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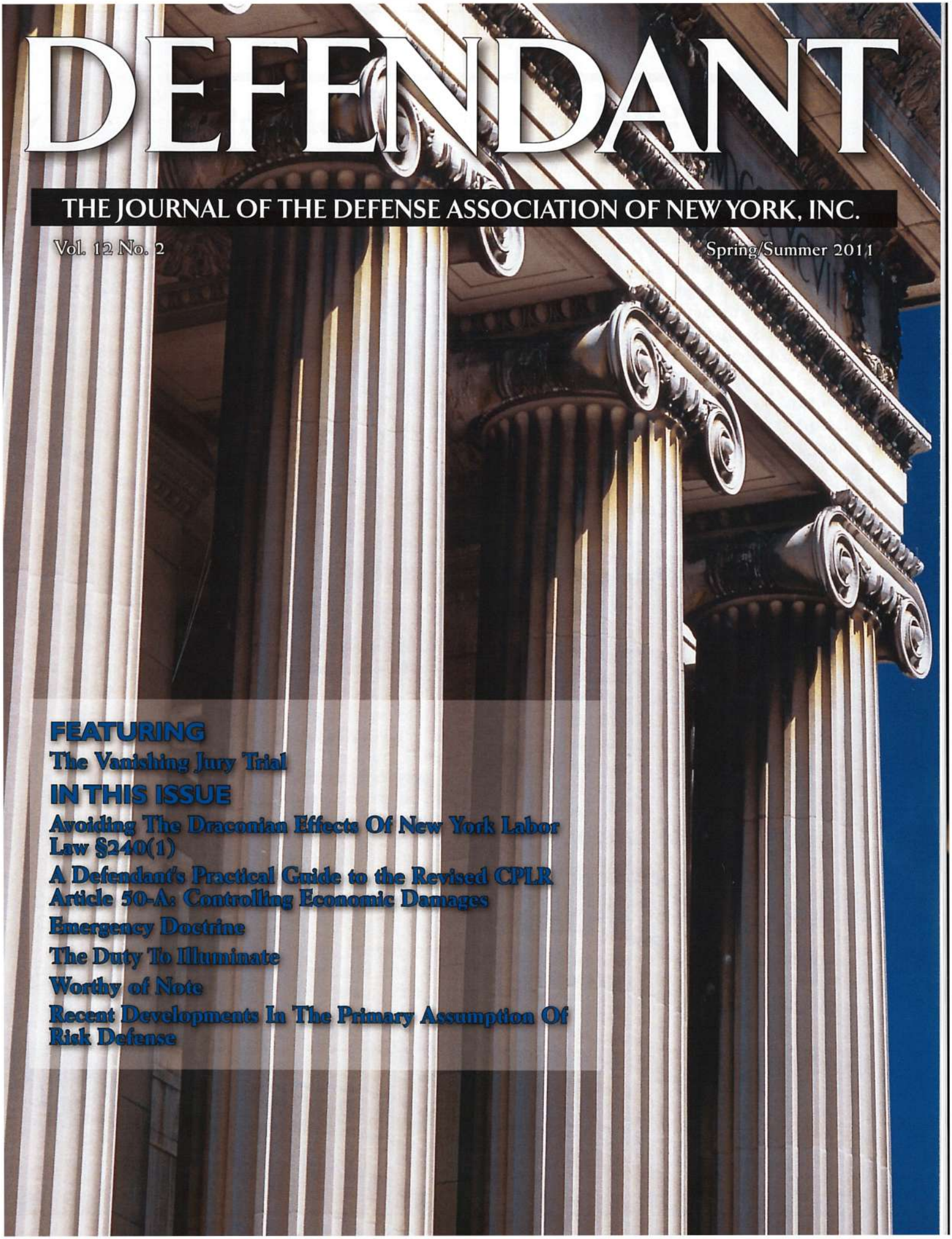

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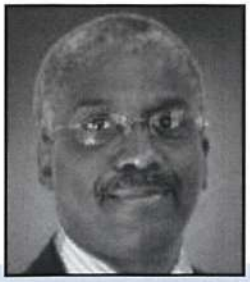

President's Column

LAWTON W. SQUIRES *

Having been sworn in as the President of DANY for the 2011-2012 year, I would be remiss if I did not thank the Past Presidents, Chairman, Officers, Executive Board members, colleagues and friends for entrusting me with this honor and responsibility. I must also thank my partners and colleagues at Herzfeld & Rubin, P.C. who encouraged me and provided support with the more mundane tasks around the office when I was engaged in work for DANY.

Many of my mentors in the practice of civil litigation long ago encouraged me to join DANY and to attend its educational, networking and social functions. My work with DANY has enabled me to develop substantive business relationships with colleagues and insurance carriers that allowed me to transition from an in-house senior trial attorney, to an in-house managing trial attorney, to a senior trial associate and then to a partner and "rainmaker" supervising my own insurance defense unit for Herzfeld and Rubin, P.C.

Since the publication of our last issue of *The Defendant*, in the Fall of 2010 DANY held its annual Pinckney Awards Dinner. The Hon. David Schmidt was our Pinckney Honoree and gave a short but riveting acceptance speak describing the struggles of his family in a concentration camp. The Outstanding Jurist Award was given to the Hon. Douglas McKeon and my friend and law partner, David Hamm, Esq. was presented with the DANY Literary Award for his work with the *Amicus* Committee.

DANY has also continued its commitment to the education of its members and the bar. Two sold out CLE programs were conducted so

Continued on page 26

* *Lawton W. Squires is a member of the firm, Herzfeld & Rubin, P.C. He handles complex litigation matters from inception through trial to verdict in the State and Federal Courts. His practice encompasses products liability, labor law, construction accidents, general liability, attorney and judicial disciplinary proceedings, professional malpractice and motor vehicle matters. Mr. Squires also serves as excess and monitoring counsel for numerous clients and several major insurance carriers.*

The Vanishing Jury Trial

JOHN J. MCDONOUGH, ESQ.*

Over the past several decades, the legal world as we know it has vastly changed in almost every regard. The number of lawyers practicing in the U.S. today has almost tripled since 1960; the total amount spent on litigation and the cost per case has inflated; the number of cases being filed with the Courts have increased; more authoritative legal materials are available now than ever before; and the practice of law continues to gain prominence in the public eye. However, all of these changes only serve to add greater confusion to the topic at hand, that is, the sharp decline in the number of jury trials that come before our courts on both the state and federal levels. For purposes of our analysis, a case disposed of by jury trial is defined as a case in which the jury has been impaneled and a witness has been sworn in, prior to disposition of the case.

> ...Although virtually every other indicator of legal activity is rising, trials are declining not only in relation to cases in the courts but to the size of the population and the size of the economy. The consequences of this decline for the functioning of the legal system and for the larger society remain to be explored.[1]

I. THE STATISTICS

Chief Judge William G. Young of the U.S. District Court for the District of Massachusetts encapsulated the problem in his Open Letter to United States

1 Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 Journal Of Empiracal Legal Studies 459-570 (November, 2004).

Continued on page 2

* *John J. McDonough is a member of Cozen O'Connor where he is Vice Chair of the firm's General Litigation practice group. This article is derived from the keynote address given by Mr. McDonough to the Maryland Defense Association in his capacity as Chairman of the Defense Research Institute's Jury Preservation Task Force.*

The Vanishing Jury Trial

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District Judges: "The American jury system is withering away. This is the most profound change in our jurisprudence in the history of the Republic."[2]

In the last 40 years of the 20th Century, the number of lawyers in the United States increased at a rate more than twice the growth of the population. In 1960, there were 385,933 lawyers in the U.S.; by the year 2000, that number had increased to 1,066,328.[3] In 1960, there was one lawyer for every 627 Americans, and at the end of the century, there was one lawyer for every 264 Americans.[4] This makes the sharp decline in jury trials even more perplexing.

A. FEDERAL COURT

The number of civil jury trials in federal court over the period spanning from 1962 to 2010 has drastically fallen, both as a percentage of filings and in absolute numbers. In 2007, the number of civil cases terminated by jury trial in the U.S. District Courts had inexplicably and uncharacteristically spiked, reaching 8,739 total civil jury trials, which is 6,324 more trials than the prior year. However, that increase was most likely due to an unforeseen variable (such as the termination of a mass tort action or multi-district litigation), and the increase was short lived. From 2007 to 2010, the number of civil cases terminated by jury trial in the U.S. District Courts dropped from 8,739 to 2,280. From examining a longer time span, it is clear that civil jury trials are on a downward spiral.

In the period from 1985 to 2010, the total number of civil cases terminated during or after trial by the U.S. District Courts dropped from 12,529 cases in 1985 to 3,356 cases in 2010.[5] In those same years, the number of civil cases terminated by jury trial in the U.S. District Courts dropped from 6,253 to 2,280. Of the 285,126 civil U.S. District Court cases terminated in 2010, only 1.2 percent, 3,356 cases, did so after reaching trial, and only 2,280, or less than one percent of those cases, were terminated by jury trial.[6]

---

2 Hon. William G. Young, *An Open Letter to U.S. District Court Judges*, THE FEDERAL LAWYER, 30, 31 (July 2003).
3 Marc **Galanter**, *A World Without Trials?*, 2006 J. Disp. Resol. 7, *11
4 *Id.*
5 U.S. Courts Website (www.uscourts.gov) Table C-4.
6 *Id.*

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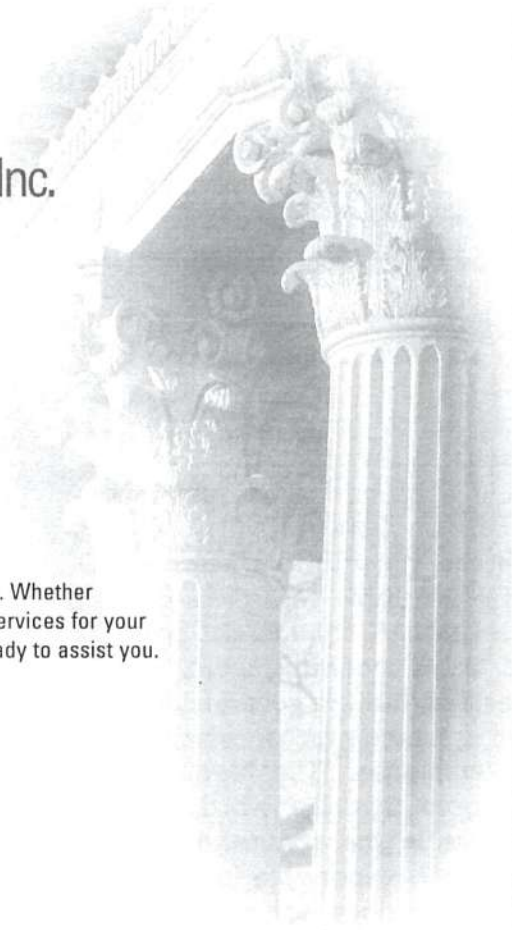

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Avoiding The Draconian Effects Of New York Labor Law§240(1)

ANDREW M. ROHER *

New York Labor Law §240(1) has bedeviled New York's insurance defense lawyers for decades. Arguably, there is no other state in the United States which has such draconian laws that favor personal injury plaintiffs. The law states, in a nutshell, that if a plaintiff, while employed in construction or construction-related work, falls from a height, both the general contractor ("GC") and property owner are liable regardless of active negligence or supervision. A commercial property owner may be held liable notwithstanding having done nothing other than hiring a general contractor which, in turn, hired a sub-contractor which failed to supervise its own employee. The New York Court of Appeals has noted that the words "strict liability" appear nowhere in the statute. If a plaintiff is solely and exclusively responsible for his or her own fall then the statute does not apply. Blake v. Neighborhood Housing Services of New York City, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003). However, comparative negligence is not a defense under Labor Law §240(1). The defendant does not get the benefit of a set off for defendant's negligence. That set off is available in virtually all other negligence-based tort claims. For the defendant found guilty of only 1% culpable conduct, that defendant must pay 100% of plaintiff's claim.

