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Torts

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TORTS

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I. INTRODUCTION

This Article surveys the most significant torts cases decided in the courts of New York State during the *Survey* year. Only cases which challenged existing law, modified longstanding doctrine, or announced new decisional law have been included. While 1989 was not a year of signal change for the law of torts, a number of cases deserve examination and analysis.

II. TORT CASES — 1989

A. Governmental Liability

Perhaps the most interesting case concerning governmental liability, and in some ways potentially the most far reaching, was the Court of Appeals *per curiam* decision in *Cowles v. Brownell.*[1] New York's highest court brought to a crashing halt the common practice of prosecutors and police that required liability releases from criminal defendants as the price of consent by the prosecutor to a dismissal of charges. While not applied to major crimes, this practice was commonly used for misdemeanors and violations. The Court of Appeals was correct in dismissing questions of voluntariness as basically irrelevant, and instead directing its focus on the perceived unfairness of the practice.[2] The releases invalidated in *Cowles* exposed prosecutors and police alike to possible conflict of interest problems, while virtually insuring the appearance of impropriety.[3] While there is much in this

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1. 73 N.Y.2d 382, 538 N.E.2d 325, 540 N.Y.S.2d 973 (1989).

2. *Cowles*, 73 N.Y.2d at 386, 538 N.E.2d at 327, 540 N.Y.S.2d at 975.

3. *Id.* These releases have, understandably, been extremely popular with police officials who fear tort litigation and who often must defend actions which were undertaken in good faith and in reasonable reliance on a citizen's complaint. The author interviewed a major leader in the police profession in New York State, Donald L. Singer, Chief of the Greenburgh Police Department. Chief Singer, who is also a member of the New York Bar, stated that the Court of Appeals decision in *Cowles*

> [I]s good for law enforcement in the long run because it will ensure that police and prosecutorial behavior is more professionally discharged. There may be

case of interest to members of the criminal defense and prosecution bar, its significance for tort lawyers is that they will no longer have to face contesting the validity of a waiver in attempting to prove an underlying case of false arrest.[4]

A divided Court of Appeals wrestled with the recurring issue of municipal liability to persons injured by third parties on public property in *Bonner v. City of New York*.[5] New York, like many jurisdictions, has limited the liability of the governmental entity as owner and operator of facilities when persons are injured by individuals not employed by the owner. In *Bonner*, a teacher suffered injuries at the hands of an assaultive child while the teacher was discharging supervisory duties in a playground.[6] The plaintiff sustained injuries when a person removed from the playground had returned through a gate which was not in good order.[7]

New York distinguishes between a governmental entity acting in its official capacity and exercising discretionary, policy-based functions, and the same agency operating in a real or quasi-proprietary form.[8] As with so many legal rules, the statement of the rule is easy to the point of facility while its application invites disputed analysis. Four Court of Appeals' judges found the operation of the gate in *Bonner* to fall within the governmental function of the defendant city and

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> more protracted litigation since the release cannot be used as a quick knock-out punch but the sense of coercion which these releases created, intentionally or otherwise, reflected badly on the police profession and, in the long run, did little to offset well-founded claims of improper police behavior.

Interview with Donald L. Singer, Chief of the Greenburgh Police Department (Dec. 11, 1989).

4. Because many of the false arrest claims are also brought as federal civil rights suits, these waivers have been of little effect and were often sidestepped by alleging federal causes of action.

5. 73 N.Y.2d 930, 536 N.E.2d 1147, 539 N.Y.S.2d 728 (1989).

6. *Bonner*, 73 N.Y.2d at 931-32, 536 N.E.2d at 1148, 539 N.Y.S.2d at 729.

7. *Id.* at 934, 536 N.E.2d at 1150, 539 N.Y.S.2d at 731. The plaintiff was, of course, engaged in his assigned duties. Municipal government strongly opposes the imposition of new liability or the extension of existing parameters of liability for injuries to employees by third parties. New York courts have struggled with this issue for years, unwilling to recognize a general duty to the victim and equally unwilling to slam shut any possibility of relief under any set of facts. The current balancing act of weighing proprietary against governmental functions produces little guidance for resolving future issues because of the extreme importance of facts in the structure of liability, or non-liability, created by the current and somewhat shifting doctrine.

