

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

1-1-1985

Torts

Ralph Michael Stein
Pace Law School

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [State and Local Government Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Ralph Michael Stein, Torts, 36 Syracuse L. Rev. 595 (1985), <http://digitalcommons.pace.edu/lawfaculty/272/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

TORTS

Ralph Michael Stein*

I. INTRODUCTION

About the only thing a teacher of tort law can be sure of is that each year he or she will witness new efforts, some successful and most not, to extend the reach and effect of the law of private wrongs. Last year's *Survey* article analyzed a wide range of tort issues¹ and while New York courts handed down fewer tort opinions of broad implication this *Survey* year, there is much to study and to apply in future litigation. As always, tort law is a somewhat quixotic but nonetheless valid barometer of shifting societal and judicial values about the nature of harm.

II. MEDICAL MALPRACTICE

A. *Informed Consent*

The usual mini-flood of informed consent cases did not flow from New York's courts during the *Survey* year. Perhaps, just perhaps, physicians are learning to discharge the duty imposed by law and these actions, which account for much insurance payout to plaintiffs, may be declining.

A typical case is *Crisher v. Spak*, in which a motion by defendants to set aside a jury verdict was denied.² What is atypical is that this informed consent case was premised not on the failure to explain risks and complications, but rather on the failure to disclose a remote but potentially critical diagnosis that surgery would reveal. The plaintiff consulted the defendant about a problem with her right foot, for which surgery was performed.³ The patient experienced further difficulty and the defendant recommended additional surgery, indicating that a pinched nerve might be the source

* Associate Professor of Law, Pace University School of Law. The author is a co-author of the recently published treatise *Comparative Negligence* (Matthew Bender 1984), and he frequently lectures on medical, psychiatric, and nursing malpractice law. The author acknowledges the valuable aid of research assistants Laurie Marchin and Deborah Glasser.

1. Stein, *Torts, 1983 Survey of N.Y. Law*, 35 SYRACUSE L. REV. 651, 651-84 (1984).

2. 122 Misc. 2d 355, 471 N.Y.S.2d 741 (Sup. Ct., N.Y. Co. 1983).

3. *Id.* at 356, 471 N.Y.S.2d at 742.

of the patient's problem.⁴ The court noted:

What the doctor failed to advise his patient at the time was that he did not know what was causing the pinched nerve and that surgery was necessary to make that determination. Further, the doctor did not tell her that one of the possible causes of her pain was a tumor. He testified that, indeed, he did not even consider the possibility of a tumor.⁵

The plaintiff's problem turned out to be a tumor that was not diagnosed until some eight months after her refusal to undergo an operation by the defendant for the "pinched nerve."⁶ The finding of a malignancy necessitated a below-knee amputation.⁷ The jury returned a \$1,500,000 verdict for the plaintiff that was minimally reduced on the grounds of comparative negligence.⁸

In sustaining the jury verdict for the plaintiff, the trial judge accepted approvingly, but misanalyzed,⁹ the leading California case of *Truman v. Thomas*.¹⁰ The trial court concluded that the defendant's negligence consisted of a failure to observe a standard of due care in treating the plaintiff, rather than a failure to obtain informed consent, noting that "[a] breach of the duty of due care is negligence, not a lack of informed consent."¹¹

In *Truman*, a pivotal case involving a physician's failure to explain the benefits of a routine Pap test to a young woman who refused the test and who subsequently died of an atypical neo-

4. *Id.*

5. *Id.*

6. *See id.* at 358, 471 N.Y.S.2d at 744.

7. *Id.*

8. *Id.* at 355, 471 N.Y.S.2d at 742.

9. *See id.* at 357-58, 471 N.Y.S.2d at 743.

10. 27 Cal. 3d 285, 611 P.2d 902, 165 Cal. Rptr. 308 (1980). The court also discussed *Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

In *Truman*, the patient declined to undergo a Pap test, indicating that concern for the cost of the procedure was part of the basis for refusal. A Pap test is a quick, harmless, and inexpensive means of detecting a malignancy. In developing informed consent law, the California court posed the question "whether Dr. Thomas breached his duty of care to Mrs. Truman when he failed to inform her of the potentially fatal consequences of allowing cervical cancer to develop undetected by a pap smear." 27 Cal. 3d at 290, 611 P.2d at 905, 165 Cal. Rptr. at 311. *Truman* stands for the concept that informed consent doctrine requires that the physician explain the benefits of a diagnostic procedure. Where the procedure is simple and relatively free of risk, the failure to explain the reason for proposing the test is a breach of the informed consent duty. Of course, no cause of action materializes unless the risk that the test should have discovered actually exists and harm to the patient results.

11. 122 Misc. 2d at 35, 471 N.Y.S.2d at 743.

plasm, the concept of informed consent was substantially but rationally enlarged. It is axiomatic that any unreasonable failure to obtain informed consent is in itself a breach of a duty of due care. The court in *Truman* asserted that the unreasonable failure to explain the possible, though not necessarily likely, ramifications of refusing a diagnostic procedure deprived the patient of the right to choose or reject medical care on an informed basis.¹²

While it can be argued that, in *Crisher v. Spak*, the defendant's own admission that he did not suspect a tumor may independently suggest a failure of due care,¹³ the crux of the plaintiff's case is supported by *Truman* and is an informed consent problem. Had she been informed that a second procedure was needed to determine an as-yet unknown reason for her continuing discomfort and pain, she would have been in a position to evaluate her course of action more realistically. In all probability, the term "pinched nerve" suggests little of serious import to the average patient and certainly does not raise the spectre of a malignancy.

It should be expected, indeed encouraged, that *Truman* and the doctrine announced in that case will form the basis of future actions in New York. These types of actions are true informed consent cases. The failure to provide sufficient, or any, information on the possible benefits of diagnostic tests or exploratory surgery in reality often controls the patient's choice of options. The failure to explain what such medical intervention might disclose is often more dangerous to the actual welfare of a patient than the more typical situation in which a doctor withholds information, receives less than legally valid informed consent and, as is the case in most instances, nothing unfavorable happens. Something very unfavorable happened to Mrs. Chrisher, a result against which California law strives to guard. New York law should be equally assertive in requiring physician disclosure.

12. See 27 Cal. 3d at 293-94, 611 P.2d at 906-07, 165 Cal. Rptr. at 312-13.

13. Because Dr. Spak did not reveal his lack of knowledge about the cause of the plaintiff's discomfort and pain, she declined to accept his recommendation for a second surgical procedure. 122 Misc. 2d at 356, 471 N.Y.S.2d at 742. Dr. Spak knew what procedure he wished to perform and it seems highly likely that had the plaintiff consented to the surgery, the malignancy would have been discovered, probably saving her leg. Although the defendant may have lacked the knowledge to suspect the existence of a malignant tumor—and this is not clear by any means—the real problem is that Mrs. Crisher declined the procedure because of a lack of information.

B. Arbitration

Alternatives to medical malpractice litigation have been proposed, tested, rejected, praised, and damned in a number of jurisdictions. Arbitration, usually accepted enthusiastically in the world of commercial law, has been advanced as a cost-reducing measure to slow the flow of actions against physicians. New York physicians have seemed especially resistant, often even hostile, to the concept of arbitrating claims of substandard medical care.¹⁴

In *Sanchez v. Sirmons*¹⁵ a plaintiff's motion to stay the arbitration of a medical malpractice claim was granted. The patient had consulted the defendant for an elective abortion, which he performed at his office.¹⁶ Prior to the procedure, the plaintiff signed a "Consent to Abortion" form that contained a fairly standard arbitration clause.¹⁷ Subsequently, believing herself to be the victim of

14. I have discussed arbitration with groups of physicians over the past few years. While expressing a sense of helplessness and rage over the medical malpractice dilemma, most physicians are reluctant to explore arbitration. The most frequent objection is that the insertion of an arbitration clause in a surgical consent document or the proffering of an arbitration agreement to a new patient disturbs the relationship of trust between patient and physician. Additionally, it is often argued that the existence of an arbitration agreement sows the seeds of litigation in the minds of patients not so disposed. Given the number of medical malpractice actions in New York, it is difficult to believe that patients will be encouraged to bring even more actions because of arbitration clauses. There is also no evidence whatsoever that an arbitration clause by itself will in any way interfere with the goal of an effective doctor-patient relationship. Just as many doctors fear giving information in order to obtain informed consent, many are reluctant to explain the existence of arbitration because of their own reluctance to deal with a possibility of future dispute.

15. 121 Misc. 2d 249, 467 N.Y.S.2d 757 (Sup. Ct., Bronx Co. 1983).

16. *Id.* at 249, 467 N.Y.S.2d at 758.

17. *Id.* at 250-51, 467 N.Y.S.2d at 758-759. Dr. Sirmons' consent form appeared as follows:

1. I, Carmen Sanchez, do hereby give my authorization and consent to an abortion to be performed upon me on or about by Dr. Sirmons.
2. I certify that I understand the meaning of the word abortion or termination of pregnancy.
3. I further certify that I am seeking this procedure of my own free will and that no coercion has been used.
4. I consent to the administration of anesthetics to be applied by or under the direction of the Doctor, and the use of such anesthetics as he may deem advisable in my case.

I also consent that said Doctor preceding and following the operation, perform any other procedure or treatment which is deemed necessary or desirable in order to perform the abortion.

5. Recognizing that an abortion requires the cooperation of technicians, Nurses, Assistants, and other personnel, I give my further consent to administrations and procedures on my body by all such qualified personnel working under the supervision

malpractice, Ms. Sanchez filed an action against Dr. Sirmons.¹⁸ Laboring under the soon-to-be-established delusion that an arbitration clause¹⁹ meant that there would be arbitration, the defendant demanded that the clause be invoked, which led to the plaintiff's motion to stay arbitration.²⁰ Justice Cotton found that "Dr. Sirmons may not fairly demand arbitration of the malpractice action brought against him by Ms. Sanchez."²¹ While the arbitration clause did not state that a legal right to trial by jury was being waived, it did clearly indicate that the patient's sole remedy was arbitration.²² The plaintiff was, at the time she sought the defendant's services, twenty-seven years old, and could read and understand English. She stated that she did not study the provisions of the form she signed because "she thought that she was only giving her consent to submit to an abortion."²³

While the court rejected the plaintiff's claim that an arbitra-

of said Doctor before, during and after the operation to be performed.