As a practical matter, it is quite difficult to show that a plaintiff is 100% responsible for his or her own accident. No matter how careless the plaintiff's conduct, their lawyers can and do contrive arguments that the absence of some safety device was a contributing factor to an accident. With the help of plaintiff's "experts", they need only satisfy the easy burden of showing that some act or omission by defendant was a 1% contributing factor to a fall. The practical consequence of Labor Law §240(1) is that a commercial property owner, and in some cases even a residential property owner, can be held 100% liable even though that owner never stepped anywhere near the worksite, or supervised plaintiff's work in any fashion. Accident claims that are exclusively a worker's compensation matter in other states are tried in New York before juries as general negligence matters, with unlimited verdict potential. There is little protection in New York, for a GC or for property owners, other than to purchase a general liability insurance policy with high coverage limits. This article addresses the limited defenses that are available to any attorney attempting to defend a New York Labor Law §240(1) claim.

IS THE STATUTE APPLICABLE?

The best way to defeat Labor Law §240(1) liability is to argue that the statute is not applicable. The statute was generally intended to apply solely to gravity-related claims. The quintessential circumstance that the statute was intended to address is when a worker falls a substantial distance from a scaffold or steel structural beam while engaged in construction of a hi-rise building. But what if the plaintiff falls a deminimus distance of only a few feet? Many New York courts impose Labor Law §240(1) liability in such circumstances. The defense bar has had success in defeating these liberal applications of the Labor Law. See Mikcova v. Alps Mechanical, 34 A.D.3d 769, 825 N.Y.S.2d 130 (2nd Dept 2006) ["The metal barriers that fell on the plaintiff did not fall from a higher elevation as the plaintiff claimed and were not the type of hazard experienced by construction workers that is covered by Labor Law 240(1)"]. Similarly, what if an object, prior to striking plaintiff, merely "rotates" out of control rather than falls, or what if it "falls" only a deminimus distance? If, for example, a co-worker "merely" loses control over the object, as it moves in a predominantly horizontal manner, then it can successfully be argued that the statute has no application. Natale v. City of New York, 33 A.D.3d 772, 822 N.Y.S.2d 771 (2nd Dept 2006). A key test utilized by courts is whether the plaintiff suffered injury due to the "usual and ordinary dangers" that are typically associated with construction sites. Cruz v. Neil Hospitality, 50 A.D.3d 619, 855 N.Y.S.2d 219 (2nd Dept 2008). This is a "common sense" rule

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*Andrew M. Roher is an associate at the law firm of Herzfeld & Rubin, P.C. in New York.

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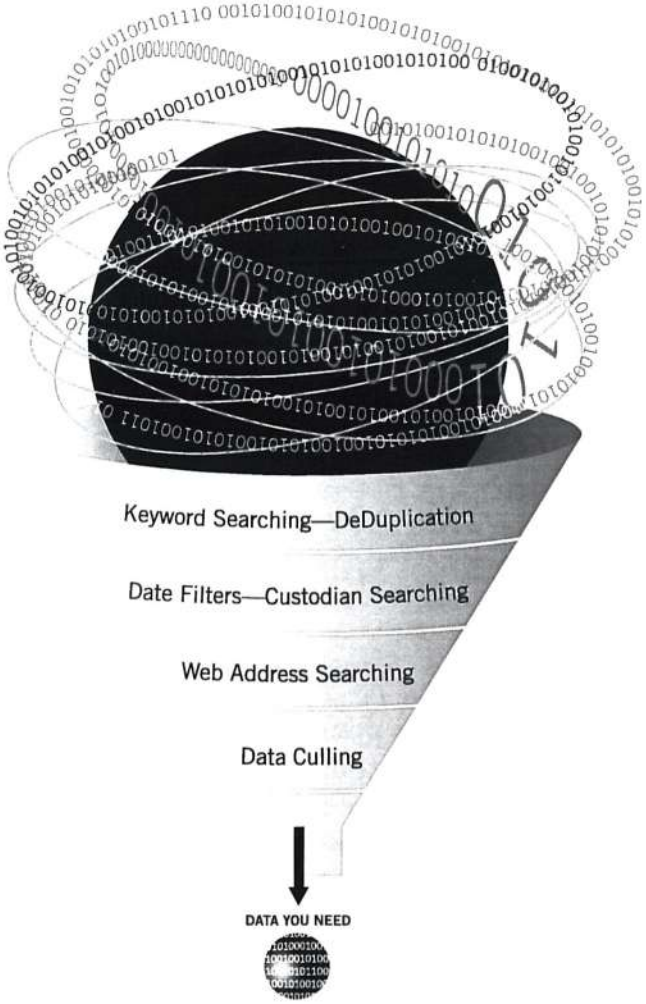

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Avoiding The Draconian Effects Of New York Labor Law §240(1)

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because the statute was intended solely to protect the extraordinary dangers associated with working at a height, rather than, for example, a routine tripping hazard that is not gravity-related. Success in the foregoing arguments can make a huge difference in the settlement value of a case. A summary judgment finding in favor of plaintiff under Labor Law §240(1) is the functional equivalent of imposition of strict liability. In contrast, if §240(1) is defeated, then the plaintiff must satisfy the usual common-law negligence standard.

WERE THE PLAINTIFF'S ACTIONS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT?

Even where it is indisputable that plaintiff fell from a height, there are still defenses that can defeat Labor law §240(1) liability. What if the plaintiff falls eight feet from a defective ladder, but a better ladder was readily available at the worksite? What if, prior to the accident, the plaintiff had been told by a supervisor to utilize a different ladder or safety device? In that case, the argument can be made that plaintiff was the "sole proximate cause" of the accident. Torres v. Mazzone, 46 A.D.3d 1040, 848 N.Y.S.2d (3rd Dept 2007) ("In these circumstances, we find that plaintiff's conduct in opting to use a piece of equipment out of convenience, instead of the otherwise adequate safety devices provided to him by his supervisor, was the sole proximate cause of his injuries and thus the complaint was properly dismissed in its entirety."); Yedynak v. Citnalta Construction Corp, 22 A.D.3d 840, 803 N.Y.S.2d 705 (2nd Dept 2005)["This evidence was sufficient to demonstrate, prima facie, that the sole proximate cause of the plaintiff's fall was his own conduct in failing to use the safety equipment provided, not violations of Labor Law §240(1)..."]. In Robinson v. East Med. Ctr., LP, 6 N.Y.3d 550, 814 N.Y.S.2d 589 (2006) New York's highest Court held as follows:

> Similarly, plaintiff knew that he needed an eight-foot ladder in order to screw the rods into the clamps once he left the hallway and entered the office suite. He acknowledged that there were eight-foot ladders on the job site, that he knew where they were stored, and that he routinely helped himself to whatever tools he needed rather than requesting them from the foreman...
>
> ...Plaintiff's own negligent actions – choosing to use a six-foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work – were, as a matter of law, the sole proximate cause of his injuries.

A related defense is that plaintiff is a "recalcitrant worker" who failed to follow orders to utilize the proper equipment or proper safety procedures. This defense works only if the right equipment was available at the worksite, or if there was a "better" method available to accomplish the task at hand. See Cahill v. Triborough Bridge and Tunnel Authority, 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004) ("The word "recalcitrant" fits plaintiff in this case well. He received specific instructions to use a safety line while climbing, and chose to disregard those instructions.")

The foregoing defenses (i.e., "sole proximate cause" and "recalcitrant worker") are inter-related. If a plaintiff is "recalcitrant" in failing to use available safety equipment, then the argument can also be made that plaintiff is the sole proximate cause of the accident. There is a substantial body of case law arising under the foregoing defenses. Every defense lawyer should keep the best and most recent cases in his or her defense arsenal. Montgomery v. Federal Express Corporation, 4 N.Y.3d 805, 795 N.Y.S.2d 490 (2005) ("Rather than go and get a ladder, plaintiff and Mazzei climbed to the motor room by standing on an inverted bucket. When he left the motor room, plaintiff jumped down to the roof, injuring his knee in the process. We agree with the Appellate Division that, since ladders were readily available, plaintiff's "normal and logical response" should have been to go get one. Plaintiff's choice to get up, and then jump down, was the sole proximate cause of his injury..."); Egan v. Monadnock Construction, Inc., 43 A.D.3d 692, 841 N.Y.S.2d 547 (1st Dept 2007) (citing Montgomery) ("since the ladders were readily available, plaintiff's normal and logical response should have been to go get one. Plaintiff's choice to use a bucket to get up, and then to jump down, was the sole cause of his injury"); See Gallagher v. The New York Post, 55 A.D.3d 488, 866 N.Y.S.2d 178 (1st Dept. 2008) in which denial of plaintiff's Labor Law §240(1) summary judgment motion was affirmed due to questions of fact as to "... whether plaintiff was provided with adequate safety devices, was instructed to use them, and declining to do so, rending his action, or lack thereof, the sole proximate cause of his injuries."); Destefano v. City of New York, 39 A.D.3d 581, 835 N.Y.S.2d 275 (2nd Dept 2007) ("However, liability cannot be imposed under Labor Law §240(1) where there is no evidence of violation and the proof reveals that the plaintiff's

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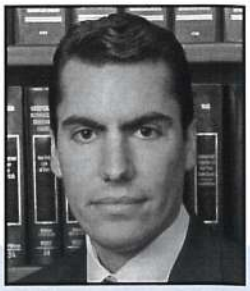
A Defendant's Practical Guide to the Revised CPLR Article 50-A: Controlling Economic Damages



CARYN L. LILLING AND RICHARD J. MONTES[1]

We have now seen the first wave of cases that have been tried under the revised CPLR Article 50-A for structuring judgments in medical malpractice cases. Unfortunately, few have taken full advantage of all of the benefits available under the new statute. The following is a guide to some of the changes in the statute and how the failure to apply the statute properly can unnecessarily – and drastically – inflate damages.

BACKGROUND

In 2003, the New York Legislature revised CPLR Article 50-A in light of concerns raised by the Court of Appeals in Desiderio v. Ochs (100 N.Y.2d 159 [2003]), and the Court's invitation to the Legislature to revisit the statute to determine whether it was achieving its intended goal of moderating the cost of medical malpractice insurance premiums, or was actually overcompensating plaintiffs. The revisions are now applicable to all medical malpractice actions commenced on or after July 26, 2003.

In addition to addressing the problems identified in Desiderio, the revisions substantially changed the prior statute. Awards for loss of services, loss of consortium and wrongful death are now payable in a lump sum. In addition, awards for future pain and suffering of $500,000 or less are payable in a lump sum. With respect to awards for future pain and suffering in excess of $500,000, the greater of 35% of the award or $500,000 is payable in a lump sum, and the remaining damages are payable in periodic installments over a maximum period of 8 years, subject to an annual 4% increase factor as under the old statute. Similarly, the plaintiff is entitled to a lump sum payment of 35% of the present value of the awards for future economic loss.

Perhaps the most valuable change with respect to future damages from the defense perspective, however, is the requirement, set forth in revised CPLR 4111(d), that the jury determine, as to each item of future economic loss: (1) the annual amount in current dollars, rather than the total lifetime award; (2) the period of years for which the item is applicable and the date of commencement for the particular item of damages; and (3) the applicable growth rate. These changes have provided several important advantages to the defense that can be utilized at trial and during settlement negotiations.

THE YEAR OF COMMENCEMENT FOR ANNUITIES [2]

Under the revised Article 50-A, the jury must determine the year that an item of economic damages is to commence. The year of commencement determines the year that an annuity will begin to fund that item of damages. Annuities that are purchased now, but which will not be payable until a future date, are considerably cheaper than annuities that commence today. This presents a potentially significant economic benefit for the defendant driving down the cost of satisfying an Article 50-A judgment.

Let us start with a simple example using lost earnings. Assume the jury has made an award for lost earnings to an infant plaintiff that will total $4,000,000 over a 44 year work life expectancy,

1 Special thanks to Sam Senders from EPS Settlements Group for his assistance and contributions to this article. Barbara D. Goldberg, formerly with the firm, is also a co-author.

2 An annuity is an insurance contract that provides for a lump-sum payment or a series of periodic payments. When arranged as part of a settlement or verdict, the interest on the annuity grows tax free.