8. To a large extent, the governmental agency can insulate itself from liability by the way it characterizes its functions. Judicial scrutiny of this issue appears to be, generally, shallow.

board of education, thereby insulating the government from liability. Judge Simons and Chief Judge Wachtler, however, recognized in dissent that "it is difficult to draw the line between claims resting upon a breach of a proprietary duty and those resting upon a governmental duty"[9] and directed their focus on the alleged specific act of omission or commission to determine the classification of the act. Under that analysis, the failure to maintain the gate was viewed by the dissenters as the failure of, in essence, a common landlord and thus not subject to the shielding effect of immunity.[10]

Although *Bonner* may be viewed as a "close call," the author believes that the dissenters, by focusing on the facts of the alleged negligence leading to plaintiff's injury, have the better argument. Having relinquished its sovereign immunity, the state and its subdivisions should not be sheltered from the results of acts bearing no relation to the establishment of policy, but rather which reflect individual systemic shortcomings and failures.

A divided Court of Appeals in *Kircher v. City of Jamestown*,[11] citing, among many other cases, *Bonner*,[12] applied the special relationship test to defeat a rape victim's claim that police failure to respond to a report of her abduction led to her being raped with resultant physical injuries. These cases arise, both in actuality and in law, with distressing frequency. While the failure of the police to follow a reasonable standard of care may not be hard to prove, the plaintiff is usually headed off at the pass, or simply kept from even entering it, by the threshold duty issue.

While the *Kircher* majority's opinion is rooted firmly in decisional law largely formulated to insulate government from this type of liability, Judge Bellacosa's dissent, cogent in reasoning and penetrating in policy dissection, presents a fundamentally fairer resolution. Noting that the victim in this case directly appealed for help and got the attention of passersby who noted her predicament and immediately flagged down a police officer, Judge Bellacosa in effect argues for

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9. 73 N.Y.2d at 934, 536 N.E.2d at 1150, 539 N.Y.S.2d at 731 (Simons, J., and Wachtler, C.J., dissenting).

10. *Id.* at 934-35, 536 N.E.2d at 1150, 539 N.Y.S.2d at 731 (Simons, J., and Wachtler, C.J., dissenting).

11. 74 N.Y.2d 251, 543 N.E.2d 443, 544 N.Y.S.2d 995 (1989).

12. 73 N.Y.2d 930, 536 N.E.2d 1147, 539 N.Y.S.2d 728 (1989); *see also* Logan v. City of New York, 148 A.D.2d 167, 543 N.Y.S.2d 661 (1st Dep't 1989).

a special relationship by proxy.[13] The police officers dismissed the whole event as a probable squabble and did little, in fact nothing, else.[14] By depending on the passersby who were aware of the victim's plight and relayed information to the police, Judge Bellacosa suggests the formation of a special duty by vicarious process.[15] Essentially, Judge Bellacosa is dismayed by the majority's adherence to an overly rigid doctrine at the expense of recognizing the need to apply tort law to both redress victims and deter future conduct of this kind by law enforcement agencies.[16]

B. General Negligence

New York, by statute,[17] encourages the use of some privately-owned real property for recreational purposes by precluding liability against the owner by persons using the land for recreation. In *Iannotti v. Consolidated Rail Corp.*,[18] the Court of Appeals, reversing both the trial and appellate courts, found New York General Obligations Law section 9-103 applicable and insulated the railroad from liability. The plaintiff, who was operating a trail bike when he was injured, alleged ordinary negligence on the part of the defendant.[19] The majority found that the use of the property as an active commercial site did not deprive the defendant of the sheltering protection of the recreational use statute.[20] Judge Simons, in dissent, argued that the property was unsuitable for any form of recreation and was thus outside the intent and scope of the statute.[21]

While recourse to the plain language of the statute is unhelpful here, it seems the point of contention between the majority and the dissent lies in whether the focus is on the actual use being made of the

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13. *Kircher*, 74 N.Y.2d at 265-66, 543 N.E.2d at 451-52, 544 N.Y.S.2d at 1003 (Bellacosa, J., dissenting).

