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## Torts

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# TORTS

Ralph Michael Stein\*

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### I. INTRODUCTION

Tort law remains the most exciting and challenging area of private law to teach and practice. Tort law reflects, sometimes elegantly, often crudely, the evolving standards of civil conduct. New York courts last year were, as usual, confronted with litigants seeking to broaden the scope of duty and expand the range of damages. Most decisions conservatively preserved the legal status quo, some ventured forth intellectually. Most of the decisions were sound, but

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a few cases were wrongly decided.

## II. MEDICAL MALPRACTICE

Medical malpractice actions continue to occupy much court time. Although there is no evidence to support the oft-voiced fears of medical society spokespersons that a crisis again looms in New York, many cases require reexamination of negligence doctrines as applied in these often complex cases.

### A. Informed Consent

The informed consent doctrine in New York is codified.<sup>1</sup> The standard employed is one of reasonableness; the actions of both patient and physician are measured by what the reasonable person would have concluded in the circumstance presented.<sup>2</sup>

*Lipsius v. White*<sup>3</sup> presents the typical intermeshing of a cause of action asserting lack of informed consent with an action for malpractice, in that an unnecessary procedure was allegedly performed.<sup>4</sup> The trial court, on the defendant's motion, dismissed the plaintiff's complaint by ignoring both the quality and the quantity of the plaintiff's allegations that she had suffered injuries because of the severing of a nerve in her right hand by the defendant. The court rejected clear factual allegations that she was never informed of the risks and alternatives to the hand surgery.<sup>5</sup> The plaintiff also had the benefit of a unanimous panel finding of malpractice<sup>6</sup> and expert testimony to buttress her medical malpractice claim.<sup>7</sup>

It is hard to view *Lipsius* as anything other than a correction of a trial court decision that far exceeded law and judicial discretion in rendering a verdict for the defendant doctor. It is regretta-

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1. See N.Y. PUB. HEALTH LAW § 2805-d (McKinney 1977). New York codified the informed consent doctrine in the hope that its courts would be more restricted in their development of this doctrine than sister jurisdictions following a common-law course.

2. See *id.* § 2805-d(1), (3).

3. 91 A.D.2d 271, 458 N.Y.S.2d 928 (2d Dep't 1983).

4. *Id.* at 272, 458 N.Y.S.2d at 930.

5. *Id.* at 276, 458 N.Y.S.2d at 932.

6. *Id.* at 278, 458 N.Y.S.2d at 933. The panel was convened pursuant to N.Y. JUD. LAW § 148-a (McKinney 1983) and in this case, unlike many others, had little difficulty finding improper and negligent actions by the defendant. It is ironic that a panel system which seldom works properly suffered reversal by a trial judge in a case so obviously presenting evidence of malpractice.

7. 91 A.D.2d at 279, 458 N.Y.S.2d at 934.

ble that the appellate division did not couch its reversal in strong words of censure of the trial court.

Few specific problems in malpractice law trouble physicians more than the string of tragic cases arising out of the administration of oxygen to babies in the early 1950's. Blindness resulted in a number of instances and very large verdicts have been awarded to the victims, now young adults. As a Washington state court noted, physicians face enormous damages often after having tried "to steer their tiny patients between the Scylla of blindness and the Charybdis of brain damage."<sup>8</sup> In *Burton v. Brooklyn Doctors Hospital*,<sup>9</sup> the First Department reversed the trial court on the issue of damage. The court's discussion of informed consent is interesting because the court affirmed the finding of liability on a broader concept of informed consent than the current codified version.<sup>10</sup> Because the procedure in question, the administration of oxygen to premature infants, was in a "gray area," in regard to risks, when the plaintiff was blinded by oxygen therapy, the court clearly sustained the concept of informed consent even when the alternative for the parents was the possible death of their newborn.

The court's acknowledgment that "[i]n the summer of 1953 a significant segment of the medical community continued to believe that the liberal administration of oxygen to prematures was important in preventing death or brain damage"<sup>11</sup> underscores the vitality of the informed consent doctrine for establishing liability. With authorities almost equally divided as to when the procedure in question became medically unnecessary or too risky to employ routinely, informed consent emerges as the liability theory of choice. It is apparent that parents of infants blinded by oxygen administration were not properly informed, even by the doctrinal standards of thirty years ago.<sup>12</sup>

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8. *May v. Dafore*, 25 Wash. App. 575, —, 611 P.2d 1275, 1276 (1980).

9. 88 A.D.2d 217, 452 N.Y.S.2d 875 (1st Dep't 1982).

10. *See id.* at 225-26, 452 N.Y.S.2d at 881.

11. *Id.* at 218, 452 N.Y.S.2d at 887.

12. The specific medical issue in *Burton* will disappear from the litigation scene when all plaintiffs' claims are disposed of. The lesson remaining is that developing medical procedures will always create a period of doubt and possible subsequent disavowal. Plaintiffs seeking to rely upon malpractice theories will face the problem of establishing when a practice was no longer deemed generally acceptable. This type of case often creates jury sympathy both for the defendant doctor and the institutional defendant. When adequate facts indicate a lack of informed consent, this should be the cause of action most vigorously pursued by plaintiffs' counsel.

An area of duty continuing to develop is that owed to the unborn by a physician. In a case of first instance in the appellate courts, *Hughson v. St. Francis Hospital*,<sup>13</sup> the Second Department sustained the viability of a cause of action for prenatal injuries that allegedly occurred because informed consent was not properly obtained from the pregnant patient.<sup>14</sup> The *Hughson* court correctly distinguished the plaintiff's cause of action from those previously brought under the concept of "wrongful life."<sup>15</sup> In *Hughson* "the infant at bar was an identifiable being within the zone of danger at the time of the wrongful act. Thus, this case would appear to fall squarely within the general rule that a surviving child has a right to recover for tortiously inflicted prenatal injuries."<sup>16</sup>

*Hughson* is a logical and necessary extension of the doctrine that physicians owe a duty to those unborn children who enter the world injured due to the physician's negligent care of the mother. A child cannot give informed consent and, of course, an infant *in utero* is totally dependent on its mother's actions for its health and safety. Justice Weinstein, in *Hughson*, cogently established that the duty concept, based on informed consent, extends to the unborn.<sup>17</sup> This extension of duty should not significantly burden physicians because good medical practice dictates that therapy considerations include weighing effects on fetuses.

### B. Psychiatry

Psychiatric malpractice actions require factfinding that is qualitatively different from that in most medical negligence cases. In *Bell v. New York City Health and Hospitals Corp.*,<sup>18</sup> a jury verdict for the plaintiff was affirmed by the Second Department. The

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13. 92 A.D.2d 131, 459 N.Y.S.2d 814 (2d Dep't 1983).

14. Unfortunately, the facts underlying this action were inadvertently pleaded and thus the nature of the plaintiff's injury could not be reported. The appellate division decided the appeal on the purely legal issues raised. In the world of medical malpractice, it would have been useful to know the clinical background of this action, but this presumably may emerge in subsequent proceedings in this lawsuit.

15. The theory that being born, of itself, can be a legally recognized wrong for which a remedy, presumably limited to money damages, can be fashioned, has been rejected in New York. See *Becker v. Schwartz*, 46 N.Y.2d 401, 886 N.E.2d 807, 413 N.Y.S.2d 895 (1978); accord *Albala v. City of New York*, 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981).

16. 92 A.D.2d at 132, 459 N.Y.S.2d at 815-16 (citation omitted).

17. See *id.* at 133, 459 N.Y.S.2d at 816.

18. 90 A.D.2d 270, 456 N.Y.S.2d 787 (2d Dep't 1982).

plaintiff attempted suicide after being released from Kings County Hospital. The hospital had treated the plaintiff, who had a long history of psychopathology, for schizophrenia and had released the plaintiff despite evidence of suicidal ideation and psychotic thought content. The usual battle between expert witnesses was played; the plaintiff's psychiatric authority asserted that the plaintiff's release precipitated the suicide attempt and the defendant's expert maintained that the plaintiff's wife triggered his attempt at self-destruction.<sup>19</sup>

Because most psychiatric malpractice cases raise questions of judgmental error, which are difficult to resolve, standards for liability must be clearly articulated. The *Bell* court correctly and succinctly delineated the negligence elements that favored the plaintiff's claim: the inadequacy of the psychiatric examination and the psychiatrist's admission of departure from good medical practice. An inadequate record also contributed to the structuring of a picture of negligence.<sup>20</sup>

### C. The Panel Problem

The medical malpractice panels remain a problem. Designed to winnow out cases devoid of merit and to encourage settlement of justified claims, the panels have increasingly become the subject matter of court motions and disputes. As one trial justice recently noted, "[e]xperience has shown [the panel system] to be a costly failure. . . ."<sup>21</sup>

The question of physicians' impartiality on a panel was raised in several cases. The Supreme Court, Onondaga County, held that an anesthesiologist was disqualified because of his affiliation with

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19. *Id.* at 277-78, 456 N.Y.S.2d at 792.

20. *See id.* at 282, 456 N.Y.S.2d at 795. The absence of proper documentation remains an Achilles' heel for defendant physicians and hospitals. In a psychiatric case, where the observation and evaluation of behavior is usually the central issue, the failure to record and document observations remains potentially fatal for defendants. *Bell* reasserts this reality which attorneys for psychiatrists and hospitals should repeatedly bring to the attention of their clients.