6. Despite the great technical strides that have been made over the past decades, the practice of medicine is still an art and not a science. I have not been given any guarantee or promises of complete success and satisfaction from the procedure.

7. I have been informed that the risks of the abortion procedure occur in less than 0.5%. These risks are possible retained placental tissue, bleeding, infection or perforation.

8. I acknowledge that no guarantee or assurance has been made by anyone regarding the operation which I have requested and authorized.

9. I agree that any dispute or claim which I may have relating to the abortion or any related medical procedure or any consequences thereof shall be determined solely by arbitration under the auspices and pursuant to the rules and regulations of the American Arbitration Association.

10. I agree that this Consent to Abortion shall be binding upon me and my heirs, executors, and administrators.

11. I, the undersigned, grant permission to release an abstract of my Medical Record to my designated Doctor.

Witness: Names of Patient/s/ *Carmen Sanchez*

Date: 6/28/80 Name of Parent: *Tomasa Sanchez*

Guardian if Minor:

18. *Id.* at 249, 467 N.Y.S.2d at 758.

19. See paragraph 9 of the consent form set out *supra* note 17.

20. See 121 Misc. 2d at 249-50, 467 N.Y.S.2d at 758.

21. *Id.* at 250, 467 N.Y.S.2d at 758.

22. The form can be re-drafted to convey exactly the waiver to trial by jury. The real issue seems to be validating the concept of an arbitration agreement. It is easy to envision a future case featuring an arbitration clause drafted to conform with the objections raised in this case. What is also foreseeable is a judicial statement that the plaintiff did not understand the central importance of trial by jury in our country.

23. 121 Misc. 2d at 251, 467 N.Y.S.2d at 759.

tion clause was *per se* a contract of adhesion,²⁴ the court's analysis of the clause robbed it of any operative vitality. The standard imposed by Justice Cotton for waiving a trial by jury is greater than that demanded of parties to contracts not involving medical services. The court also believed that the "Consent to Abortion" form by itself was misleading.²⁵ More to the point, the court, with seeming approval, quoted an authority who states that the object of arbitration clauses in medical practice is to hold down losses, and implied that this is somehow a bad thing.²⁶

Whatever the problems of enforcing arbitration clauses in other medical and surgical settings, *Sanchez v. Sirmons* would have been a good place to uphold such a clause while transmitting a statement about a patient's duty to understand the nature of a legal and a medical transaction. Elective abortions are frequently traumatic emotionally, but they are very safe medically. The plaintiff's procedure took place in the defendant's office. The form she was given is a model of clarity and there is no suggestion she was unusually upset or in any way unable to understand the form. While an argument can be made for a more conspicuous placing of the arbitration clause,²⁷ a counter argument cogently asserts that such a step unnecessarily heightens tension and introduces distracting and clinically detrimental issues.²⁸ It is not clear that New York courts are ready to recognize binding arbitration in medical malpractice cases, regardless of the positioning of the clause or the size of the type in which its provisions are announced.

The provision for medical malpractice arbitration in no way excuses medical malpractice, nor does it result in the denial of a fair recovery of damages by victims of substandard medical care.

24. See *id.* at 252, 467 N.Y.S.2d at 759.

25. See *id.* at 253-54, 467 N.Y.S.2d at 760.

26. See *id.* at 253, 467 N.Y.S.2d at 760 (citing Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947 (1972)).

27. The court looked at a California statute requiring a conspicuous placement of the arbitration clause. See 121 Misc. 2d at 254, 467 N.Y.S.2d at 760 (citing CAL. CIV. PROC. CODE § 1295 (West 1982)). Section 1295 requires that any provision for arbitration of a medical malpractice claim must be contained in the first article of the contract. The California law further requires that a notice to patients must appear in at least 10-point bold red type, stating that signing the clause relinquishes the right to a jury or court trial. See CAL. CIV. PROC. CODE § 1295.

28. To give a patient fair notice about the import of an arbitration clause must not lead to attempts to place the fact of arbitration as the most importance piece of information in establishing the doctor-patient relationship.

The fears that courts expressed about arbitration in the infancy of that process are voiced again when physicians seek alternatives to litigation. Certainly there are many instances in which an arbitration clause in a contract for medical services is a true contract of adhesion. In some other circumstances, it would be unfair to apply an arbitration clause. A physician's desire to utilize arbitration where procedures are elective and clinically neither life-threatening nor unusual, however, should be encouraged rather than thwarted. If notice about arbitration and its effect is judicially mandated to require a doctrine of "Medical Miranda warnings," a valuable adjunct and alternative to litigation is practically lost. Lawyers may benefit, but injured patients will not. Neither will the public benefit at a time when costs associated with medical malpractice litigation continue to rise.

C. *Wrongful Birth*

Wrongful birth cases continue to arise because it still costs a lot of money to raise a child. If the child was unwanted in the first instance and the parents thought a physician had made it impossible for conception to occur, the ingredients exist for the institution of a lawsuit, regardless of the clearly stated New York law on the subject.

In *Jean-Charles v. Planned Parenthood Association of Mohawk Valley, Inc.*,²⁹ the second department dismissed a cause of action that was predicated essentially on the non-existent and theologically irreverent tort of wrongful conception. The court, following established principles, upheld a claim for the cost of the birth of a child whose presence prudent medical advice and procedures should have prevented, but denied the open-ended and never-ending costs of rearing a child.³⁰ There is not presently the slightest glimmer of hope for a change in doctrine on the New York judicial horizon.

Similarly, in *Weintraub v. Brown*,³¹ the second department

29. 99 A.D.2d 542, 471 N.Y.2d 622 (2d Dep't 1984).

30. See *id.* at 542, 471 N.Y.S.2d at 623.

31. 98 A.D.2d 339, 470 N.Y.S.2d 634 (2d Dep't 1983). An additional failed surgical birth control case in which the parents wanted the physician to pay for rearing a normal child is *O'Toole v. Greenberg*, 98 A.D.2d 814, 470 N.Y.S.2d 31 (2d Dep't 1983). Why do New York lawyers keep bringing these wrongful conception actions? What do they tell their clients? Are these hopeless actions being brought on a contingency fee basis?

sustained the dismissal by the trial court of claims, based on the theory of reliance, against a vasectomy-performing physician, a vasectomy-success-verifying pathologist, and a hospital for the cost of rearing the direct result of the plaintiff couple's reliance on the defendants.³² The opinion in *Weintraub* is required reading for counsel tempted to initiate similar actions. Perhaps *Survey* articles for the next few years will not have to repeatedly discuss this issue.

D. Miscellaneous

A tragic case, *Snow v. State*,³³ illustrates the scope of damages recoverable for negligence by acts of omission. The infant claimant had been institutionalized for much of his life, including time at Willowbrook State School during the period when its treatment of infant residents was shocking by penitentiary standards.³⁴ The State of New York failed to conduct a number of diagnostic tests with regard to the hearing acuity of the child and as a result of non-existent or inadequate testing, the claimant was neither trained nor educated to the level he could have achieved.³⁵ The Court of Claims found that the malpractice in question was medical, not educational, and the award was predicated on the failure to treat the claimant properly as a patient.³⁶

While reducing the award of \$2,500,000 to \$1,500,000,³⁷ the second department held that medical malpractice had resulted in

the mistaken institutionalization which caused the infant claimant severe and permanent psychological damage and irreparably impaired his ability to speak, communicate and read [and that this] emanated from the use of an improper I.Q. test to assess the child's intellectual capacity. The allegations in [an educational malpractice allegation case] are pale in comparison to the reality of Donald Snow's situation.³⁸

The court rejected any argument that educational malpractice, in effect, a nonexistent tort under New York law, rather than medical malpractice, dictated the result, noting that "[t]he failure to [re-

32. See *id.* at 340-49, 470 N.Y.S.2d at 636-41.

33. 98 A.D.2d 442, 469 N.Y.S.2d 959 (2d Dep't 1983).

34. See *id.* at 443-44, 469 N.Y.S.2d at 960-61.

35. *Id.* at 444-45, 469 N.Y.S.2d at 960-61.

36. See *id.* at 445, 469 N.Y.S.2d at 961 (referring to Court of Claims decision).

37. *Id.* at 450, 469 N.Y.S.2d at 964.

38. *Id.* at 449, 469 N.Y.S.2d at 963.

evaluate and reassess the claimant] constituted a discernible act of medical malpractice on the part of the State rather than a mere error in judgment vis-a-vis claimant's educational progress. Consequently, this appeal does not involve a non-cognizable claim for educational malpractice"³⁹

Whatever the merits of a distinct cause of action for educational malpractice, *Snow v. State* lucidly outlines the essentially medical nature of infant institutionalization. Holistically, education is subsumed in the reality of total custodial control and that control is inherently based on a medical model.⁴⁰ Thus, attempts to blunt allegations of medical malpractice by trying to separate the totality of custodial care into discrete elements is as unpersuasive rationally as it is unacceptable judicially.

E. Damages

Survey articles in past years have paid scant attention to the question of damages and the role of appellate courts in revising trial awards. In *Thornton v. Montefiore Hospital*,⁴¹ the trial court drastically reduced a jury verdict in a medical malpractice case. While recognizing that "the setting aside of a jury verdict may not be lightly undertaken,"⁴² the court reduced a jury verdict of \$1,000,000 for pain and suffering to \$500,000, an award of \$1,000,000 for future medical expenditures to an uninspiring \$34,480, and damages of \$500,000 for loss of earning ability to a still significant \$350,000.⁴³ Awards for loss of services and payment of past expenses for the mother of the injured minor were similarly reduced.⁴⁴ Worth noting is Justice Mercorella's observation, with regard to jury verdicts in medical malpractice cases, that insupportable damages assessments are routine. "This is not a rare in-

39. *Id.* at 450, 469 N.Y.S.2d at 964.