Continued on page 10

* *Caryn L. Lilling is the managing partner at Mauro Lilling Naparty LLP, the largest law firm in New York dedicated exclusively to Appellate Advocacy and Litigation Strategy. She has handled hundreds of civil appeals in state and federal courts, and has argued cases in the New York Court of Appeals. Her name appears on many significant published opinions in a variety of practice areas.*

* *Richard J. Montes is a partner of the firm. He has litigated appeals in a variety of practice areas, including medical and other professional malpractice, construction, insurance coverage, personal injury, toxic tort, commercial, and matrimonial. From 2007-2009, he served as Chairperson of the Suffolk County Bar Association's Appellate Practice Committee. He is also the immediate Past President of the Long Island Hispanic Bar Association.*

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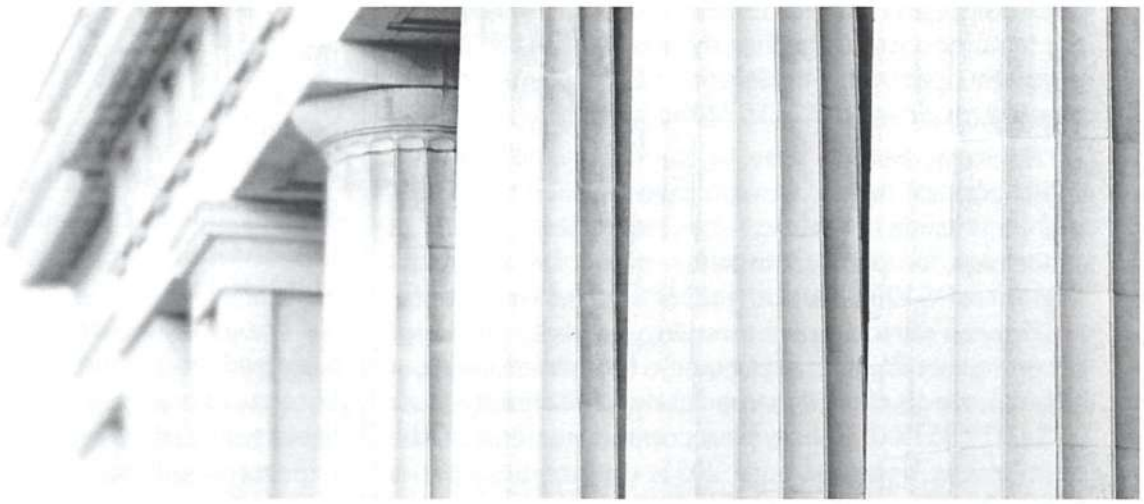

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A Defendant's Practical Guide to the Revised CPLR Article 50-A: Controlling Economic Damages

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based on a starting annual amount of $90,909 and a growth rate of 3.5%. In addition, assume that the infant, who sustained catastrophic brain damage at birth, is now six years old. If payment of the annuity for lost earnings commences immediately, the annuity cost would be $3,299,852.61.[3] If, however, the annuity does not begin until 2025, when the infant will turn 21, the annuity cost is significantly less, $1,174,594.28. As is readily apparent, the deferral of the payment start date drives down the cost of the annuity.

Similarly, assume that in the case of an injured adult plaintiff who would have retired in 2035, the jury made an award for future loss of union retirement or pension benefits, based on an annual amount of $100,000, with a 3.5% growth rate, over a 10 year period corresponding to the remainder of the plaintiff's life expectancy. In this example, if payments commence immediately, the annuity cost is $1,029,857.00. If, however, commencement of the payments is deferred until 2035, the annuity cost is $308,609.00, a savings of $721,248.

Here is yet a further example. What if the plaintiff's expert testified that custodial care in the case of the catastrophically injured six year old infant plaintiff is $40,000 a year until age nine; $60,000 a year from ages 9-16; $80,000 a year from ages 16-21; and $100,000 a year after age 21? If the jury is only asked to give a lifetime award, and arbitrarily bases this award on an annual cost of $80,000 and a 3.5% growth rate, the annuity cost, assuming a 70 year life expectancy, would be $3,781,225.15. If, however, the jury is asked to determine the annual amount and growth rate for each of the different intervals testified to by the plaintiff's expert, the annuity cost, assuming the same growth rate of 3.5% for each of the different periods, would be a total of $2,728,975.80, a savings of $1,052,249.35. Once again, we can see the dramatic difference in the cost of purchasing the annuity resulting from the deferred commencement date of the future payments of $80,000 and $100,000 a year.

Thus, having each of these items listed separately on the verdict sheet, with their dates of commencement and applicable growth rates, brings down the cost of purchasing the annuities.

In the future, to ensure receiving the full benefit of the statute, defense counsel must raise the year of commencement issue at trial for every item of economic damages, including replacement costs (i.e., a new wheelchair or specially equipped van); make certain that appropriate evidence is introduced; make certain that the year of commencement and the growth rate are reflected in the interrogatories to the jury; and make certain that the starting dates, the growth rates and the annual amounts that will be paid by the different annuities are reflected in the judgment.

RETAINING YOUR OWN EXPERT ON DAMAGES: CROSS EXAMINATION IS NOT ENOUGH

For years the conventional wisdom has been that a defendant should not present a damages expert because the jury could view this as a concession of liability, and that cross-examination of the plaintiffs' experts is sufficient to rebut the plaintiff's claims of damages. While we have always disagreed with that philosophy, not calling a damages expert (or several damages experts) in an action subject to the new Article 50-A will rarely, if ever, be a viable option.

The revised 50-A requires an entirely new verdict sheet that specifically delineates each item of economic damages and asks the jury to identify the annual amount for each, the growth rate and the year the expense will commence. This in and of itself increases the prominence of the damages issue to the jury, such that the jury is unlikely to find a defense on damages as a concession of liability. In fact, jurors are more likely to see the absence of defense experts as a concession on damages. Additionally, a strong defense on damages, would not set a "floor" for damages, but would "chip away" at the plaintiff's numbers. Attacking the credibility of the plaintiff's underlying assumptions regarding damages, may prompt the jury to question the plaintiff's credibility on liability issues as well.

Potential damages experts for the defense in an action subject to the new statute include an expert economist, who can testify to a lesser growth rate than that proposed by the plaintiff's expert, thereby reducing the present value if the jury agrees with the defense expert; and an expert life-care planner, who can challenge both the items included in the plaintiff's expert's life-care plan, as well as the cost of

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3 All cost figures in this article are estimates based on prevailing rates as of June 2010. To determine cost in your case, you will need to contact a life annuity underwriter.

Emergency Doctrine

ANDREA ALONSO, ESQ. * AND KEVIN FALEY, ESQ. **

New York State recognizes the need for authorized emergency vehicles to respond immediately to emergency situations. Vehicle and Traffic Law §1104 provides operators of emergency vehicles, such as ambulances, police cars, fire trucks and other governmental authority vehicles, with qualified protection from liability stemming from injuries to third parties when responding to an emergency situation.

However, this rule is not absolute and its application will depend on whether the drivers are engaged in certain categories of privileged conduct. This determination, in turn, will decide whether the driver receives an ordinary "due care" standard or the more protective "reckless disregard" charge.

As described in detail below, the recent Court of Appeals decision in *Kabir v. County of Monroe*, 16 N.Y.3d 217, 945 N.E.2d 461 (2011) determined that the "reckless disregard" standard, as opposed to an ordinary "due care" standard, only applies when drivers of emergency vehicles are engaged in one of the four specific categories of privileged conduct enumerated in the Statute.

STANDARD FOR EMERGENCY VEHICLES

Vehicle and Traffic Law §1104(a) provides that drivers of "an authorized emergency vehicle" involved in "an emergency operation" do not have to comply with certain traffic rules and regulations when faced with such emergencies.

As defined in Vehicle and Traffic Law §101, "emergency vehicles" include the following:

> ambulance, police vehicle or bicycle, correction vehicle, fire vehicle, civil defense emergency vehicle, emergency ambulance service vehicle, blood delivery vehicle, county emergency medical services vehicle, environmental emergency response vehicle, sanitation patrol vehicle, hazardous materials emergency vehicle and ordnance disposal vehicle of the armed forces of the United States.

Additionally, as defined in Vehicle and Traffic Law §114-b, an "emergency operation" includes the following:

> The operation, or parking, of an authorized emergency vehicle, when such vehicle is engaged in transporting a sick or injured person, transporting prisoners, delivering blood or blood products in a situation involving an imminent health risk, pursuing an actual or suspected violator of the law, or responding to, or working or assisting at the scene of an accident, disaster, police call, alarm of fire, actual or potential release of hazardous materials or other emergency. Emergency operation shall not include returning from such service.

In these cases of emergency, Vehicle and Traffic Law §1104 provides that the drivers of emergency vehicles are exempt from compliance with certain traffic laws. As the following sections of §1104 demonstrate, a driver of an emergency vehicle, who is utilizing its sirens and lights, can exceed the speed limit, stop, stand or park where needed, proceed through red traffic lights and stop signs and disregard regulations with regard to direction of traffic.

Vehicle and Traffic Law §1104(a) and §1104(b) provides the following:

> (a) The driver of an authorized emergency vehicle, when involved in an emergency operation, may exercise the privileges set forth in this section, but subject to the conditions herein stated.
>
> (b) The driver of an authorized emergency vehicle may:

- Stop, stand or park irrespective of the provisions of this title;
- Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;
- Exceed the maximum speed limit so long as he

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does not endanger life or property;

- Disregard regulations governing directions of movement or turning in specified directions.

However, certain procedures must be followed in order for the privileges stated above to apply. Specifically, pursuant to Vehicle and Traffic Law §1104(c), the emergency vehicle's "audible signals" must be sounded" while the vehicle is in motion "by bell, horn, siren, electronic device or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp so that from any direction, under normal atmospheric conditions from a distance of five hundred feet from such vehicle, at least one red light will be displayed and visible."

However, immunity from suit in situations involving an emergency vehicle responding to an emergency situation is not absolute. Vehicle and Traffic Law §1104(e) provides the following:

The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

PRIOR PRECEDENT

Based on the language stated in Vehicle and Traffic Law §1104(e), which uses both "due regard" and "reckless disregard" language to define the applicable standard of care, a main inquiry in emergency situation cases is whether a "reckless disregard" standard or an ordinary "due care" standard applies to drivers of emergency vehicles.

Prior to the Court of Appeals decision in *Kabir v. County of Monroe*, 16 N.Y.3d 217, 945 N.E.2d 461 (2011), there was a question with regard to the duty of care applicable to drivers of emergency vehicles.

In *Saarineen v. Kerr*, 84 N.Y.2d 494, 620 N.Y.S.2d 297 (1994), the Court of Appeals determined that although the statute makes reference to both "due regard" and "reckless disregard" standards, the Court found that a "reckless disregard" standard would apply to drivers of emergency vehicles.

In *Saarineen,* a Village police officer was pursuing a suspect's vehicle when the suspect's vehicle collided with the plaintiff. The Court found that as a matter of law the police officer's actions did not rise to the level of reckless disregard for the safety of others.

Significantly, as pointed out by the Court of Appeals in *Kabir*, the Court of Appeals in *Saarineen* applied the reckless disregard standard irrespective of an analysis as to whether the specific action that caused the plaintiff's injury was privileged under Vehicle and Traffic Law §1104(b). As a result, this left an ambiguity in the law which the Court of Appeals would revisit in *Kabir*.

KABIR

In *Kabir v. County of Monroe*, 16 N.Y.3d 217, 945 N.E.2d 461 (2011), a Monroe County deputy sheriff was responding to a possible burglary when he momentarily took his eyes off the road in order to consult the data terminal in his vehicle. While glancing at the data terminal, he rear-ended the plaintiff's vehicle. At the time of the accident, the police officer did not have the emergency vehicle's lights or sirens activated and was traveling below the posted speed limit.

As a matter of first impression, the Court of Appeals determined the main question that was left open in *Saarineen*: what specific actions or types of conduct are privileged under Vehicle and Traffic Law §1104 and thus subject to the reckless disregard standard. In a 4 to 3 decision, Justice Read determined that the "reckless disregard" standard ***only*** applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific four categories of privileged conduct listed in Vehicle and Traffic Law §1104(b). The four activities include: (i) stopping, standing or parking irrespective of the provisions of this title; (ii) proceeding past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation; (iii) exceeding the maximum speed limit so long as it does not endanger life or property; and (iv) disregarding regulations governing directions of movement or turning in specified directions. Since the driver of the authorized emergency vehicle involved in an emergency operation engaged in conduct not specifically listed in Vehicle and Traffic Law §1104(b) – he was not speeding, was not running a red light and did not have the car's sirens activated – The Court of Appeals held that an ordinary negligence standard would apply.