21. *Stone v. Buffalo Gen. Hosp.*, 117 Misc. 2d 889, 890, 459 N.Y.S.2d 394, 395 (Sup. Ct., Erie Co. 1983). The court granted motions to dispense with the panel, accepting movants' contention that only factual issues were disputed and that panel submission was unnecessary and time-consuming. While interpreting the Judiciary Law to permit dispensing with the panel, Justice Bayser clearly expressed his dissatisfaction with the panel system. *See id.* (construing N.Y. Jud. Law § 148-a(1) (McKinney 1983)).

the defendant hospital.<sup>22</sup> The problem highlighted by this case is that in most malpractice actions outside major urban centers the designated panelist may well be affected, in one manner or another, by a relationship with the parties.<sup>23</sup>

The issue of bias arose when a law firm that was currently representing a panelist member in a separate matter also represented a physician appearing before that medical panel.<sup>24</sup> In this action, not only was the panelist disqualified, but it was necessary to vacate the findings of two panels to insure impartiality.<sup>25</sup> The procedure resulted in a waste of time and money for all. Because relatively few lawyers handle much of the medical malpractice defense work, similar conflicts will arise regularly. The writer suggests that the panel system as presently constituted should be abandoned due to a host of deficiencies proven by experience.<sup>26</sup>

#### D. Other Malpractice Issues

A medical malpractice trial is complicated and judicial decorum is of great importance. The Second Department recognized this and reversed for a new trial, vacating jury verdicts for the plaintiff, in *Lopez v. Linden General Hospital*.<sup>27</sup> The court found that the trial judge "routinely interrupted counsel to question the witnesses in a manner that was at times facetious, at other times pedantic . . . . The gratuitous nature of these intrusions . . . deprived the municipal appellants of a fair trial."<sup>28</sup> Shame on the trial court.

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22. See *King v. Retz*, 115 Misc. 2d 836, 454 N.Y.S.2d 594 (Sup. Ct., Onondaga Co. 1982).

23. The designated panelist in *King* practiced in the same department as several of the defendants. If he found that the questioned procedure indicated malpractice, he might be acting against his own prior medical judgment in similar cases. *Id.* at 842-43, 454 N.Y.S.2d at 598-99.

24. See *Scott v. Brooklyn Hosp.*, 93 A.D.2d 577, 462 N.Y.S.2d 272 (2d Dep't 1983).

25. See *id.* at 581-82, 462 N.Y.S.2d at 275.

26. It is not suggested that alternatives to full-blown trials are not desirable. The goals of the State, as expressed in the Judiciary Law, see N.Y. JUD. LAW § 148-a (McKinney 1983), can be met by a corps of full-time physicians who could successfully provide what *ad hoc* panel membership fails to achieve—equitable and unbiased medical opinions. With a surfeit of physicians looming as a probability and with older doctors reluctant to practice part-time because of malpractice premium rates, a full-time staff of medical specialists would likely be both workable and economical.

27. 89 A.D.2d 1010, 454 N.Y.S.2d 452 (2d Dep't 1982) (mem.).

28. *Id.* at 1010-11, 454 N.Y.S.2d at 453.

## III. NEGLIGENCE

A. *State and Municipal Entities*

The Court of Appeals, in a short and well-reasoned opinion, abolished the fellow-servant rule in *Buckley v. City of New York*.<sup>29</sup> Recognizing that "[t]he theoretical underpinnings of this rule have, to a large extent, been discredited in recent years,"<sup>30</sup> the Court analyzed the current operation of the rule and found that it worked to the disadvantage of municipal employees who, in many instances, are denied recourse to workers' compensation.<sup>31</sup>

An especially interesting municipal tort duty issue was decided in *DeLong v. County of Erie*.<sup>32</sup> This case involved negligence in dispatching police assistance to a woman who had called the 911 emergency number to report an attempted burglary. The 911 operator failed to obtain proper information from the caller and the wrong police department was therefore dispatched to a nonexistent address in its area. Subsequently, the woman calling for help was sexually assaulted and mortally stabbed.<sup>33</sup> Sustaining an award of \$600,000, the appellate court found the defendants, Erie County and the City of Buffalo, to be equally liable.<sup>34</sup> The court created a duty to provide nonnegligent emergency services to persons using the 911 number.

The providing, or the lack of providing, of police services has been a fertile ground for negligence actions in New York. For example, the Court of Appeals, through two key cases, has recognized that liability does not attach to a specific refusal to furnish protec-

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29. 56 N.Y.2d 300, 437 N.E.2d 1088, 452 N.Y.S.2d 331 (1982).

30. *Id.* at 303, 437 N.E.2d at 1089, 452 N.Y.S.2d at 332.

31. Although the rule was abolished entirely, the largest group that had been affected by its existence were police officers and firefighters. The rule has been a constant source of unhappiness to members of these high-risk occupations. For firefighters especially, injuries at the hands of negligent fellow-servants, without any other attributable negligent conduct, are frequent. Municipal governments will face increased liability exposure because of the rule's extinction but this problem could not justify retention of a nineteenth-century concept. Interestingly, the Court of Appeals, which has demonstrated both its reluctance to actively advance common-law duties and its preference for legislative action, pointedly emphasized the decisional law ancestry of the fellow-servant rule. *See id.* at 304, 437 N.E.2d at 1089-90, 452 N.Y.S.2d at 333.

32. 89 A.D.2d 376, 455 N.Y.S.2d 887 (4th Dep't 1982), *aff'd*, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983).

33. 89 A.D.2d at 379, 455 N.Y.S.2d at 889.

34. *See id.* at 377, 455 N.Y.S.2d at 888.



tion based on police evaluation of the request,<sup>35</sup> although failure to protect a threatened citizen publicly identified with helping the police is tortious.<sup>36</sup> The 911 system has further expanded the range of police response capabilities while providing local government with larger, centralized facilities for processing emergency calls.

It is common knowledge in New York, however, that two difficulties exist with the 911 system: 911 operators must process out nonemergency calls and the operators are not usually police officers. Thus, discretion and competence are required of personnel who often lack relevant experience and sufficient training. *DeLong* clearly warns local governments that they are accountable if they either fail to establish reasonable procedures for the 911 apparatus or if such procedures are ignored or overlooked. The harsh reality recognized by the *DeLong* court is that "without the critical mistakes in handling the initial transmission and the subsequent failure to conduct a follow-up, a Village of Kenmore police car would have arrived in time to prevent the attack or to stop the intruder before he could inflict the final fatal wound to the neck."<sup>37</sup>

Two Court of Appeals decisions worthy of brief note involving local government are *Garrett v. Holiday Inns, Inc.*<sup>38</sup> and *Kush v. City of Buffalo*.<sup>39</sup> The codefendant in *Garrett*, the Town of Greece, was found not only to have permitted blatant violations of its building and fire laws, but to have knowingly issued a false certifi-

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35. See *Riss v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968). Linda Riss was threatened with harm by the boyfriend she wished to leave, an attorney. The police failed to protect her and she was almost totally blinded by a thug hired by the boyfriend. While the writer agrees with the rule announced in *Riss*, the facts of the case are narrower than the rule it created. Riss provided the police with very specific information about threats made to her, see *id.* at 583, 240 N.E.2d at 862, 293 N.Y.S.2d at 899, which should have been sufficient to require police protection.

36. See *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958). Arnold Schuster spotted wanted bank robber Willy Sutton on a subway train. His information led to Sutton's apprehension and Schuster's murder on a Brooklyn street. *Schuster* was decided on a public policy basis; a citizen aiding police in the arrest of a wanted person established a right to be protected from individuals or groups taking a negative view of the citizen's action. See *id.* at 86, 154 N.E.2d at 540, 180 N.Y.S.2d at 274.

37. 89 A.D.2d at 385, 455 N.Y.S.2d at 892. The issue of the decedent's culpable conduct was never raised. She gave her address as "319 Victoria" without indicating Avenue or Boulevard. See *id.* at 378, 455 N.Y.S.2d at 889. It is clear from the court's opinion that the advertising and publicity given to the 911 number was sufficient to place the full onus for failing to get a correct address on the police.

38. 58 N.Y.2d 253, 447 N.E.2d 717, 460 N.Y.S.2d 774 (1983).

39. 59 N.Y.2d 26, 449 N.E.2d 725, 462 N.Y.S.2d 831 (1983).

cate of occupancy.<sup>40</sup> The appellant, third-party plaintiffs, advanced both contribution and indemnification theories against the Town.

The Court of Appeals found that contribution may be imposed against the municipal corporation. Although the Town owed no duty to the actual fire victims with regard to the inspection of the motel and the issuance of permits and certificates, a duty to owners and developers to share the cost of joint tortious activity exists.<sup>41</sup> Indemnity was properly found by the Court of Appeals to be inappropriate because no allegations were made that the Town was solely liable on a vicarious liability theory for the fire and subsequent injuries.<sup>42</sup>

The issue of proportionate tort liability for local government is well-raised by *Garrett*, with a clear analysis provided by the Court of Appeals. It is important to note that mere negligence in executing governmental duties will not expose a local government to liability through contribution.<sup>43</sup> In *Garrett* the defendant Town either deliberately, indeed criminally, colluded with builders or operators of the motel or the Town was grossly negligent in its inspection and certification procedure. In all likelihood, the former reason explains the events leading to the fatal fire.

If, as is alleged in the complaints, known, blatant, and dangerous violations existed on these premises, but the town affirmatively certified the premises as safe, upon which representation appellants justifiably relied in their dealings with the premises, then a proper basis for imposing liability on the town may well have been demonstrated.<sup>44</sup>

In effect, the Town of Greece was found liable for an intentional tort. The tort in question, if committed by and charged against an individual, would, in all probability, have constituted a crime. The Court's holding does not significantly expand local government tort liability because, hopefully, the type of municipal behavior disclosed by *Garrett* is a rarity. Certainly the decision must force responsible local government administrators to ensure a high level of code and ordinance compliance.