40. How much of Donald Snow's condition was genetically determined and how much environmentally is undiscoverable. The profound deficits, neurological and cognitive and possibly also affective, which characterized Donald's condition are treated by a team, which is always directed by a physician. The learning disabilities are manifestations of the underlying deficits. For the State to argue that Donald's claim was really one sounding in educational malpractice is ridiculous, untenable, and unsupported by any case law.

41. 120 Misc. 2d 1003, 469 N.Y.S. 979 (Sup. Ct., Bronx Co. 1983), *modified*, 99 A.D.2d 1024, 473 N.Y.S.2d 758 (1st Dep't 1984).

42. 120 Misc. 2d at 1004, 469 N.Y.S.2d at 981.

43. *See id.* at 1006-08, 469 N.Y.S.2d at 982-83.

44. *Id.*

stance of gross excessiveness. Rather it has become an all too common occurrence in this country and the trend continues and appears to proliferate at least in this Court's experience."⁴⁵

Equally worth noting is that the first department reduced the trial judge's revised verdict.⁴⁶ Pain and suffering damages were cut by a further \$100,000 and impairment of earning ability was slashed to \$50,000.⁴⁷

The *remittitur*, the procedural device by which a jury's damage award is diminished, whether at the trial or appellate stage, is a valid and effective curative device. It would be better, however, for juries to be carefully instructed so that the incidence of excessive verdicts described by the trial judge in *Thornton* declines. Too frequent use of the *remittitur* undermines public confidence in the role of the jury, and verdicts motivated by sympathy or based on shaky factual evidence impose intolerable stresses on insurers and, ultimately, on consumers. A decrease in the tendency of juries to return fantastic and unsustainable, but sometimes actually sustained, verdicts may lessen the cry for statutory attention to the problem of damages. Such so-called reforms may in the long run create fairness problems. Justice Mercorella's observation is also a warning.

III. NEGLIGENCE

A. General

As readers of general publications know, pizza parlor owners have been waging a battle, probably successfully, to convince the public that pizza is not junk food, but is actually rich nutritionally. Threatening the campaign to persuade parents to allow their children to eat great quantities of pizza pie was an attempt in the third department to have pizza judicially declared to be a "dangerous instrument." In *Keohan v. Di Paola*,⁴⁸ the father of the eight-year old plaintiff, Melinda, drove to the defendants' pizzeria. An employee brought the boxed pizza to the car and placed it through the right rear window on Melinda's lap, although Mr. Keohan had

45. *Id.* at 1005, 469 N.Y.S.2d at 981.

46. *See Thornton v. Montefiore Hosp.*, 99 A.D.2d 1024, 473 N.Y.S.2d 758 (1st Dep't 1984).

47. *See id.*

48. 97 A.D.2d 596, 468 N.Y.S.2d 218 (3d Dep't 1983).

told the employee to put the pizza on the front seat.⁴⁹ On the ride home Melinda began screaming because of the pain from burns caused by the pizza.⁵⁰ She was hospitalized for several days.⁵¹

An action was begun by Melinda's father against the owners of the pizza establishment.⁵² They, in turn, sought indemnification from Melinda's father alleging that his negligent supervision caused the injury.⁵³ Opposing a motion to dismiss for failure to state a cause of action, the pizza parlor owners argued that their product was a "dangerous instrument." Special Term granted the requested summary judgment and the pizza parlor owners appealed to the third department. Relying on *Nolechek v. Gesuale*,⁵⁴ the appellate court affirmed summary judgment on behalf of Melinda's father.⁵⁵

New York law does not recognize liability through either contribution or indemnification "to third parties for damages resulting from failing to supervise his or her child."⁵⁶ The seeming inflexibility of this doctrine is somewhat modified by the "dangerous instrument" exception. While ingenious, the attempt of the pizza parlor owners to have their product join the ranks of "bicycles, lawn mowers, power tools, motorcycles, or automobiles,"⁵⁷ products already designated as dangerous by the Court of Appeals, was properly rejected.⁵⁸ Although the Court of Appeals has not provided a comprehensive list of products that allow utilization of the dangerous instrument rule, it is clear that some products are both inherently dangerous and categorically unsuitable for entrustment to a child.⁵⁹ Indeed, allowing a child to operate a car or motorcycle may be a criminal offense in itself. The mere fact that an object can cause serious injury does not, and should not, bring it within the

49. *Id.* at 596, 468 N.Y.S.2d at 219.

50. *Id.*

51. *Id.* at 597, 468 N.Y.S.2d at 219.

52. *Id.*

53. *Id.*

54. 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978) (tortfeasor may seek indemnity or contribution from injured child's parent when injury results from parent's negligent entrusting of dangerous instrument to child).

55. *See* 97 A.D.2d at 597, 468 N.Y.S.2d at 219.

56. *Id.*

57. *Id.*, 468 N.Y.S.2d at 220 (quoting *Nolechek v. Gesuale*, 46 N.Y.2d at 338, 385 N.E.2d at 1272, 413 N.Y.S.2d at 344).

58. *See* 97 A.D.2d at 597, 468 N.Y.S.2d at 220.

59. *See id.*

dangerous instrument rule. Although the third department, in finding that pizza is not a dangerous instrument, stopped there, it can readily be seen that no food product can qualify under *Nolechek*.

In a second negligent supervision action, *Zikely v. Zikely*,⁶⁰ the second department affirmed the dismissal of a complaint alleging that a defendant mother caused a child's burns by allowing the infant to wander into a bathroom and to fall into a tub containing hot water. Both *Nolechek v. Gesuale*⁶¹ and *Holodook v. Spencer*⁶² were cited to support the appellate court's action.⁶³ The court, however, may have applied what appeared to be controlling case law in an inappropriate setting.

Justice Gibbons, dissenting in *Zikely*, highlighted an important factual distinction between this action and the cases relied upon by the majority. Justice Gibbons stated that

[t]he facts in this case do not directly involve a parental decision about how much freedom or responsibility to give a child. Rather, this case involves an unconsidered lapse which exposes the child to a dangerous condition created by the parent, independent of and separate from the parent-child relationship. Holding the parent liable for creating that condition does not impinge on the exercise of parental authority and does not involve familial relationships.⁶⁴

While the appellate division majority decision was upheld by the Court of Appeals,⁶⁵ I suggest that Justice Gibbons provided the better reasoning. Negligent supervision has developed as a theory by which an injured child argues that the quality of parental attention, or the lack thereof, violated a standard of due care of parenting, and that recovery should be permitted for injuries incurred. While recognizing that this is an especially sensitive area, some jurisdictions permit recovery for negligent supervision, while New York firmly rules out even the suggestion of a cause of action for

60. 98 A.D.2d 815, 470 N.Y.S.2d 33 (2d Dep't 1983), *aff'd*, 62 N.Y.2d 907, 467 N.E.2d 892, 479 N.Y.S.2d 8 (1984).

61. 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978).

62. 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

63. *See* 98 A.D.2d at 815-16, 470 N.Y.S.2d at 34-35.

64. *Id.* at 817, 470 N.Y.S.2d at 36 (Gibbons, J., dissenting) (emphasis in original).

65. *See* *Zikely v. Zikely*, 62 N.Y.2d 907, 467 N.E.2d 892, 479 N.Y.S.2d 8 (1982).

negligent supervision.⁶⁶

The focus in *Zikely* should be on the actions of the parent insofar as he or she created a dangerous condition. By statutes, every parent must protect affirmatively the health and safety of his or her child. Using conventional duty and reasonable standard of care analysis, there seems to be little doubt that the defendant, Mrs. Zikely, would have been liable to her child's playmate if both fell into the tub together. The real issue is the creation of a grave hazard with serious foreseeable consequences. The negligence in supervision does not go to parenting *per se*, but to the establishment of a hazard, perhaps almost a trap, where young children are known to be about the premises. Little social utility is served by denying recovery where parents proximately cause injuries through behavior essentially extrinsic to the special qualities of parenting which, by themselves, arguably justify a refusal to recognize a general cause of action for negligent parenting.⁶⁷

In the area of duty, United States District Judge Werker, in *Sprayregen v. American Airlines, Inc.*,⁶⁸ a diversity action applying New York law, denied a motion for summary judgment finding that, even with an airline's duty to exercise the highest degree of care for a passenger's safety, the airline need not inform cold sufferers of the consequences of flying.⁶⁹ The plaintiff, a physician, claimed a permanent hearing loss after flying on the defendant's plane while suffering a head cold.⁷⁰ The court held:

There is no evidence that American knew that Sprayregen had a head cold, and it is agreed that Sprayregen never informed American of the discomfort that he experienced upon descent of the plane. The court therefore finds that American had no duty to warn Sprayregen of the dangers of flying with a head cold.⁷¹

66. See generally W. KEETON, PROSSER AND KEETON ON TORTS 914-15 (5th ed. 1984).

67. Collusion is certainly not a serious bar to considering this cause of action. In most instances, the serious injuries themselves bespeak the lack of collusion. While it cannot be ruled out that a few parents might commit crimes against helpless children in order to create litigation against insurance companies, this is too bizarre and rare a possibility to raise as a serious objection. In instances of serious injury caused by a hazard created by the parent, the availability of insurance benefits may be the only means to correct or minimize the harm inflicted upon the child.

68. 570 F. Supp. 16 (S.D.N.Y. 1983).

69. See *id.* at 18.

70. *Id.* at 17.

71. *Id.* at 18.