14. *Id.* at 263, 543 N.E.2d at 450, 544 N.Y.S.2d at 1002 (Bellacosa, J., dissenting).

15. *Id.* at 265-66, 543 N.E.2d at 451-52, 544 N.Y.S.2d at 1003 (Bellacosa, J., dissenting). The vicarious process advocated by Judge Bellacosa eliminated the necessity of finding reliance by the victim upon the alleged tortfeasor which is normally required in such cases, by substituting the reliance by the passersby that the officer would intercede to help the victim, thus eliminating the direct contact requirement.

16. *Id.* at 265-66, 543 N.E.2d at 451-52, 544 N.Y.S.2d at 1003 (Bellacosa, J., dissenting).

17. N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1989).

18. 74 N.Y.2d 39, 542 N.E.2d 621, 544 N.Y.S.2d 308 (1989).

19. *Iannotti*, 74 N.Y.2d at 41-42, 542 N.E.2d at 622-23, 544 N.Y.S.2d at 309.

20. *Id.* at 47, 542 N.E.2d at 625, 544 N.Y.S.2d at 312.

21. *Id.* at 52, 542 N.E.2d at 628, 544 N.Y.S.2d at 315 (Simons, J., dissenting).

property at the time of the accident (majority), or its objective unsuitability for such use (dissent).

Judge Simon's reasoning is more persuasive because under suitability analysis, a defendant does not benefit from the inappropriate or aberrational use of his land. The statute seems to have been enacted with the intent to encourage recreational use of private property and it seems illogical that the legislature wished to encourage the inappropriate use of real property.

It also seems quite likely that both in *Iannotti* and factually similar cases, withdrawal of the recreational use statute from the defendant will not result in a plaintiff's verdict. The evident unsuitability of the property for the use which resulted in injury will probably suffice to demonstrate that the plaintiff was proximately liable for her own injuries.

The common law has dealt with issues of pursuing animals onto neighbors' property since the Middle Ages. A cow pursuit in Albany County led to plaintiff's injuries on defendant's property in *Persons v. Cross*.[22] The Third Department panel found that neighbors could neither foresee nor guard against the hot pursuit of cows at night by persons unfamiliar with the terrain.[23]

Urban, suburban, and probably rural New York are increasingly "wired" for burglary and fire alarms and litigation following the failure of an alarm system is becoming common. While such actions frequently have a contract basis, causes of action in tort often appear and may predominate. During the *Survey* year, both the First and Second Departments considered alarm failure cases and, applying different reasoning, reached opposite conclusions. In *Koos Van Den Akker Atelier v. Honeywell*,[24] the First Department applied a contract liability limitation clause to defeat the plaintiff's claim that the defendant's negligence led to a successful burglary. In *Gentile v. Garden City Alarm Co.*,[25] however, a similar clause failed to protect the defendant alarm system installer when the system failed, the plaintiff's premises were subsequently burglarized, and the plaintiff's daughter was assaulted and injured. The distinction between the two cases was the *Gentile* court's finding that the negligence of the defendant was gross

22. 146 A.D.2d 892, 536 N.Y.S.2d 597 (3d Dep't 1989).
23. *Persons*, 146 A.D.2d at 893, 536 N.Y.S.2d at 598.
24. 148 A.D.2d 359, 539 N.Y.S.2d 7 (1st Dep't 1989).
25. 147 A.D.2d 124, 541 N.Y.S.2d 505 (2d Dep't 1989).

rather than ordinary and that exculpatory clauses were void under such circumstances.[26] Despite the difference in negligence standards, the facts in the two cases do not suggest any real difference in negligence between the two defendants.[27]

A recurrent and particularly horrific type of negligence case found in advance sheets every year involves swimming pool diving accidents in which the plaintiffs, almost invariably young people, are rendered quadriplegic as a result. This year was no exception with *Denkenshohn v. Davenport*[28] and *Kriz v. Schum*,[29] reported from the Third and Fourth Departments respectively. A unifying characteristic of these cases is that they are brought both as negligence actions, usually against the owner of the pool, and as product liability actions. There is enough case law in which such actions against pool manufacturers are dismissed or defeated to suggest that automatically bringing actions against such defendants may border on the sanctionable. As in the two cases this year, the pool manufacturer has put out an honest product which may be prone to misuse and is often misused. In both of the actions this year, the victim is probably the sole cause of the injuries incurred, and while a colorable cause of action against the owner may be stated, and in some instances proved, inclusion of the pool manufacturer is abusive.