The dissent in *Garrett* is worthy of brief comment. Judge

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40. See 58 N.Y.2d at 262, 447 N.E.2d at 721, 460 N.Y.S.2d at 778.

41. See *id.* at 261-63, 447 N.E.2d at 721-22, 460 N.Y.S.2d at 778-79.

42. See *id.* at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779.

43. See *id.* at 262, 447 N.E.2d at 721, 460 N.Y.S.2d at 778.

44. *Id.* (citations and footnote omitted).

Jasen argued that *Garrett* was factually indistinguishable from prior Court of Appeals' decisions holding that no liability attaches to a town for breaching a general rather than a special duty. Citing *Sanchez v. Village of Liberty*,<sup>45</sup> in which public assistance recipients were moved into a falsely certified building which subsequently burned, Judge Jasen maintained that the *Sanchez* finding—no special municipal duty to the victims—precluded the outcome in *Garrett*.<sup>46</sup>

The writer suggests that Judge Jasen reversed the basis for proper analysis. *Garrett* was correctly decided; *Sanchez* was not. Seen retrospectively, the element of reliance raised in *Garrett* for developers and investors was even greater in *Sanchez*. This also means, of course, that the fire victims themselves should have been able to plead a special duty to themselves running from the Town. There is a major difference between the traditional doctrine of no general duty running from local government to potential victims of governmental negligence and the hopefully emerging concept of a municipal entity being held liable for any harm directly flowing from conscious, and usually corrupt, wrongdoing.

In the second case, *Kush v. City of Buffalo*,<sup>47</sup> the Court of Appeals confronted the duty issue with regard to injuries sustained by a child finding chemicals taken from a public school and then abandoned. The defendant school maintained chemicals for instructional purposes. Two student-employees, perhaps interested in conducting unauthorized experiments off the school premises, took a quantity of chemicals and hid them behind a bush where the eight-year-old plaintiff found the items. The explosion of the chemicals burned the boy.

The duty found in this case is not one of general supervision because, under that theory, liability for harm done by students to others is usually not found against a school.<sup>48</sup> Here the school maintained dangerous chemicals and the duty imposed is to rea-

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45. 42 N.Y.2d 876, 366 N.E.2d 870, 397 N.Y.S.2d 782 (1970), *appeal dismissed on other grounds*, 44 N.Y.2d 817, 377 N.E.2d 748, 406 N.Y.S.2d 295 (1978); *see also* *Quinn v. Nadler Bros.*, 92 A.D.2d 1013, 461 N.Y.S.2d 455 (3d Dep't 1983) (mem.).

46. *See* 58 N.Y.2d at 265-66, 447 N.E.2d at 723-24, 460 N.Y.S.2d at 780-81 (Jasen, J., dissenting).

47. 59 N.Y.2d 26, 449 N.E.2d 725, 462 N.Y.S.2d 831 (1983).

48. *See* *Hoose v. Drumm*, 281 N.Y. 54, 22 N.E.2d 233 (1939); *Kosok v. Young Men's Christian Ass'n*, 24 A.D.2d 113, 264 N.Y.S.2d 123 (1st Dep't 1965), *aff'd mem.*, 19 N.Y.2d 935, 228 N.E.2d 398, 281 N.Y.S.2d 341 (1967).

sonably ensure that the chemicals are properly safeguarded.

The Court of Appeals in *Kush* rejected the defendant's claim that the act of the student-employees in stealing the chemicals was beyond the scope of employment. As the Court noted, the "[d]efendant's duty in this case is not predicated on its status as an employer. Rather, the control and supervision of school-aged children present within the building, whether as students or employees, is an essential part of defendant's duty to secure dangerous chemicals from the children's access."<sup>49</sup> The Court had little difficulty disposing of the intervening act defense, noting:

Defendant's duty was to take reasonable steps to secure the dangerous chemicals from unsupervised access by children. By its very definition, any breach of this duty that leads to injury will involve an intentional, unauthorized taking of chemicals by a child. When the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs.<sup>50</sup>

Schools that purchase and store hazardous materials must also bear the responsibility for ensuring that injuries do not result from the activity. Although grounded in negligence, *Kush* really announces a standard closer to strict liability because access to chemicals by students, and the likelihood of small amounts being stolen by them, are both difficult, if not impossible, factors to control.

Compensation of over one and one-half million dollars was awarded to a paid fireman for permanent injuries sustained because of the explosion of a military weapon at a training session.<sup>51</sup> The Court of Claims found that the fireman, while at a state-supported county fire training center, was exposed to a white phosphorus antipersonnel grenade instead of the anticipated smoke bomb.<sup>52</sup> The court correctly found the State to be solely liable for what should have been denominated gross negligence. Although the State pled contributory negligence, the court disposed of this defense.

The claimant had a right to rely on [the state instructor's] repre-

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49. 59 N.Y.2d at 32, 449 N.E.2d at 728, 462 N.Y.S.2d at 834 (footnote omitted).

50. *Id.* at 33, 449 N.E.2d at 729, 462 N.Y.S.2d at 835.

51. *See Talbone v. State*, 116 Misc. 2d 864, 456 N.Y.S.2d 950 (Ct. Cl. 1982).

52. *See id.* at 865, 456 N.Y.S.2d at 953.

sentation that the device was a smoke bomb unless he knew or should have known otherwise. This was not established, since the only evidence of his possession of the device was in a darkened area outside the training facility. In addition, the claimant's failure to throw the grenade cannot be assigned as a cause, for he was acting under the reasonable belief that it was a smoke bomb and, hence, was harmless. Lastly, the claimant's failure to wear protective clothing cannot be considered a contributing factor, for there was no proof that had he done so, his injuries would have been any less severe.<sup>53</sup>

In *Ammirati v. New York City Transit Authority*,<sup>54</sup> the Supreme Court, Kings County, dismissed a claim against the Transit Authority alleging a failure to prevent or protect a passenger from injury by a thrown rock. The court correctly identified the gravamen of the complaint as an attack on governmental discretion to allocate police and other security resources rather than the articulation of a specific duty owed to the plaintiff.<sup>55</sup> This type of complaint seems to be filed by victims of crime with increasing frequency. As there is no sign that the Court of Appeals is considering adopting a wider concept of duty in this area, most of this litigation is wasteful and unproductive.

### B. General

The area of infliction of mental distress was highlighted again this past year. The most interesting case, while not strictly sounding in negligence, was *Garland v. Herrin*,<sup>56</sup> a diversity action. *Garland* was the civil sequel to a nationally publicized murder case.<sup>57</sup>

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53. *Id.* at 869, 456 N.Y.S.2d at 955.

54. 117 Misc. 2d 213, 457 N.Y.S.2d 738 (Sup. Ct., Kings Co. 1983).

55. *See id.* at 215, 457 N.Y.S.2d at 740.

56. 554 F. Supp. 308 (S.D.N.Y. 1983). Subsequent to the writing of this *Survey* article, the Second Circuit reversed the district court. *See Garland v. Herrin*, No. 1341 (2d Cir. Dec. 8, 1983). The Second Circuit found that the district court's analysis was an extension rather than an application of New York law and was unsustainable. As a result of the Second Circuit's widely publicized reversal, several New York legislators have announced plans to introduce bills to create private causes of action in situations similar to *Garland*.

57. Richard Herrin and Bonnie Garland were lovers. When Garland sought to end the relationship, Herrin became despondent. In July 1977, Garland discussed her relationship with Herrin in her bedroom and indicated, according to Herrin, that she wished to date other men. The only thing definitively known to have followed this conversation was Herrin's bludgeoning of Garland with a hammer. Herrin subsequently told police of his act and a local officer went to the Garland home and asked the unaware Mrs. Garland to take him to

The victim's parents brought this action on principle rather than as a serious quest for money damages from a prison inmate.<sup>58</sup> Applying New York law, District Court Judge Griesa found that the murderous and brutal assault on the victim in her own bedroom constituted a reckless infliction of mental distress on both parents, even though neither parent witnessed the attack and only the mother discovered her dying daughter in the home.<sup>59</sup> The husband first saw his daughter at the hospital.

Although not binding, of course, on New York courts, the district court opinion is disturbing. New York, through two key cases, had previously recognized both a cause of action for mental distress unconnected to physical injury<sup>60</sup> and the tort of intentional infliction of mental distress.<sup>61</sup> In both cases the harm was both foreseeable and direct. No New York case has accepted the doctrine of liability for mental harm to persons not witnessing the commission of a crime or tort, but merely viewing the aftermath in the form of the victim. The district court gratuitously stated that "there is no reason to believe that the New York Court of Appeals would not also approve"<sup>62</sup> the section of the *Restatement (Second) of Torts* creating liability for emotional harm to third parties.<sup>63</sup> A reasonable basis for believing that New York would *not* adopt that provision, for a judge sitting in a diversity action, is that it has not done so.

Further, the Restatement section relied on by Judge Griesa requires the third person to witness the extreme or outrageous behavior, not the aftermath.<sup>64</sup> The Restatement was not intended to

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the girl's bedroom, where the mother then discovered her battered and dying comatose daughter. The plaintiff father was notified by telephone and rushed to the hospital. *Id.* at 311.

58. Personal knowledge of the author.

59. *See* 554 F. Supp. at 308.