Litigation arising from the Great Con Ed Blackout of July 13, 1977, is still in the courts. In *Strauss v. Belle Realty Co.*,⁷² the second department dismissed a complaint brought by a tenant injured in a common area of his building during the blackout. The plaintiff stated both a third-party contract beneficiary theory of recovery and cause of action in negligence.⁷³

In a brief discussion of the plaintiff's negligence cause of action, the appellate division majority found that the defendant utility owed no duty to the plaintiff,⁷⁴ despite the fact that "[i]t is true that the injury suffered by the plaintiff was to some degree foreseeable"⁷⁵ The court contrasted the plaintiff's plight to that of the victim in *Hall v. Consolidated Edison Corporation*,⁷⁶ where electricity had been intentionally terminated for one building and the tenant slipped on some wax drippings in a darkened hallway. *Hall* permitted a cause of action, and the majority distinguished this obviously inapposite case by commenting that "[o]ur situation involves, at most, grossly negligent conduct affecting millions of people."⁷⁷

Responding in a well-reasoned dissent, Justice Gibbons rejected the majority's belief that "a reasonable opportunity to reduce the risk of a foreseeable injury is lacking."⁷⁸ Justice Gibbons argued that:

Such is not the case. It certainly is true that the ability to adopt practical means to avoid injury is an aspect of the question of duty. However, from the facts and circumstances surrounding the happening of the blackout . . . there can be no doubt that Con Ed could have fairly easily prevented a blackout from occurring. The imposition of a duty on Con Ed is not a demand to do the impossible. Rather, it is merely a requirement that the utility exercise, at least, slight care in its operations.⁷⁹

Justice Gibbons analyzed the interrelationship between tort and contract theories of recovery and found that existing case law

72. 98 A.D.2d 424, 469 N.Y.S.2d 948 (2d Dep't 1983).

73. *Id.* at 425, 469 N.Y.S.2d at 949.

74. *See id.* at 428, 469 N.Y.S.2d at 951.

75. *Id.*

76. 104 Misc. 2d 565, 428 N.Y.S.2d 827 (1980).

77. 98 A.D.2d at 429, 469 N.Y.S.2d at 951-52.

78. *Id.* at 432, 469 N.Y.S.2d at 953 (Gibbons, J., dissenting).

79. *Id.* (Gibbons, J., dissenting) (citations omitted).

posed no barriers to the maintenance of the plaintiff's cause of action.⁸⁰ Justice Gibbons stated that

[w]hat plaintiff is maintaining, a proposition with which I agree, is that he is within one of the classes of persons to whom Con Ed owes a duty to make reparations for injuries suffered as a result of its gross negligence. That class, made up, among others, of tenants injured as was the plaintiff, is foreseeable, is limited in size, is defined, and consists of persons who Con Ed must be presumed to have contemplated would rely on its service on a regular basis. In such circumstances, I can perceive of no public policy justification for excusing Con Ed from liability on the alleged basis that plaintiff was not a member of a class to whom Con Ed owed a duty of care.⁸¹

It is likely that we will witness again a major electric power blackout. The disposition of *Strauss* and the reasoned analysis of the dissent will be reviewed in future litigation. While it can be argued with some force that traditional negligence law is ill-suited for modern mass disaster and public emergency scenarios, such a conclusion clearly has such sweeping implications for change that it must be reserved for the Legislature. Traditional duty analysis must be applied in all common law negligence actions, whether there are one or one million potential plaintiffs. Public utility operations are not technological experiments. They are standardized applications of well-developed and thoroughly understood, if often undercontrolled, technology. Reliance on utility companies is total and inescapable. Liability may or may not follow a failure of a utility, but the issue of duty that allows a plaintiff to demonstrate breach of a standard of care and proximately caused harm should be resolved categorically against the utilities.

In determining a reasonable standard of care, the existence of an emergency may be considered in weighing the reasonableness of an actor's behavior.⁸² The rule is simple, unlike its application. The prime problem is the determination of what constitutes an emergency.

In *Shaw v. Manufacturers Hanover Trust Co.*,⁸³ the first department found that "the bank is not entitled to the emergency

80. See *id.* at 432-40, 469 N.Y.S.2d at 953-58 (Gibbons, J., dissenting).

81. *Id.* at 438-39, 469 N.Y.S.2d at 957.

82. See generally W. KEETON, *supra* note 66, at 196-97.

83. 95 A.D.2d 738, 464 N.Y.S.2d 172 (1st Dep't 1983).

instruction because the possibility of a bank robbery cannot be said to be one that is not anticipated.”⁸⁴ Reversing a verdict for the bank and its employee, an off-duty police officer who wounded the plaintiff while attempting to foil a bank heist, the court found that the emergency rule was unavailable for two reasons. First, the possibility of a bank robbery was known to all employees and they, in fact, had been trained as to procedures in case of a robbery.⁸⁵ Second, and of great importance, the emergency rule is not available if the actor’s conduct aggravated or created the emergency.⁸⁶ The police officer-bank employee, violating police procedures and a reasonable standard of care, opened fire, even after the felon recognized him and threatened violence if he resisted the robbery attempt.⁸⁷

There can be emergencies within emergencies. In *Shaw*, no emergency existed from a tort standpoint. The defendants may not benefit from a special emergency rule but must show that their behavior was reasonable under the circumstances.

Two important contribution decisions were announced during the *Survey* year. The New York Court of Appeals, in *Mitchell v. New York Hospital*,⁸⁸ held that the agreement of all parties to an action will permit a settling tortfeasor to obtain contribution from another person, despite the restrictions imposed by section 15-108(c) of the General Obligations Law.⁸⁹ The plaintiff was burned by scalding steam, and brought an action against the hospital where he was injured while working as a steamfitter.⁹⁰ The hospital sought contribution and indemnification in a third-party action against several parties.⁹¹ A settlement was reached.⁹² A stipulation was read into the record at the time the parties informed the court of the proposed settlement that, among other provisions, stated that “[i]t is specifically agreed and understood by all of the Third-

84. *Id.* at 739, 464 N.Y.S.2d at 174.

85. *See id.*

86. *See id.* at 740, 464 N.Y.S.2d at 174.

87. *Id.*

88. 61 N.Y.2d 208, 461 N.E.2d 285, 473 N.Y.S.2d 148 (1984), *modifying* 92 A.D.2d 832, 461 N.Y.S.2d 49 (2d Dep’t 1983).

89. Section 15-108(c) provides that “[a] tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.” N.Y. GEN. OBLIG. LAW § 15-108(c) (McKinney 1978).

90. 61 N.Y.2d at 212, 461 N.E.2d at 287, 473 N.Y.S.2d at 150.

91. *Id.*

92. *See id.*

Party Defendants here that no one waives any rights to contributions [sic] or indemnification by entering into this settlement.”⁹³ The stipulation also provided for trial by New York Hospital against “each of the named third-party defendants,”⁹⁴ and prior to trial the third-party defendants sought the protection of subdivision (c) of section 15-108 of the General Obligations Law.⁹⁵ Motions to dismiss were denied by the trial court, which found a waiver of the statutory bar against the seeking of contribution or indemnification.⁹⁶ The first department reversed, finding that the statutory provisions could not be waived by agreement.⁹⁷

Without dissent, the Court of Appeals reversed the appellate division and upheld the stipulation of the parties to the litigation.⁹⁸ The Court of Appeals stated that

[w]henver the enforceability of a stipulation among parties in a civil case is put in issue, we must begin our analysis with the recognition that courts have long favored and encouraged the fashioning of stipulations as a means of expediting and simplifying the resolution of disputes. . . . We have repeatedly held that, unless public policy is affronted, parties to a civil dispute are free to chart their own litigation course.⁹⁹

After this statement of broad policy encouraging settlements by parties, the Court of Appeals went on to find that “[t]here can be no serious claim that the subject stipulation offends public policy.”¹⁰⁰ The Court of Appeals held:

The stipulation here is designed to insure the fair and prompt compensation of an injured party while reserving the right of one tort-feasor to seek contribution from the remaining wrongdoers in an effort to accomplish an equitable sharing of liability. We believe stipulations such as this effectuate, rather than affront, the public policy of this State.¹⁰¹

In reviewing the legislative history of subdivision (c) of section

93. *Id.* at 213, 461 N.E.2d at 287, 473 N.Y.S.2d at 150.

94. *Id.* at 212, 461 N.E.2d at 287, 473 N.Y.S.2d at 150.

95. *Id.* at 213, 461 N.E.2d at 287, 473 N.Y.S.2d at 150.

96. *Id.* (referring to trial court decision).

97. *See Mitchell v. New York Hosp.*, 93 A.D.2d at 832, 461 N.Y.S.2d at 50.

98. *See* 61 N.Y.2d at 216-17, 461 N.E.2d at 290, 473 N.Y.S.2d at 153.

99. *Id.* at 214, 461 N.E.2d at 288, 473 N.Y.S.2d at 151 (citation omitted).

100. *Id.*

101. *Id.*

15-108 of the General Obligations Law, the Court noted that the statute represented a legislative awareness of and support for "equitable sharing of liability."¹⁰² Where, as in the instant action, the stipulation waiving the statutory provision barring the seeking of contribution or indemnification was entered into, in effect, at arm's length and with full awareness by all parties of the implications, the positive legislative purpose is best served by upholding the stipulation, rather than by meaninglessly giving strict and controlling status to the statutory subdivision.¹⁰³

While it is unlikely that any large number of litigants will avail themselves of *Mitchell*, the case announced an additional means of negotiating equitable resolution of joint liability and should be welcomed for both its impact and its succinct but excellent restatement of policy.

Subdivision (c) of section 15-108 of the General Obligations Law was also the subject of a second department review of an action commenced in the Court of Claims, *Makeun v. State*.¹⁰⁴ In an action against defendant Makeun for personal injuries to the plaintiff allegedly caused by, in part, water flowing from the defendant's land, a bifurcated trial was held.¹⁰⁵ On the issue of liability, Makeun was found sixty-five percent liable, but a trial on the damages question was not held until thirteen months later.¹⁰⁶ Before the jury announced a verdict, Makeun settled with the plaintiff. He then sought contribution and indemnification from the State.¹⁰⁷

Under section 15-108, a tortfeasor who settled prior to a verdict could not seek contribution.¹⁰⁸ The second department noted that "[h]ere, however, the court is presented with a somewhat different and apparently novel situation. The settlement was reached after a jury verdict on culpability, but before a verdict and judgment on the issue of damages."¹⁰⁹ Affirming the Court of Claims, the second department determined that the general legislative preference for encouraging settlements would be upset if Makeun

102. *Id.* at 215, 461 N.E.2d at 289, 473 N.Y.S.2d at 152.