EFFECTS OF KABIR

As pointed out by Justice Graffeo in the dissent, the new standard set forth in *Kabir* awkwardly shifts

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The Duty To Illuminate

KEVIN G. FALEY *

It is well settled that municipalities and private landowners have an affirmative duty to illuminate roads and property only in limited situations.

MUNICIPALITIES

Various laws enable municipalities to provide lighting for roadways and public places, for example General City Law § 20(7) and Highway Law § 327[1]. However, none of these laws require a municipality to provide lighting. In *Bauer v. Town of Hempstead*, the Second Department emphasized that Highway Law § 327 gives discretion to towns to provide lighting to any area and to discontinue that lighting at any time.[2] The plaintiff in *Bauer* caught her foot on a raised curb while walking on a sidewalk and claimed that the area was inadequately illuminated. The Court held that the Town had no duty to light the public sidewalk area under Highway Law Section 327 and dismissed the claim.

In *Thompson*, the Court of Appeals held that the City of New York could not be held liable for plaintiff's injuries she sustained as a result of being struck by a car. The plaintiff was hit by a car while in a crosswalk that was not illuminated as the street light bulb had burned out. The Court determined that the City's duty to maintain streetlights is limited to the same situations in which it has the duty to illuminate. A municipality's duty to illuminate only arises when lighting is necessary to keep the street safe or because there is a defect or some unusual condition rendering the street unsafe to the traveling public. "The duty to maintain existing streetlights is similarly limited to those situations in which illumination is necessary to avoid dangerous and potentially hazardous conditions." [3]

The plaintiff in *Thompson* based liability on the City's failure to maintain the streets and roadways in a safe condition and to repair the burned out bulb. The Court held that in order to establish a cause of action against the City, the plaintiff would have to show that by failing to replace the bulb the City created a dangerous condition on the roadway where the plaintiff was injured.[4] Here, the mere outage of the streetlight alone did not render the street dangerous per se. As there was no unusual condition or defect present to create a potentially hazardous situation, the municipality's duty to illuminate was not triggered.

In a similar case, *Cracas v. Zisko and the Town of Brookhaven*, the Second Department agreed with the defendant municipality that it had no duty to replace a burned out street light bulb when a plaintiff was struck by a car as she was crossing the street at night. The plaintiff's allegation that the accident site was dark was insufficient on its own to create a duty by the Town to illuminate the area. Like *Thompson*, there was no evidence indicating that the Town created a dangerous condition at the site of the accident or that there was a defect or hazardous condition that existed on the roadway. The fact that the area was dark at night was insufficient alone to create a duty.[5]

In the Third Department case of *Gagnon v. City of Saratoga*, the plaintiff attended a fireworks display at a public park sponsored by the City defendant. As plaintiff was leaving the park she walked across a grassy area that led to the street as the paved walkway was crowded. When plaintiff approached the point where the grass ended, her foot caught the lip of the curb, which was slightly elevated above the grassy area. The plaintiff then fell onto the pavement and sustained various injuries. She brought a claim against the City based on its failure to maintain adequate lighting.

The Court held that the plaintiff did not establish a prima facie case against the City because she failed to show that the City had a duty to light the area where she was injured. Applying the *Thompson* rule, the Third Department concluded that a slight height difference between the grass and the curb, in an area that was not meant to be traversed, was not the type of dangerous or hazardous situation that would trigger the municipality's duty to illuminate.[6]

In *Rios v. City of New York*, the plaintiff brought an action against the City of New York for injuries he sustained when he was struck by a motorcycle while crossing a street at night. At the time of the accident the plaintiff was transferring from one bus stop to another

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The Duty To Illuminate

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directly across the street. The bus stops were located under an overpass that, according to the plaintiff, had light fixtures installed on the ceiling, many of which often did not work. The plaintiff alleged that the City was liable for negligently failing to maintain the lights under the overpass where the plaintiff was hit. The Second Department found that the City was not liable under this theory because there was no testimony indicating that the lack of lighting contributed or caused a dangerous condition which was a proximate cause of the subject accident. The Court went on to say that "the mere fact that a street light burned out and that the street was dark is not sufficient to render a street dangerous and is not sufficient to establish a cause of action sounding in negligence."[7]

In another case that demonstrates the difficulty in holding a municipality liable for failing to provide lighting, the First Department held in *Hayden v. City of New York* that a municipality could not be liable for breaching a duty to maintain street lights because there was no evidence that lighting was necessary to keep the subject street safe. The plaintiff in *Hayden* sued the City after he sustained injuries in a motorcycle accident he claimed to be the result of a "total absence of artificial illumination," and that before the plaintiff was able to adjust to the darkness, his motorcycle struck debris on a roadway that was being repaved causing him to lose control.[8] The plaintiff alleged that the municipality was negligent in allowing a condition of darkness on the roadway and in failing to provide or restore adequate illumination during the course of renovation on the roadway. The Court found that the plaintiff failed to allege in his complaint that there was a defect or unusual condition that existed in the road that would have required lighting to keep the road safe. Therefore, the City had no duty to maintain the existing streetlights.

In contrast with the cases discussed above, the Appellate Division, Fourth Department, reversed the Supreme Court's decision granting summary judgment in favor of the City of Rochester when a plaintiff alleged that the City breached its duty to provide adequate lighting. In *Graham v. City of Rochester*, the plaintiff sustained injuries as a result of a one-car accident while driving through an underpass. The underpass was flooded and the lack of adequate lighting in the under pass created a black hole effect preventing motorists from being able to see that water had accumulated in the underpass. The Fourth Department held that a question of fact existed as to whether the City breached its duty to provide adequate lighting to keep the street safe. The Court further held that as a result of the erroneous dismissal of plaintiff's claim, he was "deprived of a fair opportunity to prove at trial his claim that the City's inadequate maintenance of the lighting...created a dangerous condition that was a proximate cause of the accident and his injuries."[9]

PRIVATE LANDOWNERS

The Court of Appeals in *Basso v. Miller* determined a single standard of reasonable care for landowners. In *Basso*, the plaintiff was injured in a motorcycle accident on the defendant's property, which functioned as a scenic park tourist attraction and was open to the public from 8 a.m. until a half hour before dark. The Court departed from the notion that a landowner's duty of care should correlate to the status of the plaintiff, i.e. invitee, licensee or trespasser; instead, the Court of Appeals said that a landowner must "act as a reasonable person in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."[10] Thus, the duty of a landowner to illuminate his property will be determined on a case-by-case basis, taking into account the purpose of the property, potential plaintiffs, as well as financial and environmental costs.

In *Peralta v. Henriquez*, plaintiff was a guest staying at an apartment building and sued the defendant, the building's owner, to recover damages for an injury she sustained when she ran into a bent car antenna while running through a parking lot at night. The plaintiff alleged that the defendant had a duty to illuminate the lot and caused a dangerous condition that led to her injury. The Court of Appeals held that the defendant had no general duty to illuminate the lot at all times, but rather the duty owed to the plaintiff was measured by whether the defendant knew or should have known that the existing lighting was adequate given the use and design of the lot. Here, a landowner's duty to illuminate their property at all hours of darkness would have significant environmental and financial costs that would outweigh any social benefit derived from the duty imposed. Furthermore, the Court stated that "finding failure to illuminate alone created a dangerous condition would produce an indeterminate class of plaintiffs without any reasonable limitations on liability."[11]

The Second Department relied on the Court of

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Worthy Of Note

VINCENT P. POZZUTO *

PRODUCTS LIABILITY/ZONE OF DANGER

Plaintiff's Zone of Danger Claim fails; Products Claim was not Federally Preempted.
Diaz v. Little Remedies Co., Inc., 81 A.2d 3d 1419, 918, N.Y.S. 2d 781 (4th Dept. 2011)

Plaintiff treated her child with laxative manufactured by defendants. Plaintiff alleged that her son developed contact dermatitis, burns and sloughing of the skin on his buttocks and genital area. When plaintiff sought medical treatment for her son, the medical professionals suspected that she had burned the child with scalding water. Plaintiff was arrested on various child abuse charges. The charges were dismissed several months later based upon a medical opinion that the burns were consistent with exposure to senna, a botanical ingredient contained within the product. Plaintiff brought an action for emotional injuries that resulted from her arrest and based on strict products liability on behalf of her child. The court dismissed the emotional injury claims because such injuries were not the direct result of the product manufacturer's alleged breach of a duty to her, but were only a consequential result of that breach. The court further held that plaintiff could not recover under a "zone of danger" theory, because the emotional injuries for which she sought damages were related to her arrest on child abuse charges and separation from her family, not from viewing the serious physical injury of her son. Finally, the court held that the products liability claims were not preempted under the "Poisoning Prevention Packaging Act of 1970", as that act had an express exception to preemption.

PRODUCTS LIABILITY

Expert's Opinion Ruling out all Potential Causes of Accident Sufficient to Create an Issue of Fact on Manufacturer's Motion for Summary Judgment.

Alexander v. Dunlop Tire Corporation, 814 A.D. 3D. 1134, 917 N.Y.S. 2d 376 (3rd Dept. 2011).

Plaintiffs were injured in a single-car rollover accident. Plaintiff brought suit against the tire manufacturer, asserting that the accident was caused by tread separation due to a manufacturing defect. The lower court granted defendant's motion to preclude the testimony of plaintiff's expert, and based upon such preclusion, granted defendant summary judgment. On appeal, the Appellate Division held that plaintiff's expert used a process of elimination to come to the conclusion that the accident was caused by a manufacturing defect. The court held that the process of elimination is not a scientific process or a procedure, but rather a theory of logic. The court thus held that Frye did not apply, and reviewed the case based upon traditional standards applicable to a motion for preclusion and a motion for summary judgment in a product's liability case. The court held that plaintiff's expert was able to exclude all common potential causes of tread separation, specifically mounting damage, alignment damage, improper repair, improper storage, age of the tire, operation in excess of speed rating and overdeflection. Significantly, Dunlop did not identify any additional causes not considered by plaintiff's expert. The court held that preclusion was therefore improper, and further found the plaintiff's expert's opinion sufficient to create a triable issue of fact on the motion for summary judgment.

LABOR LAW

Accident and Injury Flowed Directly from Effects of Gravity. Plaintiff Granted Summary Judgment Pursuant to Labor Law §240.
Harris v. City of New York 2011 WL 1238187 (1st Dept. 2011)

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Plaintiff, an ironworker, was assisting a crew that was lifting a 10 foot by 20 foot slab from the road deck of the Macombs Damn Bridge. A crane raised the slab from the surface. One corner of the slab lifted while the opposite corner remained attached to the road bed. Plaintiff wedged a four-by-four piece of lumber into the area where the slab remained attached. The four-by-four was at an angle with the low end at the road bed and the high end four feet above the road bed. Plaintiff stood on the high end of the four-by-four and directed the crane operator to slowly lower the slab. Instead the slab descended quickly, causing the four-by-four to break. Plaintiff was thrown to the road and injured. The court held that Labor Law §240 applied under the principles applicable to falling object cases relying heavily on the court of appeals decision in Runner v. New York Stock Exchange, and found that plaintiff's injury flowed directly from the effect of gravity on the slab as it descended. The court rejected defendant's sole proximate cause argument, as the evidence showed that plaintiff's foreman directed him to stand on top of the piece of wood in order to keep it in place.

LABOR LAW

Plaintiff was Engaged in a Protected Activity. Defendant Created an Issue of fact on Sole Proximate Cause Defense under Labor Law §240.
Ozimek v. Holiday Valley, Inc., 2011 at 120573 (4th Dept. 2011)

Plaintiff fell from a ladder while working on a commercial freezer at a ski resort owned by defendant. The Court held that plaintiff was engaged in an enumerated activity under Labor Law §240 as plaintiff was investigating a malfunction, and was injured during efforts in the course of that investigation. The court held that plaintiff was injured while troubleshooting an uncommon freezer malfunction. The court held that defendant however created an issue of fact on the sole proximate cause defense. While plaintiff testified he fell to the ground when the ladder on which he was standing slid out from under him, defendant submitted an affidavit from a witness who averred that plaintiff admitted that he fell because he missed the ladder while descending from the area he was working and that he saw the ladder standing erect after plaintiff fell.