60. *See Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

61. *See Halio v. Laurie*, 15 A.D.2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961).

62. 554 F. Supp. at 313.

63. Section 46 of the Restatement provides, in pertinent part:

(2) Where such conduct is directed at a third person the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

RESTATEMENT (SECOND) OF TORTS § 46 (1965).

64. Section 46 provides that a family member must be "present at the time." *Id.*

expand liability to compensate those who discover the victims of crime, such as Mrs. Garland, and even less so to compensate those summoned by telephone to the hospital. While a description of the murder of Bonnie Garland evokes horror, more so because of the mother's discovery of the dying girl, there is no basis in New York law to support this diversity-action verdict.<sup>65</sup> No doubt others who suffer genuine emotional harm under like circumstances will attempt to have the New York courts follow *Garland*. Unless a new right is articulated, *Garland* provides no basis for such a theory of recovery.

Several other cases deserve brief mention. Following accepted New York doctrine, the Second Department denied the existence of a cause of action predicated solely on the emotional distress of a mother witnessing her baby's death because of negligent medical care.<sup>66</sup> A guest's complaint that being prematurely and negligently checked out of a hotel justified damages for emotional harm was dismissed under the theory of triviality.<sup>67</sup> Emotional distress, as the sole harm resulting from the delivery of a stillborn infant, allegedly because of negligence, is not actionable without physical injuries.<sup>68</sup> Finally, mental distress resulting from the negligent repair of a car does not add up to a cause of action.<sup>69</sup> It is fortunate that the court denied this cause of action or else the courts would truly have been unmanageably flooded by continually distressed motorists.

### C. *Specific Problem Areas*

As always, persistent issues arose last year in both old and new forms. The question of infant liability for negligence was presented in the context of a car damaged by keys thrown by an eleven-year-

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65. The district court correctly noted that "both the New York courts and the drafters of the Restatement are concerned about the need to impose appropriate limits on liability for a somewhat intangible injury such as emotional distress." 554 F. Supp. at 314. It is hard to know what limits can be raised when so often persons discover crime's dead or wounded victims.

66. See *Quijije v. Lutheran Medical Center*, 92 A.D.2d 935, 460 N.Y.S.2d 600 (2d Dep't 1983) (mem.).

67. See *Pollock v. Holsa Corp.*, 114 Misc. 2d 1076, 454 N.Y.S.2d 582 (Sup. Ct. App. T., 1st Dep't 1982).

68. See *Friedman v. Meyer*, 90 A.D.2d 511, 454 N.Y.S.2d 909 (2d Dep't 1982) (mem.).

69. See *Ford v. Village Imports, Ltd.*, 92 A.D.2d 717, 461 N.Y.S.2d 108 (4th Dep't 1983) (mem.).

old child.<sup>70</sup> The child was engaged in a game with playmates. The court found that an eleven-year-old child was capable of following the reasonable standard of care demanded by the situation. The plaintiff failed, however, to have the court impose liability on the key-throwing child's parent under General Obligations Law section 3-112.<sup>71</sup> That statute creates liability when a child "willfully, maliciously or unlawfully" destroys property.<sup>72</sup> The court noted that the plaintiff's key to proving the parents' liability rested on showing a purpose on the child's part other than play. Because the facts tended to demonstrate that the negligent defendant was playing,<sup>73</sup> access to the "deep pocket" was denied.

A second child-related case involved the theory of negligent entrustment.<sup>74</sup> A motorist, sued for injuring a child on a skateboard, counterclaimed against the injured child's father. The appellate division dismissed the counterclaim on the sole finding that a skateboard is not a dangerous instrument.<sup>75</sup>

Few interesting gross negligence actions were decided during this *Survey* year, but *Veals v. Consolidated Edison Co.*<sup>76</sup> deserves brief mention. The plaintiff, characterized by the court as "a quiet but feisty professor of gerontology at Columbia University,"<sup>77</sup> suffered the loss of residential electrical service even though the defendant acknowledged that the plaintiff had paid all of his bills in a timely manner. The defendant clearly went its own bureaucratic way without reference to the facts or proper procedure. The civil court judge correctly concluded that such actions

went far beyond mere negligence or carelessness. I find that the actions of Con Edison fit the test applicable for a finding of gross negligence. The striking fact here is that Con Edison *admitted* that the customer had paid his bill but proceeded to sever his

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70. See *Deliso v. Cangialosi*, 117 Misc. 2d 105, 457 N.Y.S.2d 396 (N.Y.C. Civ. Ct., Kings Co. 1983).

71. See *id.* at 107, 457 N.Y.S.2d at 398.

72. See N.Y. GEN. OBLIG. LAW § 3-112 (McKinney Supp. 1983-1984).

73. See 117 Misc. 2d at 107, 457 N.Y.S.2d at 398.

74. The theory of negligent entrustment arises when a parent allows a minor to possess or operate dangerous instruments. See *Nolechek v. Gesuale*, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978). The finding that an object is a dangerous instrument has been left to case adjudication.

75. See *Young v. Dalidowicz*, 92 A.D.2d 242, 248, 460 N.Y.S.2d 82, 86 (2d Dep't 1983).

76. 114 Misc. 2d 626, 452 N.Y.S.2d 153 (N.Y.C. Civ. Ct., Kings Co. 1983).

77. *Id.* at 627, 452 N.Y.S.2d at 154.



utility service anyway despite this knowledge.<sup>78</sup>

Allegations of gross negligence are appropriate in small claims actions such as *Veals* and may, in fact, be the only effective deterrent for incompetent public utilities and common carriers who rarely cause great special damages in nonpersonal injury cases.

#### IV. STRICT LIABILITY

##### A. *Products Liability*

No major products liability cases were decided last year. Announced decisions reflected the continuation of past doctrine. Perhaps the most interesting discussion was Judge Fuchsberg's dissent in *Gobhai v. KLM Royal Dutch Airlines*.<sup>79</sup> The Court of Appeals affirmed, without opinion, the appellate division's dismissal of an action sounding in strict products liability. The plaintiff had received from her son a pair of slippers which the defendant airline had given him as part of its first-class trans-Atlantic service. The plaintiff fell and injured herself at home allegedly because the slippers, brand new when she removed them from their protective wrapper, were defective.<sup>80</sup>

Judge Fuchsberg cogently analyzed the prevailing confusion in New York law resulting from the sales-service dichotomy, a concept never rationally and finally delineated in case law, and criticized what he viewed as the majority's "inadmissibly narrow definition of a sale."<sup>81</sup> This issue recurs every year with no solution adequate to either guide counsel or protect injured parties yet in sight. Judge Fuchsberg also highlighted another perennial New York products liability issue.

Preliminarily, I note that, though both courts below broadly referred to the action as though it were one in strict products liability alone, the pleadings, as already indicated, also expressly speak to breach of warranty and, arguably, if liberally construed, to negligence as well. This oversight is especially troublesome because, in this area of litigation, pleading (and substantive) categorization has been so beset by a tendency to overlap, that in the past we have thought it worthwhile to comment

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78. *Id.* at 629, 452 N.Y.S.2d at 155.

79. 57 N.Y.2d 839, 442 N.E.2d 61, 455 N.Y.S.2d 764 (1982) (mem.).

80. *Id.* at 842, 442 N.E.2d at 62, 455 N.Y.S.2d at 765-66 (Fuchsberg, J., dissenting).

81. *See id.* at 841, 442 N.E.2d at 62, 455 N.Y.S.2d at 765.

that "it may be open to a particular plaintiff to base his case on contract liability or negligence or strict products liability, or on some combination thereof."<sup>82</sup>

Although reflecting his own experience as a plaintiff's trial advocate, Judge Fuchsberg's dissent points out some of the bothersome contradictions in New York's strict products liability law. The slippers in question here were part of the price of an airline ticket and were distributed as a distinct product for use during and after the journey. The plaintiff should have had her day in court on a product liability theory.

Product-related tort cases often raise choice-of-law issues. In *Bewers v. American Home Products Corp.*,<sup>83</sup> the defendants sought to dismiss the plaintiffs' action under the doctrine of *forum non conveniens*. The plaintiffs, three English couples, demanded recovery for injuries they believed were caused by using oral contraceptives manufactured by the defendant.<sup>84</sup> The contraceptives were marketed, promoted, and distributed throughout the United Kingdom.

The court, in denying the motions for dismissal, noted the grounds for analyzing *forum non conveniens* motions.<sup>85</sup> In this case, the court found that dismissal would benefit the defendants by depriving the plaintiffs of their "strongest cause of action, . . . strict products liability."<sup>86</sup> Further, the English statute of limitations might well be an absolute bar to bringing the action in the United Kingdom.<sup>87</sup> Recognizing the burden carried by the plaintiffs if dismissal was ordered, the court noted:

Whether plaintiffs would have an adequate forum in England if their actions are dismissed in New York is uncertain, at best. If these cases are conditionally dismissed and plaintiffs' attempt to bring them in England is rebuffed, they will then have to return here after significant delay and additional expense. This prospect imposes on defendants a somewhat heavier burden to show that New York is an inconvenient forum than they would bear if an

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82. *Id.* at 843, 442 N.E.2d at 63, 455 N.Y.S.2d at 765 (quoting *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 400, 335 N.E.2d 275, 277, 373 N.Y.S.2d 39, 41 (1975)).

83. 117 Misc. 2d 991, 459 N.Y.S.2d 666 (Sup. Ct., N.Y. Co. 1982).

84. Three different oral contraceptives were implicated in the harm claimed by the women plaintiffs. *See id.* at 992-93, 459 N.Y.S.2d at 668-69.