103. *See id.* at 216-17, 461 N.E.2d at 289-90, 473 N.Y.S.2d at 152-53.

104. 98 A.D.2d 583, 471 N.Y.S.2d 293 (2d Dep't 1984).

105. *Id.* at 584, 471 N.Y.S.2d at 294.

106. *Id.*

107. *Id.*

108. N.Y. GEN. OBLIG. LAW §15-108(c) (McKinney 1978).

109. 98 A.D.2d at 586, 471 N.Y.S.2d at 295.

could seek contribution.¹¹⁰ The court stated that

[a] settling tort-feasor enjoys the protection of subdivision (b), which precludes a claim for contribution from being asserted against him. Without the presence of subdivision (c), the settlor, who is protected from contribution, would still be able to exercise a right of contribution against others.¹¹¹

While conceding that the result achieved here may not be just, the appellate division determined that change, if any, must come from the Legislature.¹¹²

It is doubtful that there is any injustice here. Makeun was free to settle or not to settle. His contribution possibilities were clear in law. Like many litigants, he gambled and, perhaps because of the unusual delay between trial for liability and trial for damages, he came out a little worse than he might have otherwise. The legislative policy behind section 15-108(c) of the General Obligations Law was not violated by the result.

B. State and Municipal Entities

This *Survey* year was relatively light in terms of decisions significantly affecting state and local government tort law. One case of interest is *Sega v. State*.¹¹³ Consolidated with *Cutway v. State*, the cases involved injury to persons who were using recreationally land owned by the State of New York.¹¹⁴ Both cases on appeal involved the applicability of section 9-103 of the General Obligations Law when raised by the state as a defense to actions for injuries.¹¹⁵

110. See *id.* at 586, 588, 471 N.Y.S.2d at 296, 297.

111. *Id.* at 588, 471 N.Y.S.2d at 297.

112. See *id.* at 591-92, 471 N.Y.S.2d at 299.

113. 60 N.Y.2d 183, 456 N.E.2d 1174, 469 N.Y.S.2d 51 (1983).

114. In *Sega*, the claimant was injured while hiking in the Catskill Forest Preserve. The claimant was seriously injured when a pipe railing on which she was sitting came loose, causing her to fall into a creek. The recreational area was not supervised except for garbage collection. The claimant alleged ordinary negligence. See *id.* at 187-88, 456 N.E.2d at 1176, 469 N.Y.S.2d at 53. In the companion action, *Cutway v. State*, the claimant was severely injured by a cable stretched across the road by state employees who were trying to combat vandalism and burglary of state buildings. Unlike *Sega*, the claimant in *Cutway* argued that the cable was a trap. No warning was posted. See *id.* at 188-89, 456 N.E.2d at 1176-66, 469 N.Y.S.2d 53-54. Because the claimant could not establish any willful or malicious intent on the part of the state or its employees, however, his action failed together with the action in *Sega*. See *id.* at 192-92, 456 N.E.2d at 1178-79, 469 N.Y.S.2d at 56.

115. See N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1978 & Supp. 1984-1985). At the time of the case, Section 9-103 read:

The statute provides that no duty of care exists on the part of owners of land used for recreation if the owners do not charge users, and, if there is neither a willful nor an intentional failure to warn of danger or to guard against its existence.¹¹⁶ Use of the State-owned land in these two cases was without charge to the public.

The Court of Appeals found that "[o]n its face, section 9-103 unambiguously includes public property within its purview."¹¹⁷ The Court applied the statute to the recreational property owned by the State and analyzed its impact. The Court noted that:

[N]othing in the statute suggest[s] that it was meant to codify the common law Its scope is restricted to a limited number of activities [S]ection 9-103 and its predecessors impose liabil-

No duty to keep premises safe for certain uses; responsibility for acts of such users

1. Except as provided in subdivision two,

a. an owner, lessee or occupant of premises, whether or not posted as provided in section 11-2111 of the environmental conservation law, owes no duty to keep the premises safe for entry or use by others for hunting, fishing, or canoeing, boating, trapping, hiking, cross-country skiing, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering of wood for noncommercial purposes or training of dogs, or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes;

b. an owner, lessee or occupant of premises who gives permission to another to pursue any such activities upon such premises does not thereby (1) extend any assurance that the premises are safe for such purpose, or (2) constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.

2. This section does not limit the liability which would otherwise exist

a. for willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity; or

b. for injury suffered in any case where permission to pursue any of the activities enumerated in this section was granted for a consideration other than the consideration, if any, paid to said landowner by the state or federal government, or permission to train dogs was granted for a consideration other than that provided for in section 11-0925 of the environmental conservation law; or

c. for injury caused, by acts of persons to whom permission to pursue any of the activities enumerated in this section was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

3. Nothing in this section creates a duty of care or ground of liability for injury to person or property.

N.Y. GEN. OBLIG. LAW § 9-103 (amended version at McKinney 1978 and Supp. 1984-1985).

116. *See id.*

117. *Sega*, 60 N.Y.2d at 190, 456 N.E.2d at 1177, 469 N.Y.S.2d at 54.

ity only if there is a willful or malicious failure to warn. And the statute does not indicate any intent to except traps or concealed defects from this standard.¹¹⁸

The Court of Appeals decision in *Sega* clearly places the State, which provides extensive recreational grounds, on an equal footing with private landowners. The public policy of providing adequate recreational facilities is achieved without subjecting the state to claims for injuries resulting from ordinary negligence. Such claims would, at the least, cripple the public parks system and result in the curtailment of access. No resulting public benefit would be achieved. Under *Sega*, the State continues to share with private landowners liability for intentional wrongful acts.

The doctrine of negligence *per se* does not create any special problems for first year law students. For some reason it has always bedeviled some trial judges. In *Dance v. Town of Southampton*,¹¹⁹ the second department found reversible error because the trial court charged that violation of a statute constituted negligence *per se*.¹²⁰ The second department reasoned that violation of a "reporting" statute that did not create a standard of care to protect motorists and did not necessarily reflect the motorist's competency could not constitute negligence *per se*.¹²¹ The statute dealt with a requirement that license holders report any personal injuries to the Commissioner of Motor Vehicles.¹²² The legislative history does not mention civil liability, but sound policy dictates that "to automatically derive a conclusion of negligence from violation of such statutes would present considerable potential for unfairness and overpunishment."¹²³ *Dance* is a good opinion, in that it outlines the nature of negligence *per se*.

A decision with disturbing policy implications is *Frazier v.*

118. *Id.* at 191, 456 N.E.2d at 1178, 469 N.Y.S.2d at 55 (citations omitted).

119. 95 A.D. 442, 467 N.Y.S.2d 203 (2d Dep't 1983).

120. *See id.* at 448, 467 N.Y.S.2d at 207.

121. *See id.* at 448-49, 467 N.Y.S.2d at 208.

122. *See* N.Y. VEH. & TRAF. LAW § 506(4) (McKinney Supp. 1984-1985), providing:

Any person holding a license issued pursuant to this chapter who suffers permanent loss of use of one or both hands or arms or of one or both feet or legs, or one eye shall, before operating any motor vehicle or motorcycle make report thereof to the commissioner, who shall take such reasonable action as may be proper under the divisions of this section.

123. *Dance*, 95 A.D.2d at 449, 467 N.Y.S.2d at 208.

State,¹²⁴ in which the State was absolved of liability in an action based on the doctrine of *respondeat superior* for a shooting by a corrections officer. The officer pursued two men who had robbed him.¹²⁵ The claimant suffered a bullet wound in the foot when the state-employed corrections officer tried to apprehend the men who robbed him.¹²⁶ The court majority analyzed the relevant statute defining the status held by the corrections officer, that of peace officer,¹²⁷ and found that the duties of a peace officer placed this officer's actions outside the scope of his duties.¹²⁸ Further, relying on a case in which a police officer tortiously misused a claim of official authority to accomplish a personal—and illegal—end, the majority found that “liability cannot be foisted on the State for negligent acts committed by Warner [the corrections officer] for reasons personal to him and not in response to any duty owed by him to the State.”¹²⁹

In a dissenting opinion, Justice Alexander reviewed the nature of the corrections officer's position and found that “he is not an ordinary citizen and assumes the duty to prevent crime and apprehend criminals.”¹³⁰ Justice Alexander also correctly pointed out the degree of control that the State maintains with regard to authorizing corrections officers to carry weapons when off-duty.¹³¹

Although Justice Alexander's dissent is persuasive, it does not go far enough. Neither the majority nor the dissent recognized the real public policy behind allowing non-police officers, such as cor-

124. 100 A.D. 270, 474 N.Y.S.2d 7 (1st Dep't 1984).

125. *See id.* at 274, 474 N.Y.S.2d at 11.

126. *Id.* at 271, 474 N.Y.S.2d at 8.

127. *See id.* at 272, 474 N.Y.S.2d at 9.

128. *See id.*

129. *Id.* at 274, 474 N.Y.S.2d at 11. The court majority relied on *Stavitz v. City of New York*, 98 A.D.2d 529, 471 N.Y.S.2d 272 (1st Dep't 1984). In *Stavitz*, an off-duty police officer assaulted a neighbor with whom he was engaged in a dispute about sand dumped on a common driveway. Following the assault, the officer returned, displayed his shield, and arrested both his neighbor and his neighbor's mother, charging them with assault and resisting arrest. *See Frazier*, 100 A.D.2d at 274, 474 N.Y.S.2d at 10-11. What relevance *Stavitz* has for *Frazier v. State* is beyond me.

130. *Frazier*, 100 A.D.2d at 276, 474 N.Y.S.2d at 12 (Alexander, J., dissenting).