COVERAGE

Insured Decedent was Injured as a Result of an Accident Within the Meaning of the Uninsured Motorist Edorsement Where Decedent was the Victim of an Intentional Crime with a Motor Vehicle.
State Farm Mutual Automobile Insurance Company v. Langan 2011 WL 1118579 (2011)

The decedent Neil Spicehandler was one of many who were injured or killed when Ronald Popadich intentionally drove his vehicle into pedestrians. Popadich later pleaded guilty to second degree murder and admitted he intended to cause Spicehandler's death. Spicehandler was insured under an automobile liability policy issued by State Farm. Spicehandler's administrator brought a claim seeking to recover benefits under the policy's underinsured motorist endorsement. State Farm denied coverage on the ground that Spicehandler's death was not caused by "an accident," but by Popadich's intentional conduct. The Court of Appeals held that the death was caused by "an accident" within the meaning of the policy. The Court found that while the endorsement at issue does not define the term "accident," the Court has previously held that the term is not to be given a narrow interpretation. The Court further held that in order to determine whether an event is an "accident", it is customary to look at the event from the point of view of the insured. The Court found that from Spicehandler's perspective, the occurrence was an unexpected or unintended event and therefore an "accident".

LABOR LAW

Labor Law § 241(6). Industrial Code § 23-9.4 Applies to Front-End Loaders
St. Louis v. Town of North Elba 2011 W.L. 1157707 (2011)

Plaintiff was employed as part of a crew that was constructing a drainage pipeline. The crew utilized a clam shell bucket attached to a front-end loader to lift sections of the pipe four feet above the ground to

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Recent Developments In The Primary Assumption Of Risk Defense

BRIAN MCELHENNY *

In *Trupia v. Lake George Central School District*,[1] the Appellate Division, Third Department rejected defendant's attempt to argue primary assumption of risk in a case where an 11 year old boy fell while sliding down a banister at summer camp.

The trial court had granted the motion by defendant to assert assumption of risk as a complete defense. The Appellate Division, Third Department reversed because the activity leading to the injury was not part of a sporting or athletic program.

The Court of Appeals affirmed, holding that complete assumption of risk was not available in circumstances properly characterized as horseplay.[2] Plaintiff was not engaged in an athletic or recreational activity and plaintiff's claim was based on negligent supervision by the School District. In *Dictum*, the court limited primary assumption of risk to cases involving athletic or recreational activities sponsored or enabled by defendants.[3]

In *Cotty v. Town of Southampton*,[4] the Appellate Division, Second Department rejected assumption of risk as a defense in a case involving a bicyclist injured due to negligent maintenance of a roadway. Plaintiff was riding his bicycle as part of a bicycle club outing when a rider in front fell going over a defect in the road created by road maintenance. Plaintiff swerved to avoid the bicyclist and was struck by an oncoming car, sustaining injuries.

The municipal and contractor defendants sought summary judgment, arguing plaintiff was aware of the road condition and voluntarily assumed the risk of injury by participating in the bicycle club outing. The court held that the doctrine of primary assumption of risk is designed to encourage participation in athletic activities, not to relieve municipalities of their duty to maintain roadways in a safe condition.[5]

Merely because a person uses the road as a jogger or a bicycle rider engaged in leisure activities does not eliminate the duty to maintain the road. Riding a bicycle on a paved public roadway does not constitute a "sporting activity" for purposes of applying the primary assumption of risk doctrine. The defense, however, has been applied to bicycle riders injured due to a defect or a hole in unpaved areas while mountain biking on a dirt trail.[6]

In a case involving serious injuries sustained by a rider of an all terrain vehicle (ATV) the Second Department dismissed plaintiff's complaint in Morales v. Coram Materials Corp.[7] Plaintiff was an experienced ATV rider who was injured while riding the ATV up a 40 foot hill of sand and gravel. After he reached the top he observed that the center of the hill on the other side was missing and he fell 40 feet. The Court held that the assumption of risk defense is applicable to the recreational activity of ATV riding at a sand and gravel mine. Irregular terrain is inherent in the recreational activity of ATV riding. The Court rejected plaintiff's claim that the excavation of the side of the hill created a unique danger over and above the usual dangers in the sport of ATV riding.

In Demelio v. Playmakers Inc.[8] the Appellate Division Second Department affirmed denial of summary judgment in a case where plaintiff was injured at a batting cage when a ball ricocheted off a metal pole and struck plaintiff in the eye.

1 Trupia v. Lake George Central School District 62 AD3d 67, 875 NYS2d 298 (3rd Dept. 2009)
2 Trupia v. Lake George Central School District 14 NY3d 392, 901 NYS2d 127 (2010)
3 Id at 396
4 Calise v. City of New York, 239 AD2d 378, 657 NYS2d 430 (2nd Dept. 1997)
5 Id at 255
6 Calise v. City of New York, 239 AD2d 378, 657 NYS2d 430 (2nd Dept. 1997)
7 Morales v. Coram Materials Corp. 64 AD3d 756, 883 NYS2d 311 (2nd Dept. 2009) lv. den. 14 NY3d 728, 900 NYS2d 730 (2010)
8 Demelio v. Playmakers Inc. 63 AD3d 777, 880 NYS2d 710 (2nd Dept. 2009)

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Recent Developments In The Primary Assumption Of Risk Defense

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Defendant moved for summary judgment pursuant to the primary assumption of risk doctrine. The trial court denied the motion and the Second Department affirmed because defendant failed to show that the increased risk of ricocheting baseballs caused by an unpadded pole was an inherent risk of the sport. Although plaintiff was clearly engaged in a sporting activity, the Court held that the unpadded pole may have created an increased risk that was not assumed by plaintiff.

In *Anand v. Kapoor*,[9] the Appellate Division, Second Department affirmed dismissal of plaintiff's complaint against a fellow golfer based on primary assumption of risk. Plaintiff and defendant Kapoor were friends and were playing golf together on the first hole when the accident happened. Kapoor was in the rough preparing to hit his ball and plaintiff was closer to the hole, but at a significant angle from defendant's intended line of flight.

Plaintiff claimed that Kapoor failed to yell "fore," which defendant disputed. Plaintiff was struck in the eye and suffered a detached retina and permanent loss of vision. The majority opinion of the Second Department held that defendant was entitled to summary judgment because there was no duty to warn as plaintiff was not in a foreseeable area of danger and plaintiff assumed the risk of being struck by a poor shot.

The dissenting judge felt there was a question of fact as to whether defendant yelled "fore" and whether that failure unreasonably increased the inherent risk of being struck by a shot.[10]

The Court of Appeals affirmed dismissal of the case, holding that a voluntary participant in a sport consents to certain risks that arise out of the nature of the sport. A participant does not assume the risk of reckless or intentional conduct, or concealed risks.[11] Kapoor's failure to yell "fore" did not amount to reckless or intentional conduct, and did not unreasonably increase the inherent risks of playing golf. Being struck by a "shanked" golf shot is a commonly appreciated risk of golf.[12]

CONCLUSION

The Court of Appeals has reaffirmed the validity of primary assumption of risk in cases involving sporting activity. The court in *Trupia, supra*, has signaled its intent, however, not to allow broad application of the defense to activities other than sporting or recreational ones. Further cases defining what constitutes recreational as opposed to leisure activities within the scope of this defense should be expected.

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9 Anand v. Kapoor, 61 AD3d 787, 877 NYS2d 425 (2nd Dept. 2009)

10 Id at 793

11 Anand v. Kapoor, _____ NY3d _____, 2010 NY Slip Op 9380, 2010 NY Lexis 3730

12 Id

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those items. Similarly, where a plaintiff asserts a claim for loss of retirement or pension benefits, potential witnesses include representatives of plaintiff's union or employer, who may be able to present a different picture of the plaintiff's job performance and the benefits he or she would have been likely to receive than the plaintiff's witnesses.

Defense counsel must bear in mind that if, for example, the only evidence in the record is from plaintiff's life-care planner and economist and the jury's awards for economic loss correspond to that testimony, it is very difficult to prevail on appeal on an argument that the verdict is against the weight of the evidence or excessive. For example, in Kavanaugh v. Nussbaum (129 A.D.2d 559, 563 [2nd Dept. 1987], mod. on other grounds 71 N.Y.2d 535 [1988]), the Appellate Division affirmed an award of lost earnings to a neurologically impaired infant, based on the plaintiff's economist's testimony, where the "defendants adduced no evidence as to what he might have earned over the course of his lifetime in a vocational setting." Additionally, in Altman v. Alpha Obstetrics & Gynecology, P.C. (255 A.D.2d 276, 278 [2nd Dept. 1998]), the Court affirmed a $3,000,000 award for lifetime lost earnings for an infant plaintiff, "[b]ased upon the testimony of the plaintiffs' economist and the [defendant's] failure to rebut that testimony." Similarly, in Reed v. City of New York (304 A.D.2d 1, 6 [1st Dept. 2003]), the Court repeatedly emphasized that the plaintiff's evidence was uncontroverted "due to defendants' utter failure to present any expert testimony or semblance of a defense as to damages."

The same reasoning applies to every category of future economic loss, not just lost earnings. In Nolan v. Union College Trust of Schenectady, N.Y. (51 A.D.3d 1253, 1256 [3rd Dept. 2008]), for example, the jury awarded the plaintiff $3.36 million for future medical expenses, based upon the plaintiff's testimony that she was currently taking the blood thinning medication Lovenox, and the testimony of her treating physicians that she will have to take Lovenox for the rest of her life. The Third Department held that "[i]nasmuch as defendant did not present any evidence to rebut this testimony or otherwise establish that it was inaccurate, there is no basis to find that the award for future medical expenses is unreasonable. Consequently, we decline to disturb it."

Most recently, in Ulerio v. New York City Transit Authority (70 A.D.3d 410 [1st Dept. 2010]), the First Department held that "the testimony of the plaintiff's doctors and economist was sufficient to support the damages awarded, particularly since the defendant offered no expert testimony to counter that of the economist" (citations omitted).

As in each of these cases, the absence of expert testimony in an action subject to the new Article 50-A will make the task of arguing weight of the evidence and excessiveness that much more difficult. Furthermore, it is very possible that the jury might never have made awards corresponding precisely to the plaintiff's proof if they had been presented with opposing testimony and evidence. As noted above, a damages expert for the defense may be able to demonstrate that certain costs claimed within the plaintiff's life care plan are not related to the alleged injury or necessary in light of the plaintiff's abilities. A damages expert can also analyze the type of work that a plaintiff is capable of performing in light of his or her injuries and the plaintiff's earning capacity with those injuries. For example, if a plaintiff is injured and relegated to sedentary work, if the defendants can establish that the plaintiff is capable of performing sedentary jobs at the same income level as before the injury, then the plaintiff will not be able to sustain a claim for lost earnings. Even if the jury rejects the defendants' evidence, the presence of conflicting proof in the record may provide a greater likelihood of a reduction in damages on post-trial motion or on appeal, as is apparent from the cases discussed above.

Here, it is important to note that economic damages, unlike damages for pain and suffering, must be proven with reasonable certainty. Reasonable certainty has been equated with the clear and convincing standard of proof (see Kihl v. Pfeffer, 47 A.D.3d 154, 164 [2nd Dept. 2009]). Thus, it is not enough that the plaintiff's expert gave an opinion, the determination the reviewing Court must make is whether, in light of all the evidence, the plaintiff has presented clear and convincing evidence of his or her economic damages.

In sum, money is often lost in not presenting a complete defense on damages. Indeed, particularly in a case subject to the new Article 50-A, there is no reason not to put as much of an effort into presenting a defense on damages as on liability.

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LIFE EXPECTANCY

The jury's assessment of life expectancy can also have an impact on the actual cost of purchasing annuities for medical, rehabilitation and custodial care damages. If a plaintiff has a limited life expectancy, the cost of an annuity to cover medical care will be less than for a plaintiff with a normal life expectancy. Thus, where life expectancy is an issue, defendants should present expert medical evidence to that effect. In the absence of such testimony, the courts will most likely defer to the plaintiffs' experts opinions.