85. *See id.* at 994, 459 N.Y.S.2d at 669.

86. *Id.* at 995, 459 N.Y.S.2d at 670.

87. *Id.* at 996, 459 N.Y.S.2d at 670.

adequate alternative forum were unambiguously available.<sup>88</sup>

The convenience issue was also analyzed at length. An important argument accepted by the court for not dismissing this action was that

[u]nlike the vast majority of tort cases in which *forum non conveniens* is an issue, the instant cases do not arise out of an accident, which can happen as readily in one place as another. The tortious acts here alleged involve calculation and decision, that is, intentional and deliberate conduct. This conduct, the making of defendants' relevant corporate decisions, is claimed, without contradiction, to have occurred not in England, but in New York.<sup>89</sup>

Necessary proof, witnesses, and documents in all likelihood would be found more readily in New York than in London.

The defendants argued that to dismiss the actions would show deference to British policy objectives, which do not include strict products liability as a cause of action.<sup>90</sup> The defendants also worried that the trial of this issue in New York would be an unwarranted act of paternalism towards the Mother Country.<sup>91</sup> The court properly rejected these assertions as groundless. Reaching a key analytical point, the court held that

[t]he trend toward uniformity in products liability law, i.e., towards consumer protection and the rule of strict products liability, suggests that the courts in this country should be less reluctant to retain jurisdiction over transnational products liability litigation and certainly less reluctant to apply the forum's strict products liability law.<sup>92</sup>

American companies, doing business in and deriving profit from a New York base, should not be permitted to hide behind the often less rigorous laws of forums where injury occurs. *Bewers* is one of the most cogently analytical tort law/choice-of-law cases of recent memory. Transnational product liability cases will increase and *Bewers* provides a good framework for the choice-of-law dilemmas sure to arise. As the court concluded:

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88. *Id.* at 997, 459 N.Y.S.2d at 671.

89. *Id.* at 1000, 459 N.Y.S.2d at 673.

90. *See id.* at 1004, 459 N.Y.S.2d at 675.

91. *See id.* at 1005, 459 N.Y.S.2d at 676.

92. *Id.* at 1002, 459 N.Y.S.2d at 674.

On the major choice of law issue, New York law should be applied. The complications of international products liability litigation require sensible and easily applicable *forum non conveniens* and choice of law rules. New York is the headquarters or the principal place of business of many multinational corporations. It should not, however, be merely the center for corporate headquarters but also the leader in developing laws to protect innocent persons from wrongful activities of such corporations, wherever they choose to conduct their operations. New York should not become the haven of marauding tort-feasors.<sup>93</sup>

In other products liability actions it was held that strict liability should not apply to the destruction of business papers belonging to guests at a hotel.<sup>94</sup>

In yet another Dalkon Shield action, *Lindsey v. A. H. Robins Co.*,<sup>95</sup> the Appellate Division, Second Department, reversed the trial court for applying the wrong statute of limitations. The Second Department found that where an infection followed the implantation of a Dalkon Shield, the cause of action accrued with the injury, not at the date of insertion.<sup>96</sup> Because much prior case law sets accrual of the cause of action at the date a foreign object is introduced into the plaintiff's body, the court found it necessary to distinguish its decision from this prior case law.

In sum we hold that an intrauterine device which facilitates infection is significantly different from dust, asbestos particles, a hazardous dye, or a thorium dioxide substance which directly and immediately act upon the body causing injury and that the date of onset of injury rather than the date of insertion is the accrual date to be used for computing the limitation of the time for bringing suit in this kind of case.<sup>97</sup>

The court's decision in *Lindsey* reflects the real differences between pathogenic agents that immediately begin causing harm and

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93. *Id.* at 1010, 459 N.Y.S.2d at 678.

94. *See Arrow Elec., Inc. v. Stouffer Corp.*, 117 Misc. 2d 554, 458 N.Y.S.2d 461 (Sup. Ct., N.Y. Co. 1982). This case arose from the fatal Stouffer fire in Westchester that killed 26 people. The court relied on the sales-service dichotomy—because there was no sale, there could be no strict products liability action.

95. 91 A.D.2d 150, 458 N.Y.S.2d 602 (2d Dep't 1983). The case was set to be argued before the Court of Appeals on Oct. 25, 1983. *See* Court of Appeals Calendar, 190 N.Y.L.J., Oct. 17, 1983, at 16, col. 2.

96. 91 A.D.2d at 160, 458 N.Y.S.2d at 607-08.

97. *Id.*

the defectively designed product that may or may not cause harm to the user. Applying the conventional accrual rule to a product like the Dalkon Shield would deprive its users of any measure of legal redress for the harm they might suffer.<sup>98</sup>

Continuing New York's line of concert of action products liability cases was *Centone v. Schmidt & Sons, Inc.*<sup>99</sup> In *Centone* the plaintiff sued Schmidt & Sons for injuries caused by an exploding bottle. Schmidt & Sons then commenced a third-party action against five glass bottle manufacturers, its sole suppliers. The bottle could not be traced back to any specific manufacturer.<sup>100</sup> Schmidt & Sons' problem was that it could not establish tortious conduct on the part of any of the manufacturers and really sought to rely on the rejected enterprise liability concept.<sup>101</sup> The court denied the five third-party defendants' motion for summary judgment pending further discovery by Schmidt & Sons. It is most unlikely that Schmidt & Sons will uncover evidence of the requisite tortious conduct by the defendants or that the concert of action theory will be expanded to embrace enterprise liability.

### B. Dram Shop

Two cases warranting brief notice were decided this past year concerning the Dram Shop Act.<sup>102</sup> In *Kohler v. Wray*,<sup>103</sup> the plaintiff sought to expand the operation of the Dram Shop Act to include social guests who contribute towards the cost of the alcoholic beverages.<sup>104</sup> New York courts had previously limited the operation of the Act to sales situations and explicitly excluded social guests.<sup>105</sup> In *Kohler*, the plaintiff was beaten up by a fellow guest

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98. A federal court arrived at a similar conclusion in a diversity action involving the same manufacturer. See *Bailey v. A. H. Robins Co., Inc.*, 560 F. Supp. 833 (N.D.N.Y. 1983). The district court relied on the doctrine of equitable estoppel to strike down a defense that the plaintiff's action was time barred.

99. 114 Misc. 2d 840, 452 N.Y.S.2d 299 (Sup. Ct., Nassau Co. 1983).

100. See *id.* at 841, 452 N.Y.S.2d at 301.

101. *Id.* at 845, 452 N.Y.S.2d at 303; see *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (enterprise liability theory could not be relied on by women plaintiffs seeking to hold drug manufacturers liable for injuries sustained by administration of drug DES to their mothers during pregnancy), *cert. denied*, 449 U.S. 912 (1980).

102. See N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1983-1984).

103. 114 Misc. 2d 856, 452 N.Y.S.2d 831 (Sup. Ct., Steuben Co. 1982).

104. See *id.* at 858, 452 N.Y.S.2d at 833.

105. See, e.g., *Edgar v. Kajet*, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (Sup. Ct., Nassau Co. 1975), *aff'd mem.*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (2d Dep't 1976). The court sent what

who was served beer by the defendants. The plaintiff maintained that his five dollar contribution transformed the party situation and made the hosts sellers under the Dram Shop Act.<sup>106</sup> This contention was rejected by the court, as *Edgar* dictated it must be.<sup>107</sup>

A more complex problem was presented in *Wright v. Sunset Recreation, Inc.*<sup>108</sup> Plaintiff's decedent was killed by an allegedly drunken driver who had been served liquor, while intoxicated, in a bowling alley by waitresses from a tavern housed in the same building. The defendant owned the structure. The court found that no sale was made by the defendant and that the failure to allege such a sale was a fatal defect where liability under the Dram Shop Act was sought.<sup>109</sup> The court rejected the plaintiff's theory that a beneficial relationship existed between the defendant and the tavern.<sup>110</sup>

The writer believes that a quasi-sale by the defendant occurred which is within the Dram Shop Act. Here, both the tavern and the bowling alley shared a common forename, occupied the same quarters, and the bar's waitresses roamed through the bowling alley soliciting and filling orders. The defendant possibly assisted drunken bowlers in purchasing liquor from its tenant from whom it received, minimally at least, rent. Possibly the defendant also received some other remuneration from the sale of alcohol by the tavern. The dismissal of the complaint precluded the plaintiff from adducing proof to show the defendant should be considered a seller under the Dram Shop Act and was, at best, premature.

## V. INTENTIONAL TORTS

### A. Abusive Discharge

The Court of Appeals decided in *Murphy v. American Home Products Corp.*<sup>111</sup> that no cause of action for abusive discharge exists in New York. *Murphy* is one of the most important decisions

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should have been a clear message in *Edgar* that the Dram Shop Act was to be narrowly construed. The sale of a beverage by a licensed business was a *sine qua non* for invoking the Act. Apparently the message was not received by all.

106. See 114 Misc. 2d at 858, 452 N.Y.S.2d at 833.

107. See *id.*

108. 91 A.D.2d 701, 457 N.Y.S.2d 606 (3d Dep't 1982) (mem.).

109. See *id.* at 701, 457 N.Y.S.2d at 608.

110. See *id.*

111. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

of the Court of Appeals this past year because it forecloses actions that other jurisdictions increasingly recognize. The plaintiff in *Murphy* alleged that he had been dismissed for "blowing the whistle" to top management about accounting irregularities<sup>112</sup> and because of his age.<sup>113</sup>

The Court of Appeals recognized the increasing acceptance of a cause of action in tort for abusive discharge.