131. *See id.* at 278, 474 N.Y.S.2d at 13 (Alexander, J., dissenting). Police officers are required, generally, to carry an off-duty weapon at all times. This traditional requirement is not applicable to peace officers as a matter of departmental regulation, but it has become customary. For a variety of reasons, peace officers whose functions are most closely related to police duties commonly consider the privilege to carry a weapon off-duty as a right. News stories of peace officers intervening to terminate criminal activity are common.

rections officers, to carry firearms off-duty. While self-protection is a component, it is far more likely that a corrections officer like Warner will encounter hoopleheads committing crimes, rather than former guests of the state seeking vengeance. Further, the distinction between police and peace officer status is blurred not only in the eyes of the public but, at this point, is sometimes not clear to peace officers either. The uniforms and shields of peace officers are virtually identical to police uniforms and shields, training is similar and often joint, both exercise official duties in the community, and both classes of officers frequently work together. Of equal importance, peace officers may psychologically view themselves as being in the same profession as police and they may react to the same stimuli for intervention. It is hard to deny that the public purpose is served when trained officers, permitted by the State to go about armed, aid in combatting crime. Such intervention certainly should be no bar to invoking the doctrine of *respondeat superior*.

The decision in *Frazier* protects the public purse while removing an incentive for peace officers to augment the police. This is not a useful savings, and the statutes relied upon by the court majority do not dictate this unwelcome result.

C. *Recovery for Emotional Trauma*

Perhaps the most important torts decision for the *Survey* year was *Bousun v. Sanperi*,¹³² in which the Court of Appeals brought New York common law in line with that of many jurisdictions by recognizing a cause of action for emotional injuries sustained by victims in a zone of danger who observe the death or serious injury of a member of their immediate family.

Writing for the Court majority, Judge Jones began the opinion with the following succinct statement, outlining the major change in New York tort jurisprudence:

Where a defendant's conduct is negligent as creating an unreasonable risk of bodily harm to a plaintiff and such conduct is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family in his or her presence, the plaintiff may recover dam-

132. 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984).

ages for such injuries.¹³³

The Court's reasoning for its position is essentially a recapitulation of arguments that have been raised over a period of decades, both in New York and in sister jurisdictions that have recognized the zone-of-danger rule¹³⁴ for a long time. Perhaps the main thrust of *Bovsun*, after announcement of the new doctrine, is to declare what the case is *not*. The Court held that:

The zone-of-danger rule that we adopt here is not inconsistent with the past decisions of our court that have denied recovery for emotional distress attributable to a family member's death or injury None of these cases involved plaintiffs who had themselves been subject to a danger of bodily harm, although some of the plaintiffs had been present during, had observed, and even had participated in the negligent conduct.¹³⁵

Thus, New York will continue to refuse to recognize the claim of a mother who, although in no danger herself, witnesses the negligent killing of her child.¹³⁶ The case failed to decide who will be considered to be members of the immediate family.¹³⁷

Bovsun was a four-to-three decision, and the dissenting opin-

133. *Id.* at 223-24, 461 N.E.2d at 844, 473 N.Y.S.2d at 358.

134. *See id.* at 229 n.7, 461 N.E.2d at 847 n.7, 473 N.Y.S.2d at 361 n.7 (noting that only two reported decisions upheld recovery in those jurisdictions). The zone-of-danger rule allows one who is himself threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress resulting from viewing the death or serious physical injury of a member of his or her immediate family. *Id.* at 228, 461 N.E.2d at 847, 473 N.Y.S.2d at 361.

135. *Id.* at 232, 461 N.E.2d at 849, 473 N.Y.S.2d at 363 (citations omitted).

136. *See, e.g.,* *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) (holding that a mother could not recover for the harm sustained by the shock and fear for her two-year-old child who suffered from serious automobile accident injuries). For similar denials in cases of third party psychic injuries, see *Lafferty v. Manhasset Medical Center Hosp.*, 54 N.Y.2d 277, 429 N.E.2d 789, 445 N.Y.S.2d 111 (1981); *Vaccaro v. Squibb Corp.*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977).

137. *See Bovsun*, 61 N.Y.2d at 233 n.13, 461 N.E.2d at 850 n.13, 473 N.Y.S.2d at 364 n.13. Whatever the definition of immediate family will be as *Bovsun* is explored in future litigation, it is clear that both unmarried-heterosexual and homosexual couples will not be able to base a cause of action on *Bovsun*. This is regrettable, and it is possible, but perhaps not too likely, that an interpretation of *Bovsun* extending the concept of immediate family could yield a broader and more humane concept of recovery for psychic trauma. The rationale for permitting a family member who is in the zone of danger to recover for the emotional damage resulting from the viewing of the death or serious injury of another family member can be logically applied to non-family relationships of long-standing.

ion, authored by Judge Kaye, covered most of the oft-repeated reasons for not recognizing a cause of action for psychic trauma.¹³⁸ The dissent viewed the majority's action as creating a new duty¹³⁹ with "artificial and arbitrary"¹⁴⁰ limitations. The dissenters would continue reliance on prior cases.¹⁴¹ The dissent noted that the zone-of-danger rule has been critized in other jurisdictions,¹⁴² but some of these jurisdictions in fact go beyond the scope of the cause of action recognized by the *Bovsun* majority.¹⁴³ Essentially, the dissent appears concerned with the cost of newly recognized rights, and its disagreement with the majority is rooted in fundamental policy, rather than in criticism of doctrinal interpretation. Indeed, in a short opinion concurring with Judge Kaye, Judge Wachtler maintained that "[t]he institutional stability of a court is more important than any desire to remedy what may be perceived as a harsh application of the rule in a given case."¹⁴⁴

It is questionable what institutional stability value can be imperilled when the highest court of New York joins a large number of respected sister states in recognizing a cause of action for zone-of-danger recovery of psychic injuries. The societal cost will probably not be high because, in many instances, the members of the family all sustain physical injury and the emotional harm is indivisible from the physical injury. Further, *Bovsun* leaves for future adjudication what elements of proof must be established to allow

138. See *id.* at 234, 461 N.E.2d at 850, 473 N.Y.S.2d at 364 (Kaye, J., dissenting).

139. See *id.*, 461 N.E.2d at 850-51, 473 N.Y.S.2d at 364-65 (Kaye, J., dissenting).

140. *Id.* (Kaye, J., dissenting).

141. See *id.* at 234-43, 461 N.E.2d at 850-56, 473 N.Y.S.2d at 364-70 (Kaye, J., dissenting).

142. See *id.* at 242 n.5, 461 N.E.2d at 856 n.5, 473 N.Y.S.2d at 370 n.5 (Kaye, J., dissenting).

143. See *id.* (Kaye, J., dissenting) (citing *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa Ct. App. 1981); *Dziokonski v. Babineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978)). Reliance on these cases by the dissenters is disingenuous, because each case either follows or expands California's doctrine of recovery for psychic harm following the witnessing of death or injury of a close relative, without reference to the plaintiff being in the zone of danger. To the extent that these cases expose a weakness in the reasoning of the *Bovsun* majority, the weakness is that the decision does not go far enough.

144. 61 N.Y.2d at 243, 461 N.E.2d at 856, 473 N.Y.S.2d at 370 (Wachtler, J., dissenting). The harshness to which Judge Wachtler refers is not the "harsh application of the rule in a given case," but the reality, grasped by the majority, that the rule itself created an unfair and cruel result. Perhaps Judge Wachtler's short dissent unconsciously mirrors the judicial conservatism that has characterized the New York Court of Appeals in the past decade.

for recovery for psychic harm absent physical trauma. There is no reason to believe that the courts will permit runaway emotional distress verdicts. This has not happened with the tort of intentional infliction of mental distress, still a relative newcomer to New York jurisprudence,¹⁴⁵ and it should not happen in this area.

Soon after *Bovsun*, the first department decided *Landon v. New York Hospital*.¹⁴⁶ Citing *Bovsun*, the appellate court ruled that the parents of a child exposed to bacterial meningitis were barred from recovering for psychic trauma because of their own fear of contracting the disease.¹⁴⁷ Allegedly, negligence resulted in a delay in diagnosing and treating the infant plaintiff's condition. Reversing the trial court, the appellate division dismissed on the basis of existing case law, buttressed by *Bovsun*. The court noted that

[t]he duty of diagnosis ran to the child and not to the parents. To the extent that the parents were allegedly exposed to the disease prior to the diagnosis, no cause of action is properly pleaded for the obvious reason that no damage was sustained during that period. To the extent that psychic damage is asserted to flow from periods of time after the diagnosis, obviously there can be no recovery since if there was a duty to the parents it was a duty properly and promptly to diagnose the condition and so advise the parents. Plainly, no cause of action arises from such a lack of timely notification.¹⁴⁸

To be discussed at length in next year's *Survey* article is *Johnson v. Jamaica Hospital*.¹⁴⁹ The second department sustained a denial of a motion to dismiss for failure to state a cause of action where injuries were psychical. The plaintiff's nine-day-old child was kidnapped from the defendant's hospital's premises and was not located until four and one-half months later. The Court of Appeals reversed the appellate division and a full discussion of that opinion will no doubt be included in the next *Survey* article.

145. See *Halio v. Lurie*, 15 A.D.2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961) (initial allowance of recovery for intentional infliction of emotional distress).

146. 101 A.D.2d 489, 476 N.Y.S.2d 303 (1st Dep't 1984), *appeal dismissed*, 63 N.Y.2d 754, 471 N.E.2d 457, 481 N.Y.S.2d 685 (1984).

147. See 101 A.D.2d at 495-96, 476 N.Y.S.2d at 308.

148. *Id.*

149. 95 A.D.2d 598, 467 N.Y.S.2d 634 (2d Dep't 1983), *rev'd*, 62 N.Y.S.2d 523, 467 N.E.2d 502, 478 N.Y.S.2d 838 (1984) (certified question answered in the negative).

D. Legal Malpractice

No major decisions were reported during the *Survey* year in the area of legal malpractice. Two examples of impermissible courtroom antics, however, reached the second department. The conduct of defense counsel mandated a reversal and directions for a new trial in *Giumara v. O'Donnell*.¹⁵⁰ Describing counsel's behavior as "gross impropriety," the appellate panel found unacceptable the attorney's statements that the case was surrounded by mystery and deception, that there was something strange in the fact that the plaintiff spelled her name with one "r" instead of the two as found in official records, and similar statements.¹⁵¹ Gratuitous and offensive references to religion only added to the destruction of the trial process. The only mystery is why the trial judge did not declare a mistrial himself.