Defendants can also obtain the advantage of obtaining a rated age. A rated age is assigned by an underwriter for a life insurance company based on an evaluation of how long the plaintiff is likely to live and indicates that the life insurance company is willing to take the risk of providing annual payments at a lower cost than would otherwise be required. For example, assume a jury awarded $100,000 for the first year for custodial care to a catastrophically injured child who is six years old at the time of trial, with a 70 year life expectancy. Also assume a growth rate of 3.5%. The cost of the annuity would be $4,740,449. If a life insurance company, however, after reviewing the medical records assigned a rated age of 50, essentially saying the child only has a 20 year life expectancy, the annuity cost would be $2,625,005.

It should be emphasized that under the revised 50-A, as well as the prior statute, an annuity for lost earnings does not cease upon death. Rated age, therefore, would not impact the cost of this annuity. The new statute does, however, provide the benefit of delaying commencement until working age and CPLR § 4546 provides a further reduction for income taxes. Rated age also has little or no impact on the actual cost of the annuity for pain and suffering because the statute mandates payout over an eight year period. Thus, the change in cost is minimal, unless the life expectancy is less than eight years. Rated age, however, can significantly reduce the cost of annuities for such items of damages as future medical expenses, therapies, nursing and custodial care and the like.

PRESERVATION ISSUES

Another potential pitfall – relates to preservation. First, the failure to request that the jury determine the year of commencement could result in the court deeming the issue waived, which will mean that annuity payments commence immediately, thereby resulting in a higher present value and a higher cost of purchasing the annuities. Second, if the jury fails to follow the court's instructions and makes awards which appear to be lifetime awards rather than annual amounts, the jury should be sent back to correct its mistakes before it is discharged. Counsel should not rely on the court to correct the jury's mistakes on post-trial motion. Aside from a potential waiver claim from the plaintiff, as a practical matter it is more difficult for the court to translate lifetime awards into first year awards and the court will most likely defer to the plaintiff's expert's testimony. If the judge refused to have the jury reconsider its awards, then there would be a good ground for an appeal.

SETTLEMENT

Knowledge of Article 50-A is also critical during settlement discussions. When trying to determine the settlement value of a case, consideration should be given to what a verdict would ultimately look like under 50-A. In this regard, a distinction should be made among four different numerical values:

(1) jury verdicts - the awards rendered by the jury (which prior to the revised 50-A will be lifetime awards);

(2) sustainable value - the value that the Appellate Courts will likely sustain on appeal;

(3) present value - the value in today's dollars of the jury's awards after the application of Article 50-A; and

(4) cost - the amount required to purchase an annuity based on the present value.

When discussing settlement options, the focus should be placed on sustainable value rather than the range of potential jury verdicts, and cost rather than present value. For example, assume a jury returned a verdict in a case involving a catastrophically injured

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4 This example is taken from a recent article we had published in the Fall 2010 edition of the Defense Research Institute's In House Defense Quarterly entitled "An Appellate Perspective: Early Case Evaluation and Risk Management." Notably, now under the newly enacted Medical Indemnity Fund, the medical expenses in this example would be paid by the Fund and not the defendant or its insurer.

Continued on the next page

infant, making a total award of approximately $56 million ($2 million for past pain and suffering; $20 million for future pain and suffering; $4.6 million for lost earnings over 44 years and $30 million for medical expenses over 65 years).[4] Also assume that the defendant can obtain the benefit of a 25% apportionment, pursuant to General Obligations Law § 15-108, based on the plaintiff's settlement with a co-defendant. Assuming no reductions, the defendant's pay out in that case would not be $56 million, it would be approximately $8 million.

Now consider the jury's awards. To date, there has yet to be a medical malpractice case involving an infant where an appellate court has sustained more than $6 million for total pain and suffering. Thus, it can reasonably be assumed that on appeal, the $22million pain and suffering award would be reduced to approximately $6 million. Furthermore, based on comparable cases, we will assume that the sustainable value of the pain and suffering award is actually $3 million. Also assume that the plaintiff arguably failed to prove, with reasonable certainty, that the infant would have had $4.6 million in lost earnings, and that the award for lost earnings would be reduced to $1.5 million. Similarly, assume that the plaintiff arguably failed to prove some aspects of his or her claim for medical expenses, and that arguably the award would be reduced to $23 million. That results in a potential total award of $28 million.

After applying the new 50-A (which takes into account the offset for the settlement with the co-defendant, the cost to the defendant inclusive of lump sum payments, and the annuities and attorneys' fees) the cost to satisfy a judgment based on these reduced awards is approximately $2 million. Furthermore, the $2 million projected cost does not take into account potential collateral source reductions, the possibility of obtaining a dismissal or a new trial on appeal, or that a life annuity company may give you a rated age. Thus, for what started out as a $56 million verdict, a strong and credible argument can be made that the settlement value of this case is below $2 million.

Importantly, this analysis can be employed and, more often with better results, before a case goes to trial. Prior to trial, the evidence can be developed and analyzed using the principles discussed in this article, such as deferred commencement dates. Utilizing such, a likely verdict and its sustainable value can be forecasted based on the application of Article 50-A, the estimated costs of the plaintiff's medical and related treatment, projected lost earnings, and the likely sustainable value for pain and suffering. After ascertaining what the cost would be under 50-A, consideration can be given to structured settlements. Structured settlements are more flexible than a structured judgment under 50-A. The parties can tailor lump sum payments to correspond to anticipated future needs, such as the purchase of a new customized van every five years or a further hip replacement fifteen years in the future. Structured settlements can also delay the commencement date for certain annuities and take advantage of the plaintiff's rated age. Often, by working backwards from the plaintiff's claimed needs, astute defense counsel along with a skilled structured settlement broker will be able find a way to provide more benefits to the plaintiff while paying less. Of course, in such a case it will be necessary to overcome plaintiff's counsel's motivation to decline such an offer because it reduces his/her overall fee. Sometimes that can be accomplished by requiring the plaintiff himself/herself to be present when the structured settlement offer is made. The salient point, however, is that engaging in this analysis as early as possible, can and should yield better settlements.

CONCLUSION

While the revised 50-A corrected many of the inequities of the prior statute, including the possibility, noted by the Court of Appeals in Desiderio, that as a result of the application of Article 50-A the plaintiff might ultimately receive more than the jury awarded, it did not reduce the statute's complexities. Understandably, mistakes have been and will continue to be made as counsel and the courts become more familiar with the statute and more creative in applying it, and as new sets of facts create new sets of challenges. The point of this article is to help guide counsel and claims as they approach the issues that may arise, and demonstrate how crucial it is to have a firm grasp of the statute. Proper application of the statute and maximizing its benefits during settlement discussions can result in considerable cost savings, which, in the case of a catastrophically injured plaintiff, can be in the millions or even tens of millions of dollars.

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own negligence was the sole proximate cause of the accident"); Plass v. Solotoff, 5 A.D.3d 365, 773 N.Y.S.2d 84 (2nd Dep't. 2004) ("The proof presented by the plaintiff showed that the injured plaintiff, the owner of the subcontracting business, unilaterally made the determination to use only one plank on the scaffold he owned, despite having all three planks available to him to use. Under these circumstances, his actions were the sole cause of his injuries as a matter of law and he cannot recover for his injuries under Labor Law §240[1].")

See also Gittleson v Cool Wind Ventilation Corp., 46 A.D.3d 855, 848 N.Y.S.2d 709 (2nd Dept 2007) ("Here, the two defendants each made a prima facie showing that the plaintiff Robert Gittleson (hereinafter the injured plaintiff) was injured in an accident that was not proximately caused by a violation of Labor Law §240(1). Rather, it was caused solely be the actions of the injured plaintiff in choosing to use an improperly-placed, unopened, and unsecured ladder rather that the one he had brought and used earlier that day."); Negron v. City of New York 22 A.D.3d 546, 803 N.Y.S.2d 664 (2nd Dept 2005) ("... the sole proximate cause of the accident in this case was the failure on the part of the plaintiff to have himself again tied to the lanyard before attempting to ascertain that the blanket was properly secured."); Capellan v. King Wire Company, 19 A.D.3d 530, 798 N.Y.S.2d 76 (2nd Dep't. 2005) ("Accordingly, the Supreme Court should have granted those branches of King Wire's motion which were for summary judgment dismissing the Labor Law §§ 200, 240(1) causes of action insofar as asserted against it.")

PLAINTIFF'S CREDIBILITY FOR AN UNWITNESSED ACCIDENT.

Many accidents are not witnessed. Plaintiff's frequently rely on their own deposition testimony, without corroboration, to prove a case under Labor Law §240(1). Courts typically do not deny a Labor Law claim solely because plaintiff cannot provide independent corroboration of the claim. However, where the plaintiff has not been consistent in describing the accident, or where circumstantial evidence tends to conflict with plaintiff's account, then a Court may deny summary judgment. In Antenucci v. Three dogs, LLC, 41 A.D.3d 205, 838 N.Y.S.2d 513 (1st Dept 2007), the Appellate Court held as follows:

> The conflict between plaintiff's deposition testimony and defendants' submissions precludes us from determining, as a matter of law, whether defendants are liable under Labor Law §240(1) for providing plaintiff with a defective or malfunctioning ladder (cf. Felker v. Corning Inc., 90 NY2d 219, 682 NE2d 950, 660 NYS2d 349 [1997]; Fernandes v. Equitable Life Assur. Socy. of U.S., 4 AD3d 214, 774 NYS2d 4 [2004]), or, alternatively, whether plaintiff's conduct was the sole proximate cause of his fall (Cahill v. Triborough Bridge & Tunnel Auth., 4 NY3d 35, 823 NE2d 439, 790 NYS2d 74 [2004]; see also Blake v. Neighborhood Hous. Servs. Of N.Y. City, 1 NY3d 280, 290, 803 NE2d 757, 771 NYS2d 484 [2003]). Accordingly, we reinstate plaintiff's Labor Law §240(1) claim and remand the matter for trial. [further citations omitted]

There is a significant body of case law from multiple judicial departments arising under the defense that an accident is un-witnessed, or that plaintiff's "credibility" is in question. These defenses are generally not as successful as the more commonly raised "sole proximate cause" and "recalcitrant worker" defenses. Nonetheless, the defense can and does work in select circumstances where there is some independent basis to doubt plaintiff's allegations. Every defense lawyer should keep the best and most recent cases in his or her defense arsenal. See Vargas v. City of New York, 59 A.D.3d 261, 873 N.Y.S.2d 295 (1st Dept 2009) ("Since there is no other competent evidence supporting her version of the purported incident, a credibility question as to even whether the accident occurred is present, and requires a resolution at trial."); Wilson v. Haagen-Dazs Co., Inc., 215 A.D.2d 338, 627 N.Y.S.2d 41 (1st Dept 1995) ("Plaintiff was allegedly injured when the ladder upon which he had to climb in order to perform his work swung free, lurching his body sideways and wrenching his back in the process. However, plaintiff provided conflicting versions of the alleged accident. Consequently, there exists a triable issue precluding summary judgment, requiring plaintiff's testimony be subjected to cross-examination and his credibility be assessed by the fact finder at trial."); Gonyon v. MB Television, 36 A.D.3d 592, 828 N.Y.S.2d 452 (2nd Dept 2007) ("There were no witnesses to the plaintiff's accident, and therefore his credibility was critical. Based on inconsistencies between the plaintiff's trial testimony and his deposition testimony, and the conceded deterioration of his memory due to medication, the jury could have fairly discredited his claim that

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Avoiding The Draconian Effects Of New York Labor Law §240(1)

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the defendant's bolt caused his accident."); Colazo v. Tower 45 Associates, 209 A.D.D 339, 619 N.Y.S.2d 547 (1st Dept 1994) ("Under the circumstances, the differing accounts of the accident present a triable issue precluding summary judgment and require that plaintiff's testimony be subjected to cross-examination and his credibility assessed by the fact finder at trial."); Hicks v. Montefiore Medical Center, 266 A.D.2d 14, 697 N.Y.S.2d 606 (1st Dept 1999) ("The conflicting evidence submitted in support of plaintiff's motion for summary judgment raises factual issues as to whether the ankle was injured while plaintiff was still on the scaffold, or whether it resulted from a fall from the scaffold, or whether he actually had been on the scaffold when the incident giving rise to the injury occurred. In view of the factual discrepancies in plaintiff's own evidence, a triable issue exists."); Antunes v. 950 Park Avenue Corp., 149 A.D.2d 332, 539 N.Y.S.2d 909 (1st Dept 1989); Russel v. Rensselaer Polytechnic Institute, 160 A.D.2d 1215, 555 N.Y.S.2d 480 (3rd Dept 1990), (citing Antunes) ("We agree with the reasoning of the First Department in Antunes v 950 Park Ave. Corp. (149 AD2d 332, 333) that 'since plaintiff was the only person to have witnessed the accident, whether he fell from the ladder, within the scope of Labor Law § 240, is a triable issue of fact.'")