Those jurisdictions that have modified the traditional at-will rule appear to have been motivated by conclusions that the freedom of contract underpinnings of the rule have become outdated, that individual employees in the modern work force do not have the bargaining power to negotiate security for the jobs on which they have grown to rely, and that the rule yields harsh results for those employees who do not enjoy the benefits of express contractual limitations on the power of dismissal. Whether these conclusions are supportable or whether for other compelling reasons employers should, as a matter of policy, be held liable to at-will employees discharged in circumstances for which no liability has existed at common law, are issues better left to resolution at the hands of the Legislature. In addition to the fundamental question whether such liability should be recognized in New York, of no less practical importance is the definition of its configuration if it is to be recognized.<sup>114</sup>

The Court also felt that the dislocation in expectations that would be created by an abusive discharge cause of action was too great to be supported solely by a decisional law basis.<sup>115</sup> As with the repeated attempts to have the Court of Appeals recognize a common-law right of privacy, so too in this area, the Court indicated its desire to defer to the Legislature.<sup>116</sup>

The Court's fears about the disruption of stable expectations are, the writer believes, grossly exaggerated. Court-ordered reinstatement and back wages, as well as punitive damages, are already within the borders of New York law in sex, race, and religious bias

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112. *See id.* at 297-98, 448 N.E.2d at 87, 461 N.Y.S.2d at 233.

113. *See id.* at 298, 448 N.E.2d at 87, 461 N.Y.S.2d at 233. Plaintiff was over 50 years old. His age discrimination complaint was rejected by the appellate division as time-barred, but was reinstated by the Court of Appeals. *See id.* at 297, 306-07, 448 N.E.2d at 87, 92, 461 N.Y.S.2d at 233, 238.

114. *Id.* at 301, 448 N.E.2d at 89, 461 N.Y.S.2d at 236.

115. *See id.* at 302, 448 N.E.2d at 90, 461 N.Y.S.2d at 236.

116. *See id.*

cases.<sup>117</sup> The perennial judicial fear that a new tort law duty will unleash an unacceptable horde of litigants has never materialized before; it would not now.<sup>118</sup>

Regardless of the direction taken by sister states, it is within the power of the Court of Appeals to recognize the tort of abusive discharge. Employment is increasingly regarded as a property right, the deprivation of which should not occur for arbitrary or capricious reasons. An additional major policy reason for recognizing a cause of action for abusive discharge lies in the reality that some employment terminations follow an employee's exposure of corrupt or illegal practices of the employer. The employee may, as in *Murphy*, reveal the problems internally, or resort may be had to the police, legislative bodies, or the media. The activity of whistle blowing, although certainly prone to abuse by disaffected employees, should be supported by public policy through a cause of action for abusive discharge. In the critical field of environmental protection, for example, society needs to be protected from illegal hazards, the revelation of which can often only come from employees of violators. Because employment termination usually occurs after an employee reveals information of improper or criminal activities, protection must be afforded to whistle blowers.

Because of the political and economic interests involved, the writer is not sanguine over the likelihood of a legislatively created cause of action for abusive discharge. This is a matter with which the Court of Appeals can deal and the Court should have recognized the common-law right sought by the plaintiff in *Murphy*.

### B. Privacy and Publicity

In the absence of either a legislative or statutory general right of privacy, litigants in New York continue to depend, in many instances, on section fifty-one of the Civil Rights Law.<sup>119</sup> In some

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117. See, e.g., *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 79, 417 N.E.2d 525, 529, 436 N.Y.S.2d 231, 235 (1980) (religious bias); *Batavia Lodge v. State Div. of Human Rights*, 35 N.Y.2d 143, 146, 316 N.E.2d 318, 320, 359 N.Y.S.2d 25, 27 (1974) (racial bias); *Mize v. State Div. of Human Rights*, 33 N.Y.2d 53, 56, 304 N.E.2d 231, 233, 349 N.Y.S.2d 364, 366-67 (1973) (sex bias); N.Y. EXEC. LAW §§ 296(1)(a), 297(4)(c)(iii) (McKinney 1982).

118. For a refutation of the standard argument against extending duties, see Judge Meyer's dissent in *Murphy*, 58 N.Y.2d at 314-15, 448 N.E.2d at 97, 461 N.Y.S.2d at 243 (Meyer, J., dissenting).

119. See N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 1983-1984).



instances, resort to the Civil Rights Law is inappropriate, but this practice will continue as long as New York remains in the minority of states which do not recognize a right of privacy.

The Court of Appeals in *Welch v. Mr. Christmas Inc.*<sup>120</sup> affirmed an award of both compensatory and exemplary damages to an actor whose commercial for the defendant was broadcast after the contract for its use expired.<sup>121</sup> Although the commercial was aired by a distributor and not by the defendant, the defendant was liable because it "had actively encouraged the maximum use of the commercial in order to sell Christmas trees and had placed no restrictions on the use of the commercial by its distributors, and [its president] was sure that he had not received back all of the prints sent out."<sup>122</sup>

In another Court of Appeals decision, the Court refused to apply section fifty-one of the Civil Rights Law for the benefit of actress Brooke Shields in a media-publicized action.<sup>123</sup> With her mother's consent, Shields had posed at the age of ten for the defendant who now wished to publish the pictures. The plaintiff sought to enjoin photos of her frolicking nude in a bathtub.<sup>124</sup> This action was complicated by the issue of the plaintiff's infant status at the time the contract was executed. The Court discussed the nature of child modeling careers and concluded that the parents enjoyed the right to enter into contracts which, under the Civil Rights Law, could not be disaffirmed by the model on attaining the age of majority.<sup>125</sup> The Court noted that the photos in question were not pornographic, a factor apparently relevant in denying the plaintiff the injunctive relief sought.<sup>126</sup>

In dissent, Judge Jasen disagreed with the majority's application of section fifty-one, noting:

The majority holds, as a matter of law, not only in this case but as to all present and future consents executed by parents on behalf of children pursuant to sections 50 and 51 of the Civil Rights Law, that once a parent consents to the invasion of pri-

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120. 57 N.Y.2d 143, 440 N.E.2d 1317, 454 N.Y.S.2d 971 (1982).

121. *See id.* at 146, 440 N.E.2d at 1319, 454 N.Y.S.2d at 972.

122. *Id.* at 146, 440 N.E.2d at 1319, 454 N.Y.S.2d at 973.

123. *See Shields v. Gross*, 58 N.Y.2d 338, 448 N.E.2d 108, 461 N.Y.S.2d 254 (1983).

124. *Id.* at 342, 448 N.E.2d at 109, 461 N.Y.S.2d at 255.

125. *See id.* at 345, 448 N.E.2d at 111, 461 N.Y.S.2d at 257.

126. *See id.* at 346, 448 N.E.2d at 112, 461 N.Y.S.2d at 258.

vacy of a child, the child is forever bound by that consent and may never disaffirm the continued invasion of his or her privacy, even where the continued invasion of the child's privacy may cause the child enormous embarrassment, distress and humiliation.<sup>127</sup>

Judge Jasen's analysis recognized that section fifty-one should be interpreted to afford plaintiffs a right to prevent and enjoin ongoing commercial exploitation of their likenesses, based on prior parental consent, after they become legal adults. It is clear, however, that section fifty-one was never intended to vitiate accepted doctrines with regard to disavowal of contracts executed in infancy.<sup>128</sup>

Judge Jasen correctly recognized that the real issue in *Shields* was the protection of exploitable infants at the point when they become legally competent to manage their own affairs. Section fifty-one should allow a person, obligated during infancy by contracts entered into by parents, to halt the commercial use of his or her name and to forego both the benefits and the costs involved in such use. As neither the text nor the legislative history of section fifty-one precludes such a possibility, the Court of Appeals decided *Shields* incorrectly.

Allegations of violations of New York's limited right of privacy as codified in section fifty-one of the Civil Rights Law are frequently countered by first amendment defenses. In *Davis v. High Society Magazine, Inc.*,<sup>129</sup> a famous female pugilist sought damages for the publication of a photo, allegedly of her and naming her as the subject, showing her bare-breasted in a boxing ring. Revers-

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127. *Id.* (Jasen, J., dissenting).

128. As Judge Jasen stated:

Two factors distinguish sections 50 and 51 of the Civil Rights Law from those statutory provisions which do, in certain contexts, abolish the minor's right to disaffirm a contract. The first is that in all cases when the Legislature has intended to do so, they have made their intention clear by specific language which directly refers to the infant's common-law right. The absence of any reference in the Civil Rights Law to the minor's right to disaffirm a contract, especially when it is clear that the right to disaffirm was well established, indicates that the Legislature did not intend to affect that right. Secondly, unlike the other kinds of contracts which the Legislature has designated as immune from the minor's right to disaffirm, it cannot be said that a contract releasing all rights to photographs or even limited rights to those pictures is necessarily beneficial to the infant. This is even more true when the pictures, as in this case, are of the variety which can be exploited in the future or used in publications of questionable taste.

*Id.* at 351-52, 448 N.E.2d at 114-15, 461 N.Y.S.2d at 260-61.