C. Products Liability

The past *Survey* year did not see many significant products liability cases which changed the course of this area of tort law.[30] A case involving diethystilbestrol ("DES") merits attention. In the nationally noted and commented upon case of *Hymowitz v. Eli Lilly & Co.*,[31] New York's highest court determined that when plaintiffs could not determine the identification of the manufacturer of the DES adminis-

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26. *Gentile*, 147 A.D.2d at 130-31, 541 N.Y.S.2d at 509-10.

27. The alarm industry is growing rapidly and is subject, generally, to local or county regulation, and not much of that at best. This is a potential area of major liability analysis, especially since the alarm services sell both sophisticated equipment and high expectations of performance. The standard contract exculpatory clauses may fall to tort analysis which defines the right of a purchaser or lessor of such a system to minimal standards of reasonable competence in providing equipment, maintaining a system, and delivering the degree of security reasonably anticipated by the consumer.

28. 144 A.D.2d 58, 536 N.Y.S.2d 587 (3d Dep't 1989).

29. 145 A.D.2d 985, 536 N.Y.S.2d 356 (4th Dep't 1988).

30. See also Donnelly & Donnelly, *Commercial Law, 1989 Survey of N.Y. Law*, 41 SYRACUSE L. REV. 125 (1990), for additional discussion of products liability cases.

31. 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989).

tered to a parent, a market share theory was appropriate for finding liability and securing damages.[32]

Hymowitz is a concerted action case, but the only true concerted action of the numerous defendants in this and other DES cases is that they supplied a market demand at a common point in history.[33] Chief Judge Wachtler's opinion is a model of clarity as he charts the course of litigation that reflects hundreds of injury claims based on decade-old ingestion of DES.

As Judge Wachtler notes, DES cases are a subject unto themselves and, in fact, the window of liability has a clear, predictable closure based upon the withdrawal of the substance from use. In essence, the court's concert of action theory is as *sui generis* as the underlying problem is unique. The parallels in market development and distribution found in the history of DES are unprecedented in other products liability drug litigation.[34] *Hymowitz* is as close to a self-confessed, result-oriented decision as one can hope to find, yet it embodies a rational and defensible theory of liability based on known market shares and profits.

D. Medical Malpractice

In *McDougald v. Garber*,[35] the New York Court of Appeals established that loss of enjoyment of life was not a separate category of recovery which could be divorced from conscious pain and suffering, and that a person unaware of pain and suffering because of neurological damage was similarly unaware of loss of enjoyment of life. The plaintiff, at the age of thirty-one, went into an irreversible coma as a result of medical malpractice while she underwent a combined caesarian section and tubal ligation.[36] Chief Judge Wachtler found that "cognitive awareness is a prerequisite to recovery for loss of enjoyment of life."[37]

In *Lynch v. Bay Ridge Obstetrical*,[38] the Court of Appeals held

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32. *Hymowitz*, 73 N.Y.2d at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949-50.
33. *Id.* at 511-12, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.
34. *Id.* at 507-08, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947.
35. 73 N.Y.2d 246, 254, 536 N.E.2d 372, 375, 538 N.Y.S.2d 937, 940 (1989).
36. *McDougald*, 73 N.Y.2d at 251, 536 N.E.2d at 373, 538 N.Y.S.2d at 938.
37. *Id.* at 255, 536 N.E.2d at 375, 538 N.Y.S.2d at 940.
38. 72 N.Y.2d 632, 532 N.E.2d 1239, 536 N.Y.S.2d 11 (1988). The *Restatement (Second) of Torts* defines a superseding cause as "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which

that a woman's choice to have an abortion rather than to face the possiblity of bearing a congenitally defective child because of her doctor's negligence in prescribing medication when she was pregnant could not constitute a superseding cause, as a matter of law. The doctor's liability for the alleged negligence has to be analyzed without reference to the plaintiff's having exercised her right to secure an elective abortion.[39]