See also Lee v. YRM, Ltd, 204 A.D.2d 282, 614 N.Y.S.2d 156 (2nd Dept 1994) ("In any event, summary judgment was not warranted in this instance because Ms. Manning had exclusive knowledge of the facts as to whether she was aware that the subject property was previously used as a landfill when she arranged for its purchase on behalf of the plaintiffs. While ordinarily courts do not weigh the credibility of the affiants, where, as here, the key fact at issue is peculiarly within the movant's knowledge, summary judgment is ordinarily denied."); Woodworth v. American Ref-Fuel, 205 A.D.2d 942, 744 N.Y.S.2d 589 (2nd Dept 2002) (Summary judgment denied because accident "...was unwitnessed"); Boguszewski v. Solo Salon, 309 A.D.2d 777, 765 N.Y.S.2d 804 (2nd Dept 2003) ("Here issues of fact exist regarding the manner in which the plaintiff fell from the ladder, due in part to his inconsistent deposition testimony with respect to the events leading up to the fall, and his inability to recall the fall, precluding a determination that the plaintiff is entitled to judgment as a matter of law. Accordingly, the plaintiff's motion for summary judgment on the issue of liability on his Labor Law 240(1) cause of action should have been denied."); Singh v Six Ten Management Corp., 33 A.D.3d 783, 823 N.Y.S.2d 186 (2nd Dept 2006) ("Summary judgment on Labor Law §240(1) denied due to triable issues of fact as to how the accident happened."); Delahaye v. Saint Ann's School, 40 A.D.3d 679, 836 N.Y.S.2d 233 (2nd Dept 2007) ("The record reveals inconsistencies as to how the accident occurred, raising a question of fact as to the credibility of the plaintiff. Thus, on this record, it cannot be concluded, as a matter of law, that St. Ann's alleged failure to provide the plaintiff with proper protection proximately caused his injuries."); Heath v. County of Orange, 272 A.D.2d 274, 709 N.Y.S.2d 847 (2nd Dept 2000); Donohue v. Elite Associates, 159 A.D.2d 605, 552 N.Y.S.2d 659 (2nd Dept 1990) ("Moreover, the denial of summary judgment is appropriate where the injured party is the sole witness to the accident, as the salient facts are exclusively within his knowledge and his credibility is placed in issue."); Hemmings v. St. Marks Housing Assoc., 272 A.D.2d 442, 707 N.Y.S.2d 667 (2nd Dept 2000) ("None of these alleged witnesses to the accident was deposed, and the plaintiff did not submit affidavits from these witnesses to corroborate how the accident occurred.")

There is no sign that New York Courts will provide any relief any time soon from the draconian effects of Labor Law §240(1). What if a property owner requires tenants, under strict lease provisions, to inform the property owner prior to retaining a contractor to perform work on the premises? Such a provision would appear to provide a property owner a measure of protection, because there is then an opportunity to supervise the contractor's work, or at minimum ensure that the contractor is properly licensed and insured. There was previously a split of authority amongst appellate departments as to whether a property owner can escape Labor Law §240(1) liability by utilizing this type of precautionary measure. The New York Court of Appeals has recently resolved that split in favor of plaintiffs. Sanatass v. Consolidated Investing Company, 10 N.Y.3d 333, 858 N.Y.S.2d 67 (2008). Under Sanatass, even if a commercial lease states that the tenant may not hire a contractor without the owner's knowledge and approval, and even if the tenant willfully violates that lease provision, and even if the foregoing facts are undisputed, the owner is still liable under Labor Law §240(1). It appears that only an act of the New York State Legislature will provide any relief to property owners and bring New York law more in line with that of other states.

Emergency Doctrine

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how emergency vehicles are defended in such actions. As stated by Justice Graffeo, "[t]he majority's new rule is also inconsistent with the public policy underlying section 1104 because it creates an unjustifiable immunity only to police, fire or ambulance personnel who speed, run a red light or violate a handful of other traffic laws while responding to emergency calls." Thus, Justice Graffeo asserted that a "perverse effect" is created by "encouraging conduct directly adverse to the public policy of requiring emergency responders to exercise the utmost care during emergency operations."

As such, to defend an emergency vehicle in such actions, one would focus on how the driver of the emergency vehicle sped, ran red lights or engaged in one of the other specified traffic infractions listed in Vehicle and Traffic Law §1104 so that a higher "reckless disregard" standard would apply. Otherwise, as asserted by the dissent in *Kabir*, "[p]olice officers, firefighters or ambulance drivers who manage to obey traffic signals or travel within the speed limit are out of luck if they are involved in an accident."

FUTURE OF EMERENCY VEHICLE CASE LAW

The standard set forward in *Kabir* appears simple: a higher "reckless disregard" standard applies if the operator of an emergency vehicle was engaged in the specified conduct listed in Vehicle and Traffic Law §1104(b) and an ordinary negligence standard applies to all other conduct.

However, the bright line rule will not always produce fair and practical results. For example, in *Kabir*, the police officer was traveling below the listed speed limit and was charged with an ordinary negligence standard. If the same police officer were traveling slightly over the listed speed limit, the police officer would be charged with a "reckless disregard" standard and not be subject to liability.

Thus, lower courts will now have to scrutinize the facts of each and every matter to determine what exact conduct the driver of an emergency vehicle was engaged in at the time of the accident in order to determine which standard will apply. From a defense point of view, a careful analysis must be made in order to determine if the driver of emergency vehicle was engaging in specific privileged conduct as specified in Vehicle and Traffic Law §1104 so as to be held to a "reckless disregard" standard.

President's Column

Continued from page 1

far this year, in particularly timely and relevant topic areas. Board member, Colin Morrissey, Esq. coordinated a program entitled, "The Evaluation of Herniated Disks for Causation and Radiology." Our speakers for this program were Melissa Sapan, M.D., who is a double Board Certified Neuroradiologist and Diagnostic Radiologist and our own, Walter Williamson, M.D., Esq.

Walter will join newly inducted Board member, Patrick J. Bréa, Esq., Chairman of DANY's Medical Malpractice Committee to coordinate and expand this vital and as yet untapped area within our organization. Having started my career in civil litigation with a major medical malpractice defense firm, with Patrick as a mentor, I recognize that the benefits of a better understanding of "the medicine" will be a benefit to all of our members when the time comes for that inevitable damages trial.

On May 24th, 2011, we also hosted a stand alone Ethics CLE, entitled, "Hot Topics in Ethics, Including Use of Social Media." I was joined on the panel by the Hon. Barbara Kapnick and my friend and colleague, Professor Barry Temkin, Esq.

As I start my tenure, I hope to continue the tradition of my predecessors, "that DANY and its Board are here to serve and benefit its membership!" If you have any ideas, questions, suggestions or concerns, please feel free to contact me either via telephone at (212) 471-8494 or via email at lsquires@herzfeld-rubin.com.

The Defendant Welcomes Contributors
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The Duty To Illuminate

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Appeals holding in *Peralta* when it decided the case *Savage v. Desantes*. Plaintiff, a pizza delivery person, brought an action against the owner of a building after he fell while walking down a staircase in a three-unit apartment building. The plaintiff alleged that the building's owner breached his duty of care by failing to adequately illuminate the staircase. The defendant provided working light fixtures in the stairwell with switches at both the top and bottom of the stairs, leaving the responsibility of turning on and off the lights as-needed to the tenants. Furthermore, there was no evidence on the record that the defendant ever received complaints about the lighting in the stairwell. The Court determined that the defendant did not breach his duty of reasonable care owed to the plaintiff because he maintained his property in a reasonably safe condition. The holding went on to recognize that "imposing a requirement that owners provide continuous stairwell lighting during all hours of darkness would place a new and undue burden on owners."[12]

Contrast this with *Pollack v. Klein* where the plaintiff was injured when she stepped through an open doorway and fell down a set of concrete stairs while staying as a guest in the defendant's home. The plaintiff alleged that the defendant was negligent in failing to illuminate the dark hallway where the open door led to the basement. Plaintiff said that she was unfamiliar with this specific area of the house, that she could not see anything and that the defendant failed to warn her of the potential danger. The Supreme Court, Queens County, granted the defendant's motion for summary judgment, dismissing the plaintiff's case for failure to establish a prima facie case. However, the Appellate Division Second Department reversed and the matter was remitted to the Supreme Court for a new trial. The Court determined that given the evidence the case should have been submitted to the jury for resolution, rather than being disposed as a matter of law.[13]

IN CONCLUSION

Courts have been reluctant to place financial burdens on municipalities and private landowners which would require them to provide costly lighting and result in expanded liability. In these difficult economic times, where municipalities have to cut services and put off municipal repairs and improvement projects, it is unlikely that a defendant's duty to illuminate will expand.

1 Gen. City Law 20(7); Highway Law Section 327.
2 Bauer v. Town of Hempstead, 143 A.D.2d 793, 794 (2d Dept. 1988).
3 Thompson v City of New York, 78 N.Y.2d 682, 684 91991).
4 Id at 685.
5 Cracas v. Zisko, 204 A.D.2d 382 (2d Dept. 1994).
6 Gagnon v. City of Saratoga Springs, 51 A.D.3d 1096 (3d Dept. 2008).
7 Rios v. City of New York, 33 A.D.3d 780, 782 (2d Dept. 2006).
8 Hayden v. City of New York, 26 A.D.3d 262 (1st Dept. 2006).
9 Graham v. City of Rochester, 184 A.D.2d 990, 992 (4th Dept. 1992).
10 Basso v. Miller, 40 N.Y.2d 233 (1976).
11 Peralta v Henriquez, 100 N.Y.2d 139, 145 (2003).
12 Savage v. Desantes, 56 A.D.3d 1013, 1015 (3d Dept. 2008).
13 Pollack v. Klein, 39 A.D.3d 730 (2d Dept. 2007).

DEFENDANT

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be welded. Plaintiff was hitting a welded seam with a hammer to remove excess metal, when the clam shell bucket opened releasing the pipe. The pipe pinned and injured plaintiff. Plaintiff brought suit under Labor Law § 241(6) and specifically Industrial Code Section 23-9.4. Section 23-9.4 states that when "power shovels and backhoes" are used for material handling, a load suspended from such equipment shall be secured by using a wire rope. A wire rope was not being used at the time of the plaintiff's accident. Defendants argued that since the equipment being used was a front-end loader, § 23.9.4 did not apply. The Supreme Court denied defendant's motion for summary judgment and the Appellate Division affirmed. On appeal to the Court of Appeals, in a 4-3 decision, the Court held that it agreed that the safety requirements of this section appropriately extended to front-end loaders that are enlisted to do the material handling that is otherwise performed by power shovels and backhoes. The Court stated that although the Code does not enunciate each piece of heavy equipment that can suspend materials, § 23-9.4 was clearly drafted to reduce the threat posed by heavy materials falling from buckets by requiring loads to be fastened with sturdy wire. The Court further stated that the preferred rule both as a matter of statutory interpretation and as reinforcement of the Code's objectives is to take into consideration the function of the piece of equipment, and not merely the name. In a dissent, Justice Smith observed that the majority's decision is a departure from precedent, and holds that the Court may now disregard the words of the regulation so as to effectuate its purpose. The dissent held that such a "purpose based" interpretation made no sense in light of the context of the Code, the point of which is to give a remedy only for violations of its specific commands, not of its general commands.

INSURANCE COVERAGE

Insured's Denial of Coverage was not Rendered Invalid by its Subsequent Retraction
Chelsea Village Associates v. U.S. Underwriters Insurance Company, 82 A.D. 3d 617, 2011 W.L. 1046204 (1st Dept. 2011).