129. 90 A.D.2d 374, 457 N.Y.S.2d 308 (2d Dep't 1982).

ing the trial court, the Second Department found that the photo in question was used for news purposes and was also protected by the first amendment in the event that the photo complained of was not of the plaintiff, although she was identified as the subject.<sup>130</sup>

Although the photo was not of the plaintiff, plaintiff was a well known female boxer and was, therefore, a limited purpose public figure. Plaintiff thus had the burden of proving actual malice on the part of the publisher for being misrepresented in the photo caption. The court held that a substantial question of actual malice existed and denied the plaintiff's summary judgment motion.<sup>131</sup>

In *Delan v. CBS, Inc.*,<sup>132</sup> the first amendment again provided a defense against a section fifty-one claim. The plaintiff, a mentally ill patient in a state hospital, appeared for about four seconds in a nationally televised one hour telecast. He was clearly recognizable<sup>133</sup> and had signed a consent form.<sup>134</sup> The Second Department, in reversing the trial court, found the news and public interest aspects of the case to be controlling.<sup>135</sup>

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130. See *id.* at 383, 457 N.Y.S.2d at 315-16. According to the court, [i]t has long been recognized that use of a name or picture by the media in connection with a newsworthy item is protected by the First Amendment and is not considered a use for purposes of trade within the ambit of the Civil Rights Law . . . . This is true irrespective of the fact that such publications are carried on largely, and even primarily, to make a profit. More generally, it has been recognized that certain publications are of public interest and, therefore, protected, even if not strictly concerned with news or nonfictional material . . . .

*Id.* at 379, 457 N.Y.S.2d at 313.

131. See *id.* at 383-84, 457 N.Y.S.2d at 316.

132. 91 A.D.2d 255, 458 N.Y.S.2d 608 (2d Dep't 1983).

133. *Id.* at 256, 458 N.Y.S.2d at 611.

134. *Id.* at 258, 458 N.Y.S.2d at 612. The writer is troubled about the validity of this consent. Although only patients certified by one of the hospital's physicians as being capable of giving consent were allowed to actually consent, it is clear that hospital authorities were cooperating with the defendant. Without patients there would be no documentary. All the patients who signed consent forms suffered from one type or another of psychotic illness. No therapeutic reason for permitting the patients to participate in the filming was shown and there may well be none. Although there is a definite public value in showing what goes on inside mental hospitals, the writer feels the plaintiff was exploited, perhaps for the best of motives, but exploited nonetheless. Because section 51 of the Civil Rights Law properly affords no relief here, it is suggested that legislative action is needed to protect confined psychiatric patients against the type of hospital discretion exercised in this case.

135. See *id.* at 259, 458 N.Y.S.2d at 613. The court stated:

In our opinion, the documentary film with which this case is concerned dealt with a matter of legitimate public interest, i.e., the deinstitutionalization of mental patients and their placement in an outpatient program designed to benefit both them-

*C. Libel and Slander*

In *Buckley v. Litman*,<sup>136</sup> the Court of Appeals dismissed the libel action of a physician's assistant against his former physician employer. The defendant, having suspected the plaintiff of tampering with patient records and getting no satisfactory answer from the plaintiff, wrote to the appropriate licensure board. A carbon copy was sent to the county sheriff and to a physician who had just hired the plaintiff.<sup>137</sup> The Court of Appeals found a qualified privilege attached to the challenged carbon copy mailing of the letter.<sup>138</sup> Without proof of malice the motion was dismissed. It is regrettable that dismissal was not granted by the trial court. As a matter of policy, in the very sensitive area of assuring competent health care, trial courts should be alert to nonmeritorious actions for libel. The qualified privilege must be applied at the earliest stage, when the facts clearly indicate its appropriateness, so that people with information about negligent or dishonest professionals will not be discouraged from taking action. That the defendant had to appeal the case to the highest court in New York to obtain a dismissal of the action highlights the reasons so often given by doctors and hospital administrators for not reducing critical observations to writing.<sup>139</sup>

The Second Department, in *Park Knoll Associates v. Schmidt*,<sup>140</sup> decided an important libel case of first impression. The leader of a tenants' association drafted and mailed a letter to the New York State Division of Housing and Community Renewal

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selves and society as a whole. It involved a critical review of the mental hygiene program in this State as a matter of general and public concern, and the telecast, therefore, was clearly a privileged subject.

*Id.*

136. 57 N.Y.2d 516, 443 N.E.2d 469, 457 N.Y.S.2d 221 (1982).

137. *Id.* at 519, 443 N.E.2d at 469-70, 457 N.Y.S.2d at 221-22.

138. *See id.* at 520, 443 N.E.2d at 470, 457 N.Y.S.2d at 222.

139. The writer often has been asked at seminars and lectures about the issue of liability for writing truthful, *e.g.*, unflattering or negative, reference letters and for reporting incompetent professional practices to the State. Doctors, as a group, have a widespread perception that lawyers encourage the filing of vexatious libel suits to deter the reporting of their client's unethical or dangerous practices. Whether true or not, the perception operates to inhibit those with the most information from speaking out. The writer feels that the Legislature should create a right to attorney's fees for the successful defendant in a libel action where the action is dismissed on grounds of qualified privilege. Such a step would free doctors from some of the fears which now restrain them from undertaking the role that public policy and common sense dictates they should play in policing their profession.

140. 89 A.D.2d 164, 454 N.Y.S.2d 901 (2d Dep't 1982).

complaining about alleged illegal rent transactions concerning members of the tenants' association. The appellate division found that absolute immunity applied to the communications in question.<sup>141</sup> The court found that all the considerations supporting absolute immunity for quasi-judicial proceedings apply to complaints before the State housing agency.<sup>142</sup> The court recognized the role played by tenant leaders in this way:

Assuming, as plaintiff alleges, that the complaints at issue were authored by defendant in her capacity as tenant representative we hold that they constituted a pertinent part of a quasi-judicial proceeding and were within the absolute immunity afforded statements made therein . . . .

The defendant, as president of Park Knoll Tenants Association, held a position consistent with that of many other concerned tenant association leaders throughout this State. Such persons are mostly unpaid, dedicated and energetic individuals who attempt to provide advice and disseminate information to tenants, who are sometimes of advanced age or suffer handicaps such as language difficulties, or who may be generally unfamiliar with their rights and remedies, so as to provide some counterbalance against the seeming omnipotence of their landlords. To rule against extension of the absolute privilege to this defendant would undoubtedly have a chilling effect upon any tenant representative whose counsel has been sought to assist a tenant in composing a formal complaint against a landlord.<sup>143</sup>

*Park Knoll Associates* reflects, on its face, the defendant landlord's attempt to stifle tenant protests through the pressure of libel law. The recognition of an absolute privilege for tenant leaders when communicating with state, and presumably also local, authorities responsible for tenant protection, is a major step forward in safeguarding tenant rights. This is a highly volatile area with an invariable imbalance of power and resources favoring the landlord. The Second Department's holding should be affirmed and extended throughout the State.

Libel can be accomplished pictorially as well as with words. A painting with the quixotic and engaging title "The Mugging of the

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141. See *id.* at 164-65, 454 N.Y.S.2d at 902-03.

142. See *id.* at 174, 454 N.Y.S.2d at 907-08.

143. *Id.* at 175-76, 454 N.Y.S.2d at 908-09 (citation omitted).

Muse" did not qualify as libelous in *Silberman v. Georges*.<sup>144</sup> The trial court was reversed and the complaint dismissed on the finding that the painting in question, rather than defaming the plaintiff, was "obviously allegorical and symbolic;" the picture expressed "critical opinion only at most."<sup>145</sup>

The Fourth Department, in *Scacchetti v. Gannett Co., Inc.*,<sup>146</sup> reversed the trial court's grant of summary judgment for the defendant. A newspaper report had quoted the plaintiff, a police sergeant, as voicing obscenities about the United States District Court judge who had just sentenced his brother. The supreme court granted summary judgment on its own motion, finding that no cause of action had been stated. The appellate court applied the test that requires that an article be read as a whole. "Measured by these standards, the newspaper account concerning plaintiff can certainly be interpreted as subjecting him to public contempt, aversion or disgrace and tending to injure him in his profession as a law enforcement officer. The publication is thus arguably libelous per se."<sup>147</sup>

With New York City rental housing vacancies below the two per cent level, cooperative conversion campaigns have become bitter contests. It was inevitable, therefore, that allegations of libel in such a contest would reach the courts. The First Department, in *Tanner & Gilbert v. Verno*,<sup>148</sup> reversed the trial court and dismissed a law firm's libel complaint. The law firm, which represented three tenants, alleged that it had been libelled by a statement made by non-client tenants concerning the amount of its legal fees.<sup>149</sup> The court found that the firm, which had become involved in a bitter dispute, "made its conduct and its claim for legal fees an issue for discussion."<sup>150</sup> Because the allegedly defamatory statements had been made only to other tenants interested in the dispute, a qualified privilege existed.

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144. 91 A.D.2d 520, 456 N.Y.S.2d 395 (1st Dep't 1982) (mem.).

145. *Id.* at 521, 456 N.Y.S.2d at 396.

146. 90 A.D.2d 985, 456 N.Y.S.2d 580 (4th Dep't 1982) (mem.).

147. *Id.* at 986, 456 N.Y.S.2d at 581.

148. 92 A.D.2d 802, 460 N.Y.S.2d 48 (1st Dep't 1983) (mem.).

149. *Id.* at 803, 460 N.Y.S.2d at 49. The law firm sought over two million dollars in fees from both retained tenant-clients and non-clients who, the firm claimed, received a benefit from the firm's activities. In a related action, consolidated with this case on appeal, the First Department dismissed a suit for the fees brought by this law firm.