The Rockaways in Queens have seen better times and hardly any worse than the present. Perhaps urban redevelopment of this blighted area of Queens will be boosted by a second department finding that "a midday visit to a beach in the Rockaways during the month of June simply does not indicate moral turpitude."¹⁵² Such a conclusion was implied by defense counsel in *Guzzardi v. Grotas*,¹⁵³ a personal injury action. Reversal and directions for a new trial followed appellate review of the trial, in which the defense counsel had suggested that the presence of the married plaintiff in the car of the defendant imputed adultery. This comment, the court held, was "highly prejudicial."¹⁵⁴

IV. STRICT LIABILITY

A. Products Liability

Perhaps the most important products liability decision of the *Survey* year was *Martin v. Edwards Laboratories, Division of American Hospital Supply Corporation*.¹⁵⁵ *Martin* was consoli-

150. 96 A.D.2d 1049, 446 N.Y.S.2d 692 (2d Dep't 1983).

151. *See id.* at 1049-50, 466 N.Y.S.2d at 693. "[T]he cumulative effect of these and other prejudicial and highly inflammatory remarks made by defense counsel, which were totally irrelevant to any legitimate issue presented at trial, would require reversal of the judgment . . ." *Id.* at 1051, 466 N.Y.S.2d at 695.

152. *Guzzardi v. Grotas*, 98 A.D.2d 761, 762, 469 N.Y.S.2d 475, 476 (2d Dep't 1983).

153. *See id.* 98 A.D.2d at 761, 469 N.Y.S.2d 475 (2d Dep't 1983).

154. *See id.* at 761-62, 469 N.Y.S.2d at 476.

155. 60 N.Y.2d 417, 457 N.E.2d 1150, 469 N.Y.S.2d 923 (1983).

dated with *Lindsey v. A.H. Robins Co.*, which was discussed in last year's *Torts Survey* article.¹⁵⁶ Speaking for the Court, Judge Meyer announced that "[t]he Statute of Limitations for personal injury caused by the malfunctioning of a prosthetic or contraceptive device implanted or inserted into the human body runs from the date of the injury resulting from the malfunction, not necessarily from the date of implantation or insertion."¹⁵⁷

In a decision without dissent, the Court found that the appropriate period for calculating the statute of limitations in product insertion or implantation case must begin with the malfunction or failure of the device or prosthesis.¹⁵⁸ New York has agonized over the years about products liability statutes of limitations commencement periods.¹⁵⁹ The rule announced in *Martin* is the only rule that makes sense. Implanted devices can be, and too often are, time bombs. Inspection during use is often impossible and usually dangerous. Latent defects become apparent long after any breach of warranty action is possible. Often there is no negligence in the implantation process and the sole remedy is one based on strict products liability. To deny a cause of action when the undetectable occurs after three years is to make product safety in this sensitive area a horse race, with manufacturers and sellers safe when a patient passes the three year mark.

Law students who have mastered common law strict liability as represented by *Rylands v. Fletcher*¹⁶⁰ and the extra-hazardous activities cases¹⁶¹ sometimes have problems in dealing with strict products liability and, in particular, with the long line of defective design cases. Assured by the professor that they are dealing with strict liability, they hesitantly explore what, with increasing familiarity, appears to be a variation of negligence. This confusion was highlighted in *Voss v. Black & Decker Manufacturing Co.*¹⁶² The

156. *Torts, 1983 Survey of N.Y. Law*, *supra* note 1, at 669-70 (1984).

157. *Martin*, 60 N.Y.2d at 422, 457 N.E.2d at 1152, 469 N.Y.S.2d at 925.

158. *See id.* at 428, 457 N.E.2d at 1155-56, 469 N.Y.S.2d at 928-29.

159. The present state of the law in New York has eliminated much of the doubt because actions for personal injury caused by defective products are to be brought as strict products liability actions, with the statute of limitations to sound in tort.

160. 3 H. & C. 774, 159 Eng. Rep. 737 (1865), *rev'd*, 1 L.R.-Ex. 265 (1866), *aff'd*, 3 L.R.-H.L. 330 (1868).

161. *See, e.g., Spano v. Perini Corp.*, 25 N.Y.2d 11, 250 N.E.2d 31, 302 N.Y.S.2d 527 (1969).

162. 59 N.Y.2d 102, 450 N.E.2d 204, 463 N.Y.S.2d 398 (1983).

Court of Appeals remitted for a new trial a products liability action in which the trial judge sent the case to the jury on a negligence cause of action only.¹⁶³ The trial judge dismissed the plaintiff's strict products liability and warranty causes of action.¹⁶⁴ The jury returned a verdict for the defendants.¹⁶⁵

The Court of Appeals found that the plaintiff had, in fact, made out a *prima facie* case in strict products liability. His evidence that a safer product was technically possible and that the defendant had not marketed a reasonably safe product was sufficient to take the matter to the jury.¹⁶⁶ While strict products liability carries doctrinal baggage of its own, the plaintiff tried to prove, in essence, that the defendant was not reasonable in marketing the injury-producing product.

It is difficult to understand why counsel persist in bringing both strict products liability causes of action and negligence actions. Only where it is possible to show gross negligence can a good argument be made to justify the confusion created concerning the two causes of action. In *Voss*, if the plaintiff established enough to carry negligence forward, he established enough to support his strict liability claim.

In another Court of Appeals products liability decision, *Cover v. Cohen*,¹⁶⁷ the plaintiff suffered severe and permanent injuries when a Chevrolet Malibu, going backwards at high speed and out of control, struck him.¹⁶⁸ Issues raised on appeal included whether a federal motor vehicle safety standard that was not promulgated until after the car's manufacture, and a technical service bulletin that related to the cause of the plaintiff's injuries, were admissible into evidence.¹⁶⁹ The bulletin had been sent to General Motors dealers after the manufacture of the Malibu.¹⁷⁰

The Court found that admission of the federal standard was erroneous,¹⁷¹ but that the bulletin could have been of probative

163. See *id.* at 105-06, 450 N.E.2d at 207, 463 N.Y.S.2d at 401.

164. See *id.* (referring to trial court's decision).

165. See *id.* at 106, 450 N.E.2d at 207, 463 N.Y.S.2d at 401.

166. See *id.* at 110, 450 N.E.2d at 209, 463 N.Y.S.2d at 403.

167. 61 N.Y.2d 261, 461 N.E.2d 864, 473 N.Y.S.2d 378 (1984).

168. See *id.* at 267, 461 N.E.2d at 866, 473 N.Y.S.2d at 380.

169. See *id.* at 269, 461 N.E.2d at 867, 473 N.Y.S.2d at 380.

170. *Id.* at 274, 461 N.E.2d at 871, 473 N.Y.S.2d at 385.

171. See *id.* at 267, 461 N.E.2d at 868, 473 N.Y.S.2d at 380.

value on the failure to warn issue.¹⁷²

Although *Cover* does not break new ground in New York products liability, the case is a good discussion of the law of evidence as that subject applies to design defect cases.

B. *Dram Shop*

Attempts to enlarge the scope of New York's Dram Shop Act¹⁷³ are as frequent as they are unavailing. In the latest try, a tavern owner sought contribution or indemnification against a radio station that sponsored a bar party as a promotional event. The third-party complaint in *Magee v. Landers*¹⁷⁴ was dismissed, with the court observing that

[t]he radio station had no say as to whom should be served, or how often. Such matters are generally understood to be the prerogative of the tavern's proprietor and his employees, and are matters of judgment and discretion best left to such persons, who are in the best position to evaluate the circumstances and act accordingly as masters of their own premises.¹⁷⁵

So ended another attempt to expand liability under the Dram Shop Act.

V. INTENTIONAL TORTS

A. *Privacy and Publicity*

Section fifty-one of the New York Civil Rights Law¹⁷⁶ provides new issues for adjudication year after year. Perhaps because New York has no common law cause of action for invasion of privacy, resort to section fifty-one is inevitable, even when the statute's application is questionable. This *Survey* year witnessed three cases in which the statute was successfully invoked.

The only section fifty-one case to reach the Court of Appeals,

172. See *id.* at 277, 461 N.E.2d at 872, 473 N.Y.S.2d at 386.

173. See N.Y. GEN. OBLIG. LAW § 11-101(1) (McKinney 1978). The statute provides: Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication.

174. 122 Misc. 2d 736, 471 N.Y.S.2d 799 (Sup. Ct., Onondaga Co. 1984).

175. *Id.* at 738, 471 N.Y.S.2d at 802.

176. N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 1984-1985).

Dzurenko v. Jordache, Inc.,¹⁷⁷ concerned limitations on the use of photographs for commercial purposes where the consent was signed subsequent to a modeling session, rather than the usual practice of signing prior to such sessions. In a memorandum opinion, the Court held that the time of the signing of the consent was immaterial. The statute requires written consent, and the time of signing is not given, nor need it be implied as having to occur at any special time.¹⁷⁸

A preliminary injunction was granted to Jacqueline Kennedy Onassis in *Onassis v. Christian Dior-New York, Inc.*,¹⁷⁹ restraining the commercial use of photographs by the defendant.¹⁸⁰ The challenged photographs featured a "look-alike" model, and Mrs. Onassis alleged that such use violated section fifty-one of the Civil Rights Law.¹⁸¹ The trial judge reviewed Mrs. Onassis' career of public service and her assertions that she would not appear in commercial advertising, nor would she wish people to believe that she had.¹⁸² The court addressed the problem of imitators because co-defendant Barbara Reynolds maintained that "she cannot be prevented from using her own face."¹⁸³ Justice Greenfield found that a person can indeed be restrained from using his or her own face if the purpose is deception for commercial gain. Justice Greenfield stated:

There are many aspects of identity. A person may be known not only by objective indicia—name, face, and social security number, but by other characteristics as well—voice, movement, style, coiffure, typical phrases, as well as by his or her history and accomplishments. Thus far, the Legislature has accorded protection only to those aspects of identity embodied in name and face. Imitators are free to simulate voice or hair-do, or characteristic clothing or accessories, and writers to comment on and actors to re-enact events. No one is free to trade on another's name or appearance and claim immunity because what he is using is similar to but not identical with the original.¹⁸⁴

177. 59 N.Y.2d 788, 451 N.E.2d 477, 464 N.Y.S.2d 730 (1983).