Issues over the requirement for a medical malpractice panel[40] are reported each year due to the fact that New York has not yet moved to abolish these largely useless panels. Counsel for plaintiffs generally tries to dispense with the panel whenever possible. A major basis for dispensing with the panel is that the gravamen of the plaintiff's case sounds in ordinary negligence rather than in medical malpractice.

In *Borrillo v. Beekman Downtown Hospital*,[41] the Second Department affirmed the trial court's grant of the plaintiff's motion to dispense with the panel when the underlying negligence of the defendant resulted in an assault on the plaintiff by a fellow patient. A panel could offer no special expertise under those facts.[42]

Psychiatric malpractice cases are often difficult because they do not have a foundation in clinical medicine, usually reflect no objective scientific evidence, and are often brought by plaintiffs with past or present serious emotional and mental ills. *Noto v. St. Vincent's Hospital & Medical Center*,[43] is just such a case. The defendant-psychiatrist did not deny that he had an affair with the plaintiff but he denied that the sexual relationship occurred during the course of his treatment of her for depression, alcohol and drug dependence, and seductive behavior.[44] The defendant-hospital's motion for summary judgment was granted by the trial court. In this case, apparently a case of first impression, the trial judge found that a hospital bears no possible liability for a staff doctor's pursuit of his own amatory interests where the hospital had no knowledge of his pursuit of and involvement with a patient.[45]

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his antecedent negligence is a substantial factor in bringing about." W. PROSSER & P. KEETON, PROSSER ON TORTS 271 (4th ed. 1971).

39. *Lynch*, 72 N.Y.2d at 637, 532 N.E.2d at 1242, 536 N.Y.S.2d at 14.
40. N.Y. JUD. LAW § 148-a (McKinney 1983 & Supp. 1990).
41. 146 A.D.2d 734, 537 N.Y.S.2d 219 (2d Dep't 1989).
42. *Borrillo*, 146 A.D.2d at 735, 537 N.Y.S.2d at 220.
43. 142 Misc. 2d 292, 537 N.Y.S.2d 446 (N.Y. Sup. Ct., N.Y. Co. 1988).
44. *Noto*, 142 Misc. 2d at 294, 537 N.Y.S.2d at 447.
45. *Id.* at 297, 537 N.Y.S.2d at 449.

The doctrine of *res ipsa loquitor* was applied in *Kerber v. Sarles*,[46] when the Fourth Department reversed the grant of summary judgment by the trial court on behalf of the defendant-podiatrist. The plaintiff underwent foot surgery and awoke from anesthesia to discover her front teeth missing.[47] No rationale for the trial court's grant of summary judgment appears, but the facts clearly demonstrate, as the appellate panel noted, a classic *res ipsa loquitor* situation. The plaintiff certainly is not in a position to know what happened, the defendants are not admitting anything, and teeth do not become dislodged during foot surgery ordinarily but for someone's negligence.

E. Intentional Torts

In past *Survey* articles, this author has lamented the practice of lawyers alleging prima facie tort as a "boilerplate" intentional tort cause of action. This arcane tort is rarely colorably pleaded and dismissal of the cause of action is the rule, not the exception. This is the first *Survey* year where this author encountered no reported cases of trial or appellate court dismissals of prima facie tort causes of action.

