination, an opportunity unavailable to a party seeking summary judgment as in Romano.

The Court further distinguished the evidence proffered in the Adamy case from that in the Romano case.

> Unlike Romano, where plaintiff's only evidence offered to defeat summary judgment was an expert's affidavit, here, plaintiff also introduced the testimony of several police officers who observed Ziriakus' behavior and appearance at the accident scene. Finally a missing witness instruction was given to the jury with respect to the fact that the bartender on duty on the night of the accident was not called as a witness by Friday's, and his absence was not explained.[16]

The Court held that:

> Dr. Baden's testimony, when taken together with the police officers' accounts of Ziriakus' behavior at the accident scene only a short time after he left Friday's and the inferences the jury was permitted to draw from Friday's failure to call Doug Daly as a witness, provided ample evidence that Ziriakus was visibly intoxicated when served at Friday's.[17]

Conclusion

As it stands today, the Dram Shop Act provides for relief against a bar or tavern unlawfully sells alcohol to a visibly intoxicated person. When endeavoring to prove that a person was visibly intoxicated, the evidence proffered at trial, or on summary judgment, must be sufficient to show that a reasonable person would have determined that the intoxicated driver was visibly intoxicated when served his last drink. There also must be some other evidence to show or suggest that there were some visible manifestations of intoxication.

The Adamy case holds that these visible signs of intoxication may occur at the accident site, if the accident was within a short period of time after the service of alcohol. On the flip side, if the defendant driver did not show signs of visible intoxication after the accident, then one could use this evidence as a defense in a Dram Shop Act.

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An affidavit offered in conjection with a motion for summary judgment must eliminate any questions concerning the foundational scientific basis for conclusions reached in the affidavit before the court will consider it as evidence. At trial, it falls on the opponent of the testimony to bring out any and all weaknesses in the expert's qualifications and foundational support on cross-examination.

Governor's Approval Mem. 1986 McKenney's Session Laws of N.Y. @ 3194.

1 1998 Summary of Statistics – Mothers Against Drunk Drivers Web Page – The Impaired Driving Problem – 1997 Statistics.

2 Id.

3 Kelner, Joseph and Kelner, Robert S., Dram Shop Cases, NYLJ, Vol.211, #123, 6/28/94, NYLJ 3, Col. 1.

4 General Obligations Law, Section 11-101(1).

5 See, generally, Alcohol and Beverage Control Law, Section 65 (2).

6 Governor's Approval Mem. 1986 McKenney's Session Laws of N.Y. at 3194.

7 D'Amico v. Christie, 71 NY2d 76, 524 NYS2d___.

8 (1987); Greer v. Ferrizz, 118 AD2d 536, 488 NYS2d 758, (1986).

9 90 NY2d 444, 661 NYS2d 589, 684 NE3d 19 (Ct. App. 1997).

10 Romano v. Stanley, supra.

11 Romano, supra, at 451

12 Id., at 402-403.

13 Id., at 452

14 Adamy, at 402 citing Romano at 451-452.

15 Id., at 402

16 Adamy, supra, at 402-403.

17 Id., at 403.

PRESIDENT'S MESSAGE

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counsel and panel defense firms. Thus, each of these lawsuits will affect each of us. Albeit, in different ways. Therefore, we should take and try to determine how these lawsuits will alter the way our clients will conduct its business in the future.

As an organization, we need to face the inevitable changes, and develop new strategies to help our membership meet and deal with the changing business climate. While the past teaches us that we can adapt to the changing environment, we cannot hold on to the past and lose sight of the future. We need to continue to build on our success and join forces with those individuals and organizations that will enable us to develop programs that will assist us with the transition into the new millennium and develop new business opportunities for all of our members. We can accomplish this by tapping the experience and diversity of our membership. By opening program development to our membership, we can bring new ideas, new techniques and new faces into leadership roles. To do this, however, we need you and the members of your firm to become involved in the Continuing Legal Education programs and committees. With the talent and expertise within our ranks, we should be able to readily expand our acclaimed CLE program to fit the needs of all of our members. But to do this we need your commitment and support. If you, or a member of your firm is interested in becoming involved, please contact me or any of the Board members. With your support we look forward to meeting the challenges of the new millennium, and bringing new faces and ideas to the forefront of the organization.

PROPOSED CLE PROGRAMS FOR 2000

January	Young Lawyers-Trial School
March	Malpractice
April	Premise Liability
May	Arbitration/Mediation

In addition, we anticipate conducting an Ethic Program as well. Notices will be mailed prior to each Seminar.

APPLICATION FOR MEMBERSHIP*

THE DEFENSE ASSOCIATION OF NEW YORK
Executive Office
25 Broadway - 7th Floor
New York, New York 10004
(212) 509-8999

I hereby wish to enroll as a member of DANY.

I enclose my check/draft $_____

Rates are $50.00 for individuals admitted to practice less than five years; $150.00 for individuals admitted to practice more than five years; and $400.00 for firm, professional corporation or company.

Name _____

Address _____

_____

Tel. No. _____

I represent that I am engaged in handling claims or defense of legal actions or that a substantial amount of my practice or business activity involves handling of claims or defense of legal actions.

*ALL APPLICATIONS MUST BE APPROVED BY THE BOARD OF GOVERNORS.