150. *Id.*

Liability for libel was placed largely on the shoulders of a newspaper reporter in *Gaeta v. New York News, Inc.*<sup>151</sup> The plaintiff, who had never been a public figure or official, sued the *Daily News*, its publisher and editor, and a reporter.<sup>152</sup> The reporter's article implied that the plaintiff's ex-husband became mentally ill partly because their son committed suicide knowing "his mother dated other men."<sup>153</sup> As no negligence was established against either the editor or publisher, individual liability fell on the reporter whose actions were judged by the emerging standard of reasonable care for newspaper reporters.<sup>154</sup>

A diversity libel action, *Rudin v. Dow Jones & Co., Inc.*,<sup>155</sup> provides a lengthy digression on variant meanings of the term "mouthpiece" as applied to lawyers. The defendant had published an article concerning an investment made by "Frank Sinatra and a group . . . including his attorney, Milton Rudin."<sup>156</sup> Rudin replied with a "letter to the editor" which the defendant published under the caption "SINATRA'S MOUTHPIECE."<sup>157</sup> After reviewing psycholinguistic research, the court found that although the term "mouthpiece" connoted a negative image of lawyers, the plaintiff did not identify himself as an attorney in his letter to the editor and it was doubtful that readers would recall that plaintiff had been referred to as an attorney in the investment article published two months earlier.<sup>158</sup> The general use of "mouthpiece" to describe a spokesperson was not, in the context of the evidence presented, defamatory.<sup>159</sup>

#### D. Miscellaneous Intentional Torts

The pirating and illegal production and distribution of recorded music was the subject of the Court of Appeals decision in

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151. 115 Misc. 2d 483, 454 N.Y.S.2d 179 (Sup. Ct., N.Y. Co. 1982).

152. *See id.* at 484, 488, 454 N.Y.S.2d at 180, 183.

153. *Id.* at 483-84, 454 N.Y.S.2d at 180.

154. The court noted that with little effort, the reporter would have been aware that she had been given inaccurate information. *See id.* at 487, 454 N.Y.S.2d at 182. The standard of care required in this case is hardly burdensome and little interference with obtaining and publishing a newspaper story is created.

155. 557 F. Supp. 535 (S.D.N.Y. 1983).

156. *Id.* at 536 (quoting Barron's, Nov. 27, 1978, at 38).

157. *Id.* (quoting Barron's, Jan. 15, 1979, at 7).

158. *See id.* at 545.

159. *Id.* at 546.

*Sporn v. MCA Records, Inc.*<sup>160</sup> The specific issue was whether a cause of action accrued when the illegal appropriation began or at the time the defendant exploited the plaintiff's property. Stated otherwise, the Court of Appeals was asked to rescue the plaintiff from the consequences of not bringing an action in a timely manner because the appropriation allegedly began in 1965.

The plaintiff raised the theory that the defendant's action should be viewed as continuing trespasses, with a new three year statute of limitations accruing with each misuse of the recordings. The Court majority found that conversion had taken place in 1965 and the plaintiff was thus time-barred from prosecuting his claims.

[I]t seems abundantly clear that plaintiff's cause of action is one for conversion and not for trespass. The complaint alleges that although the plaintiff regained his rights to the master recording of "Get a Job" by operation of the oral agreement he had with Ember's president, the defendant, since 1965, has been using that master recording as his own by manufacturing, distributing and selling records and otherwise commercially exploiting that master recording which it is claimed is the property of the plaintiff. These allegations amount to more than mere interference. The conduct of the defendant certainly constituted a denial of both the plaintiff's right to the master recording and a total usurping of plaintiff's right to possess the master recording.<sup>161</sup>

Three members of the Court dissented claiming that

[t]he action, then, is not simply for misappropriation or conversion of the record, but for its repeated and continuing use thereafter to manufacture and sell reproductions in violation of plaintiff's rights. Short of determining that there can be adverse possession of an intangible, . . . the complaint cannot be dismissed as barred by limitations.<sup>162</sup>

The Court of Appeals correctly decided this case. The plaintiff was aware of the misuse of the master recording in sufficient time to have begun an action. What he could not know, of course, was that someone would find the recording commercially attractive in succeeding years and would use it for new albums. The measure of damages, had the action been brought at the proper time, would

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160. 58 N.Y.2d 482, 448 N.E.2d 1324, 462 N.Y.S.2d 413 (1983).

161. *Id.* at 488, 448 N.E.2d at 1327, 462 N.Y.S.2d at 416.

162. *Id.* at 490, 448 N.E.2d at 1328, 462 N.Y.S.2d at 417 (Meyer, J., dissenting).



probably be less than if the Court had accepted the continuing trespass theory. The defendant, however, by its clear exercise of dominion over the master recording in 1965 to the exclusion of the plaintiff's rights, committed conversion and the cause of action accrued at that point.

An interesting diversity action considering New York fraud law was decided by the United States District Court for the Southern District of New York in *Idrees v. American University*.<sup>163</sup> The plaintiff had resigned from a technician's position at a New York hospital to enroll at a medical school in the British West Indies. Plaintiff Idrees claimed he was induced to enroll at the defendant's school by an advertisement in the New York Times and by material that the school sent to him. He alleged fraud because, on registering at the school, he found that both the faculty and the facilities promised were nonexistent.<sup>164</sup>

The district court judge found that the defendant both intentionally and recklessly deceived applicants, including the plaintiff, and awarded the plaintiff compensatory damages.<sup>165</sup> Punitive dam-

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163. 546 F. Supp. 1342 (S.D.N.Y. 1982).

164. Among the discrepancies between promise and reality were, as presented in plaintiff's amended complaint:

1. [T]he school had a library with periodicals, books and audio-visual aids. These representations were false as the library in fact had no periodicals, books or audio-visual aids.
2. [The school] had laboratory facilities that included microscopes, microscopic slides and skeletons. These representations were false as there were no microscopes, microscopic slides or skeletons in the laboratory.
3. [F]or the class in histology [each student] would be provided with a set of prepared slides and a microscope. These representations were false as he was not provided with said slides or microscope.
4. Defendant in [its bulletin] published a photograph identified as the Montserrat Hospital calculated to give plaintiff the impression that the hospital and the school had a relationship that would enable plaintiff and other students to use the facilities of said hospital. Plaintiff was in fact deceived by the publication of said photograph inasmuch as neither he nor other students were able to use any of the facilities of the hospital.
5. [A] semester would consist of four classes commencing May 14, 1980. Such representation was false as only two classes started on that date. Defendant represented that the laboratory class would start on May 14, 1980. Such representation was false as such class did not start until June 10, 1982.
6. The number of faculty members at the school was less than one-half of the number represented by defendant. The courses in fact given were worthless and one was taught by a student enrolled at the school at that time.

*Id.* at 1345 (quoting Plaintiff's complaint at ¶¶ 3-7).

165. *See id.* at 1350.

ages were, however, denied, with the court finding that the acts of the defendant fell below the standard required for the award of such damages under New York law.<sup>166</sup>

The writer believes the court erred seriously in not awarding punitive damages after affirmatively finding multiple acts of deception, all of which formed the basis for the plaintiff's decision to attend the defendant's school. The plaintiff moved to a foreign country and disrupted his life. He discovered that his dream of obtaining a real medical education was unrealizable. Of equal importance, public policy dictates that schools that deceive applicants and that promise to deliver quality medical instruction, but have no capability of so doing, are dangerous to public welfare. The plaintiff's compensatory damages were not great. No real deterrent to the continued advertising of the defendant's school in New York emerges from the judgment. Punitive damages would or could have constituted a needed deterrent.

New York courts were plagued last year, as every year, with attempts to frame otherwise unsustainable allegations within the *prima facie* tort category.<sup>167</sup> This cause of action, limited though it may be, will be deprived of all utility if counsel continue to allege it as a matter of course and with no appreciation of its elements.

## VI. CONCLUSION

The shape of New York tort law remained fairly constant during the past year. The only certain prognostication for next year's

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166. See *id.* at 1351. The court relied upon *Walker v. Sheldon*, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961), for the punitive damage standard. According to the *Sheldon* court, as noted in *Idrees*, see 546 F. Supp. at 1351,

[p]unitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others, who might otherwise be so prompted, from indulging in similar conduct in the future.

10 N.Y.2d at 404, 179 N.E.2d at 499, 223 N.Y.S.2d at 490.

167. See *Strobl v. New York Mercantile Exch.*, 561 F. Supp. 379 (S.D.N.Y. 1983); *Filmways Pictures, Inc. v. Marks Polarized Corp.*, 552 F. Supp. 863 (S.D.N.Y. 1982); *Greenfield v. Kanwit*, 546 F. Supp. 220 (S.D.N.Y. 1982); *Roberts v. Pollack*, 92 A.D.2d 440, 461 N.Y.S.2d 272 (1st Dep't 1983); *Abelow v. Grossman*, 91 A.D.2d 553, 457 N.Y.S.2d 30 (1st Dep't 1982) (mem.); *Wehringer v. Helmsley-Spear, Inc.*, 91 A.D.2d 585, 457 N.Y.S.2d 78 (1st Dep't 1982) (mem.), *aff'd mem.*, 59 N.Y.2d 688, 450 N.E.2d 223, 463 N.Y.S.2d 417 (1983); *T.N.J. Holding v. Biaggi, Ehrlich & Lang*, 90 A.D.2d 547, 455 N.Y.S.2d 123 (2d Dep't 1982) (mem.); *Howard v. Block*, 90 A.D.2d 455, 454 N.Y.S.2d 718 (1st Dep't 1982) (mem.); *Springer v. Viking Press*, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't 1982).

*Survey* is that New York tort law will continue to reflect the evolving standards of civil wrongs in this State.