In a declaratory judgment action, the Court held, contrary to the insured's contention, that the initial denial of coverage was not rendered "invalid" by the insurer's subsequent letter withdrawing one of its grounds for denying coverage. In its initial denial letter, the insurer asserted several grounds for denying coverage. As such, rather than changing its position to rely on a ground not asserted, the subsequent letter merely retracted one of the grounds set forth in the initial letter.

LEGAL MALPRACTICE

Continuous Representation Doctrine Applicable
Riley v. Segan Nemerov & Singer, 82 A.D. 3d 572, 918 N.Y.S. 2d 488 (1st Dept. 2011)

Plaintiff's legal malpractice action was time barred. By letter dated August 25, 2004, Defendant unequivocally informed Plaintiff that they would not proceed with her case, thereby severing the attorney-client relationship. The continuous representation doctrine ceased to be applicable and the toll of the statute of limitations came to an end. The Court further found that the failure to attach an exhibit to the initial motion papers was cured on reply, especially since it was attached to the motion papers served on plaintiff, and plaintiffs were able to address the exhibit in opposition.

LABOR LAW

Defendants' Verdict on Labor Law §240 Upheld
Ramirez v. Willow Ridge Country Club, Inc., 2011 N.Y. Slip Op 03714 (1st Dept. 2011)

In a Labor Law §240 case, during trial, plaintiff testified that while removing wooden posts from a deck with a crow bar, he fell off of the deck through a space where a railing had been removed. In contrast, plaintiff's foreman testified that the plaintiff's accident occurred while plaintiff was straddling between an A-Frame ladder leaning against the deck railing and an extension ladder affixed to the wall of the building, and that plaintiff was pulling a gutter down at the time. According to the foreman, he admonished plaintiff to stop, but the gutter gave way, causing plaintiff to lose his balance and fall to the ground below. The jury found that defendants had violated Labor Law

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B. STATE COURTS

Historically, there were 50 different state collection/reporting systems in place to collect statistical data on state court filings and dispositions. More recently, the National Center for State Courts has tried, with success, to encourage the use of a uniform reporting system to be utilized in each state. As such, the availability of statistical data in state courts is lacking due to the past use of non-uniform data collection practices. However, results from the Civil Justice Survey of State Courts, 2005 ("CJSSC") conducted by the Bureau of Justice Statistics reveal that the phenomenon of the vanishing jury trial seen in federal courts is present in state courts as well. The CJSSC looked at civil trials in state courts of general jurisdiction in the nation's 75 largest counties, and found that the number of civil cases disposed of by jury or bench trial declined by about fifty percent between 1992 and 2005.[7] An analysis conducted by the National Center for State Courts ("NCSC") of trial trends in 22 state courts of general jurisdiction (accounting for 58% of the U.S. population) from 1976 to 2002 reveals that both the number and rate of civil jury trials have declined.[8] Between 1976 and 2002 the number of civil jury trials fell by two-thirds in those twenty-two state courts.[9]

While there is no simple explanation for what is causing it, there is no doubt that the number of civil jury trials is rapidly declining in both state and federal courts. The following attempts to identify, and provide insight into, some of the potential contributing factors to the decline.

II. WHY ARE AMERICANS RELYING LESS ON JURIES TO RESOLVE DISPUTES?

Clearly there is no one factor behind the decline in civil jury trials. Thus, for the purposes of this presentation, we will focus on those factors believed to play the most crucial role. Such factors include:

Judges getting involved in encouraging early resolution;

An increase in the prevalence of class actions;

The migration of cases to other forums, such as alternative methods of dispute resolution in both the commercial and consumer context;and cost and resource constraints, such as the cost of discovery, and the impact E-discovery has had on those increased costs.

A. Court Involvement In Early Resolution

Are judges focusing more on disposing of cases and less on providing a forum for fair and just dispute resolution? Although the number and rate of trials has fallen, judicial involvement in case activity has increased. Federal judges are actively involved in holding pretrial conferences, setting pretrial schedules and trial dates, setting discovery limits, and ruling on motions. The number of cases that terminate during or after pre-trial has fallen only slightly, from 15% in 1963 to roughly 12% in 2010 (27,009 cases were terminated during or after pre-trial in 2010).[10] However, the number of cases that terminated before pre-trial (but with some type of court action) rose from 20% in 1963 to roughly 70% in 2010 (or 199,475 cases).[11] The drop in trial rates has occurred in every category of cases, suggesting that the change lies in what happens in court rather than in a change in the makeup of the caseload.

Judges, in particular, have a vast impact on whether parties will settle or submit to ADR. In many instances, the Judges' role has shifted from one of presiding at trials to one of resolving disputes; as such, they increasingly approve of and encourage/induce settlement or the use of ADR as an alternative to trial.

For example, during the highly publicized WTC litigation, involving nearly 10,000 lawsuits filed by rescue and recovery workers seeking damages for respiratory and other ailments allegedly incurred during the response to and cleanup of the World Trade Center following the Sept. 11, 2001, terrorist attacks, Judge Alvin K. Hellerstein was not only adamant that the parties settle their claims, he also made his opinion known to both the parties and the media. While Judge Hellerstein acknowledged that he could not force the parties to settle, he maintained

7 Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 2005* ("CJSSC")

8 Court Statistics Project of the National Center for State Courts

9 *id.* See *also* Galanter, *The Vanishing Trial,* at 68.

10 U.S. Courts Website (www.uscourts.gov) Table C-4.

11 *Id.*

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direct oversight over the negotiation and approval of the settlement, and at one point, even rejected the settlement that had been negotiated for almost two years amongst the parties, as he felt the amount was not sufficient. Justice Hellerstein acknowledged that most settlements are "private" and "the judge has no part." "This is different," he said. "This is 9/11. This is a case that has dominated my docket, and because of that, I have the power of review." Justice Hellerstein felt that workers should have ample opportunities to ask questions and get answers about the proposed settlement, and he offered to go on a mini-speaking tour to get information to the plaintiffs. "I will make myself available in union halls, fire department houses, police precincts and schools," Justice Hellerstein said.

This level of judicial involvement in the settlement of a case that has not been designated as a class action is rare; however, it is a perfect example of the trend of increasing judicial involvement in pushing cases toward resolution and away from trial.

B. Class Actions

It can be argued that the increase in the prevalence of class actions before the courts is attributable to the decline in the number of trials, as they are effectively taking a multitude of individual cases and grouping them into one trial, or, more likely, a large settlement. This not only creates a false representation of the overall number of cases being tried before a jury, but in some instances it can provide leverage to the plaintiffs in seeking early settlement of their claims. For example, whereas a company might be inclined to defend itself against a case brought by an individual plaintiff on a particular claim for nominal damages, that company's incentive to go to trial is greatly diminished when a class action is certified against that company based on that same claim, and the nominal damage claim of one plaintiff could be a multi-million dollar claim when brought by multiple plaintiffs. When a class is certified and cannot be dismissed on appeal or motion, settlement is the likely result in the overwhelming majority of cases. In general, state courts are more likely to allow a class action than federal courts.

C. Migration Of Cases To Other Forums: Increased Use Of Alternative Dispute Resolution ("ADR")

In 2001, some 24,000 cases were referred to some form of ADR in federal courts. That is about one-seventh of the number of dispositions that year.

1. Arbitration:

A pre-condition to many economic relationships today is that the parties surrender their right to a jury trial in favor of arbitration. There has been a greater prevalence of arbitration agreements both in the commercial and consumer context, which requires that both parties to the agreement submit to an arbitrator, rather than the courts, in the event that a dispute arises among them. Unlike mediation, arbitration is a binding procedure (unless otherwise agreed upon by the parties). As such, arbitration is adjudicatory, as opposed to advisory, and the arbitrator (usually a retired judge or attorney) renders a binding decision at the end of an arbitration hearing. Thus, by agreeing to arbitration, the parties, perhaps among other things, are waiving their fundamental, constitutional right to a trial by a jury of their peers, and they will not be entitled to de novo review of the arbitrator's decision. In 1992, arbitration accounted for 1.7% of contract dispositions and 3.5% of tort dispositions in the state courts in the nation's 75 largest counties.[12]

2. Mediation:

Has the emergence of mediation and its embracement by judges, attorneys, corporate counsel, and individuals been so widespread that jury trials are only justified in a very small number of cases?

Mediation is another form of ADR that likely plays a major role in the decline of civil jury trials. Mediation, unlike arbitration, leaves the decision power in the hands of the parties. The mediator does not make any determination as to who is right, what is fair, or the merits of the case. Instead, the mediator meets with both sides as a neutral party and helps them to understand and analyze the facts and issues of their dispute and eliminate obstacles to communication, in an attempt to avoid confrontation amongst the parties, and thereby facilitate settlement. Corporate legal departments, insurance companies, judges, and society in general have all embraced the use of mediation as an alternative to trial. Many retired judges become mediators, and they use their

12 CJSSC

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§240(1), but that the violation was not a substantial factor in causing the accident. Plaintiff made a motion for judgment notwithstanding the verdict, which was denied. On appeal, the Appellate Division found that a fair inference is that the jury determined that a statutory violation existed with respect to the guardrail of the deck, but that it accepted the foreman's version of the event and found that the violation was not a proximate cause of the accident. The Court further held that the trial court judge properly charged the jury that an inference could be drawn from plaintiff's refusal to waive his attorney-client privilege and allow a former paralegal at the firm that represented him in his Worker's Compensation case to testify. The Court held that it is now established that in civil proceedings an inference may be drawn against the witness because of his failure to testify or because he exercises his privilege to prevent another from testifying, whether the privilege is constitutional or statutory. Finally, the Court held that plaintiff's counsel could not use the foreman's deposition to cross-examine him as plaintiff could not establish that the deposition was sent to the witness for his review, pursuant to CPLR §3116.

PRODUCTS LIABILITY

Plaintiffs' Testimony Regarding Alleged Manufacturer of Product was Insufficient for Purposes of Product Identification; Plaintiff's Expert Affidavit was Insufficient to Defeat Motion for Summary Judgment.
Spiconardi v. Macy's East, Inc., 2011 W.L. 1364285 (1st Dept. 2011)

Plaintiff was injured when a shirt she was wearing caught fire as she was cooking. She brought an action against Macy's and Liz Claiborne, Inc., the alleged seller and manufacturer of the shirt. The Court held that Liz Claiborne demonstrated that the garment at issue was not contained in any of Liz Claiborne's "line books" during the relevant time period, nor was the garment contained in Fabric Utilization Reports which showed all garments manufactured and shipped to the store where the garment was allegedly bought. The Court held that the Fabric Utilization Report could be considered on the motion for summary judgment, as it was not an existing business record subject to the motion court's discovery orders, but rather was a document created for litigation. The Court held that plaintiff failed to raise a triable issue of fact on the product identification issue, as subjective statements about where a product was purchased are not sufficient to create triable issues of fact where there is objective proof that a defendant did not sell the allegedly defective product. The Court further held that in any event, because defendant's expert tested an exemplar of the garment and found that both the "ignite time" and "burn time" met or exceed federal regulations, defendant's satisfied their burden on a motion for summary judgment. The Court found that conclusory allegations raised by plaintiff's expert, absent evidence that the product violated other relevant industry standards or accepted practices, or statistics showing the frequency of injuries arising out of the use of the product, was insufficient to create issues of fact warranting the denial of the motion.

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experience to educate both parties of the expense, uncertainty, and complications of going to trial. In recent years, it has been the trend among judges to pressure lawyers to mediate their cases as opposed to trying or settling them, in many cases using a mediator chosen by the judge.

D. Cost And Resource Constraints

It is unquestionable that financial considerations impact the way in which a dispute is resolved. With the cost of litigation rising and the apparent unpredictability of trial outcomes, many are inclined to settle before trial, or submit to ADR instead. The advent of E-disovery and adoption of rules imposing duties of full disclosure of ESI have greatly increased those costs as well, requiring the need for document management companies, the organization and back-up of electronic documents, as well as the use of security measures to ensure the preservation of data and communications.

E. Other Factors

Other factors for the decline in jury trials, although less compelling, may include the uncertainty of jury verdicts, the delay in resolving cases by jury trial, the increased filing and granting of dispositive motions, and the lack of trial experience among both lawyers and judges (and the attendant reluctance to try cases). Another significant influence may be the existence of more readily available information (vis-à-vis the Internet) to assist parties in valuing their cases, thereby facilitating settlement.