Similarly, there appears to be a consistent downturn in the number of cases considered by New York's courts under section 51 of the Civil Rights Act, New York's narrow and inadequate substitute for the broad-based invasion of privacy cause of action recognized in virtually every other jurisdiction. In a diversity action, the Second Circuit reversed the grant of summary judgment by the trial court and found that a genuine issue of fact required resolution.[48] Section 51 of the Civil Rights Law allows for both money damages and injunctive relief when a person's likeness is used without authorization for purposes of trade or advertisement as opposed to use by the news media.[49] In the diversity action, *Titan Sports, Inc. v. Comics World Corp.*, the plaintiff, who both promoted and managed such famous wrestlers as Hulk Hogan, "Macho Man" Savage, and similar luminaries objected to the inclusion of poster-type color photos of these wrestling greats in the defendant's publication.[50] The photos were bound into the publication as posters which could only be viewed by a

46. 151 A.D.2d 1031, 542 N.Y.S.2d 94, *appeal after remand*, 151 A.D.2d 1032, 544 N.Y.S.2d 522 (4th Dep't 1989).

47. *Id.*

48. 870 F.2d 85 (2d Cir. 1989).

49. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976 & Supp. 1990).

50. *Titan Sports*, 870 F.2d at 87.

reader by removing them entirely from the magazine. In a short but cogent restatement of New York law, the Second Circuit recognized that first amendment issues were raised by the type and location of the offending photo-posters which required a treatment by the trial court other than summary judgment.[51]

Two libel actions are worthy of note. In *Immuno A.G. v. Moor Jankowski*,[52] a libel action arising from the publication of a letter to the editor of a scientific journal, in which the plaintiff was assailed for his proposed research in hepatitis using captured wild chimpanzees. The animal rights movement is a highly visible and active element in public discourse today, and researchers who employ animals, wild or domestic, for experimentation, often face a panoply of challenges, legal and otherwise. In this instance, the researcher attacked by alleging that he had been defamed by the letter. The trial court denied summary judgment for the defendant, incorrectly, as it turned out, in the view of the appellate panel. The First Department noted that an examination of the allegations and the claimed libel showed that the statements were matters of opinion on events of public interest and that they were incapable of being proven false by the plaintiff.[53] Thus, the expressions were fully protected by the first amendment of the United States Constitution and summary judgment was appropriate.[54]

While not setting forth new law, presiding Judge Murphy's opinion for the panel is an excellent restatement of the governing first amendment principles which insulate participants in the public market of controveries and ideas not only from judgments for damages but from protracted and expensive litigation. The hesitancy of trial courts to grant summary judgment in libel cases involving alleged defamations embodying complex issues and facts should yield, as it should have in this action, to the predominant concern of preventing a libel action from chilling defendants expressions, actual or potential.

Opinions about the sartorial splendor of a testifying psychologist, published in a nonfiction book, are just that, ruled the First Department in granting summary judgment for a defendant in a libel action and dismissing the plaintiff's complaint. In *Weiner v. Doubleday &*

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51. *Id.* at 88.

52. 145 A.D.2d 114, 537 N.Y.S.2d 129 (1st Dep't), *aff'd*, 74 N.Y.S.2d 548, 549 N.E.2d 129, 549 N.Y.S.2d 938 (1989).

53. *Immuno A.G.*, 145 A.D.2d at 143, 537 N.Y.S.2d at 147.

54. *Id.*, at 144, 537 N.Y.S.2d at 147.

Co.,[55] the defendant described the plaintiff as "eccentrically costumed in bright red slacks and a loud plaid jacket" when testifying in a divorce action.[56] This is clearly a protected expression of opinion, assuming, of course, that the plaintiff was not wearing conservative business clothing while testifying.

III. Conclusion

The common law of torts remains a viable vehicle for protecting individuals against various and sundry harms. New York's courts were very active in 1989 applying existing law, especially in the area of excessive damages. Unfortunately, the past *Survey* year was not marked by exciting doctrinal developments. While the New York Court of Appeals is beginning to attract significant national attention for its scholarly and persuasive development of state constitutional law, torts seems to be, perhaps only temporarily, relegated to a backwater. Perhaps 1990 will be different.

55. *See* Weiner v. Doubleday & Co., 142 A.D.2d 100, 535 N.Y.S.2d 597 (1st Dep't 1988).

56. *Weiner*, 142 A.D.2d at 105, 535 N.Y.S.2d at 600.