178. *See id.* at 790, 451 N.E.2d 478, 464 N.Y.S.2d at 730.

179. 122 Misc. 2d 603, 47 N.Y.S.2d 254 (Sup. Ct., N.Y. Co. 1984).

180. *See id.* at 616, 472 N.E.2d at 263-64.

181. *See id.* at 604, 472 N.Y.S.2d at 256.

182. *See id.* at 609, 472 N.Y.S.2d at 257.

183. *Id.* at 612, 472 N.Y.S.2d at 261.

184. *Id.*

The first department decided the most interesting section fifty-one case of the *Survey* year, *Cohen v. Herbal Concepts, Inc.*¹⁸⁵ A photographer allegedly snapped pictures of the plaintiff Cohen and her infant daughter bathing in the nude on private property in Woodstock, New York.¹⁸⁶ Imagine the surprise of plaintiff's husband when he recognized his wife and daughter in advertisements for an anti-cellulite product¹⁸⁷ in three major, nationally circulated publications.¹⁸⁸ Although the photograph does not show faces,

[it] depicts two nude persons, a woman . . . leading a young girl . . . Although the faces of neither are visible, the rear and side of the subjects can be seen. The mother appears lean, with a long, thin neck and short, free-flowing hair. Her waist and arms are slender and her right breast is visible, as is the area of the buttocks, with what appear to be two dimples appearing above.¹⁸⁹

While it is unlikely, hopefully, that many could identify the persons in the photograph, the court concluded that the statutory protection of section fifty-one extended to the plaintiff.¹⁹⁰ Reversing summary judgment for the defendants, the first department found that sufficient allegations had been made to preserve the plaintiff's right to a verdict on the merits.¹⁹¹

The appellate division's analysis is consistent with developing section fifty-one law. Many persons whose likenesses have been unlawfully appropriated for commercial purposes are unknown outside their circle of relatives and friends. That only a handful of people, perhaps only a spouse, might have identified the subject of the photograph in *Cohen* is legally irrelevant. The full burden is properly placed upon the party seeking to benefit commercially

185. 100 A.D.2d 175, 473 N.Y.S.2d 426 (1st Dep't), *aff'd*, 63 N.Y.2d 379, 472 N.E.2d 307, 482 N.Y.S.2d 457 (1984).

186. *Id.* at 176, 473 N.Y.S.2d at 427 (Kassal, J., concurring).

187. *See id.* The photograph in the advertisement may have been flattering, but association with this type of product may have been an added source of annoyance to the plaintiff.

188. *See id.* (naming the three magazines: *Cosmopolitan*, *House Beautiful* and *House and Garden*).

189. *Id.* at 176, 473 N.Y.S.2d at 428. A comprehensive search of reported Anglo-American cases indicated that this is the first reported action in which dimples above buttocks constituted identifying marks in either a civil or criminal action.

190. *See id.* at 179, 473 N.Y.S.2d at 429 (Kassal, J., concurring).

191. *See id.* at 189, 473 N.Y.S.2d at 435 (Asch, J., concurring).

from an advertisement.¹⁹²

B. Libel and Slander

The notable case of the *Survey* year, *Sharon v. Time, Inc.*¹⁹³ was decided after the closing date for this volume. It will be covered in the next *Survey* article.

Few major libel or slander cases were decided during the *Survey* year. *Held v. Pokorny*¹⁹⁴ concerned alleged intra-familial libel. In this diversity action, the plaintiff, an attorney who conducted both the practice of law and the sale of insurance on the same premises,¹⁹⁵ alleged that he was libeled by his stepson in a letter that stated that the plaintiff's contravening of his deceased wife's wishes was immoral. Judge Weinfeld found that the offending words constituted a nonactionable statement of opinion¹⁹⁶ and that the letter did not allege any breach of a professional duty or lack of professional integrity.¹⁹⁷ We do not know if the plaintiff did disregard the wishes of the defendant's mother.

Despite my urging to the contrary in last year's *Survey* article,¹⁹⁸ the Court of Appeals reversed the second department in *Park Knoll Associates v. Schmidt*.¹⁹⁹ The appellate division had attached an absolute privilege to communications by a tenant

192. The status of the photographer, defendant James Krieger, is not clear from the opinion. Presumably he was a free-lance photographer who subsequently sold his photo of plaintiff Cohen to the defendants. It can be assumed that, in many instances, advertisements in national magazines feature photographs originally taken by free-lancers or even amateurs. Section 51 of the New York Civil Rights Law is properly applied as a strict liability tort. No duty of care on the part of the defendant who utilizes the photograph is relevant. Either there is or is not a valid, written consent for commercial use of the photograph. Because the photographers are often people with limited assets who may be difficult to locate and serve, the advertiser becomes the true target of § 51 litigation. As it is clear that identification of the subjects in a photo by close friends or relatives based on intimate knowledge of the subject's body is sufficient for damages under New York law, it is especially incumbent upon advertisers to use the highest standard of care to attempt to avoid litigation.

193. 575 F. Supp. 1162 (S.D.N.Y. 1983).

194. 583 F. Supp. 1038 (S.D.N.Y. 1984).

195. *See id.*

196. *See id.* at 1039.

197. *See id.* at 1042.

198. *See Torts, 1983 Survey, supra* note 1, at 677-78.

199. 59 N.Y.2d 205, 451 N.E.2d 182, 464 N.Y.S.2d 424 (1983) *rev'g* 89 A.D.2d 164, 454 N.Y.S.2d 901 (2d Dep't 1982).

group leader in a quasi-judicial proceeding.²⁰⁰ Judge Simons wrote for the Court majority, finding that

[t]here should be a reversal. A leader who assists group members in registering official complaints does not enjoy an absolute privilege from liability for defamation. The social value of such leaders is palpable but they are not within the limited group of persons who because of their official participation in the processes of government are granted immunity.²⁰¹

The Court noted that "were we to extend [an absolute privilege] to defendant here, there would be no apparent reason to deny immunity to the leader of any cause who encourages litigation no matter how worthwhile or frivolous the purpose of the movement."²⁰² The majority failed to understand that absolute privilege can be granted in limited categories and that there are pressing reasons for recognizing a housing crisis in New York. In addition, there exists a traditional and continuing imbalance of power between tenants in a shrinking housing market and landlords who frequently seek to convert rental buildings to cooperative or condominium ownership status. Judge Wachtler, dissenting, noted that "if there are compelling reasons for granting an absolute privilege to litigants and attorneys appearing before this body [State Division of Housing and Community Renewal], the privilege should apply as well to those volunteer representatives whom the tenant has chosen to speak on his or her behalf."²⁰³ What was not recognized by either the majority or the dissenting judges is that landlords are virtually always represented by counsel, while tenants are often dependent upon leaders from within the tenant body. Although tenant leaders are sometimes not trustworthy, this possibility should not be asserted in order to deny tenants the privilege of adequate representation. *Park Knoll* handicaps the tenant groups that most need protection, those without legal representation.

In *Matherson v. Marchello*,²⁰⁴ the first department held that "defamation which is broadcast by means of radio or television

200. See *Park Knoll Assocs. v. Schmidt*, 89 A.D.2d 164, 454 N.Y.S.2d 901 (2d Dep't 1982).

201. 59 N.Y.2d at 207, 451 N.E.2d at 183, 464 N.Y.S.2d at 425.

202. *Id.* at 210, 451 N.E.2d at 185, 464 N.Y.S.2d at 427.

203. *Id.* at 211, 451 N.E.2d at 186, 464 N.Y.S.2d at 427-28 (Wachtler, J., dissenting).

204. 100 A.D.2d 233, 473 N.Y.S.2d 998 (2d Dep't 1984).

should be classified as libel."²⁰⁵ The defendants stated that one of the plaintiffs was having an affair with a defendant.²⁰⁶ The issue as to whether the words used were clearly libelous was easily resolved against the defendants and the court reversed the trial court's granting of the defendants' motion to dismiss.²⁰⁷

The court held that if the defendants' comments were viewed as slanderous, special damages must be pleaded and proved unless a cause of action can be pleaded under the four special categories of slander *per se*.²⁰⁸ The court continued, "On the other hand, a plaintiff suing in libel need not plead or prove special damages"²⁰⁹ The court observed that "traditionally, the demarcation between libel and slander rested upon whether the words were written or spoken,"²¹⁰ but that "with the advent of mass communication, the differential was blurred."²¹¹

Recognition that the potential harm of broadcast defamation makes libel rather than slander the proper cause of action²¹² was overdue in New York.

In *Charles Atlas, Ltd. v. Time-Life Books, Inc.*,²¹³ a diversity action, district court Judge Goettel denied a motion to dismiss.²¹⁴ The plaintiff claimed product disparagement in that the defendant's exercise book implied that the plaintiff's exercise program was dangerous.²¹⁵ The action is likely to be discussed in a future *Survey* article.

To be discussed in the next *Survey* article is *Gaeta v. New*

205. *Id.* at 239, 473 N.Y.S.2d at 1004.

206. *Id.* at 234, 473 N.Y.S.2d at 1000.

207. *See id.* at 233, 473 N.Y.S.2d at 1000.

208. *See id.* at 235-36, 473 N.Y.S.2d at 1001.

209. *Id.* at 236, 473 N.Y.S.2d at 1001.

210. *Id.* at 239, 473 N.Y.S.2d at 1003.

211. *Id.*

212. A number of courts have held that defamatory broadcasts on radio or television are libelous rather than slanderous. *See, e.g.,* *Shor v. Billingsley*, 4 Misc. 2d 857, 158 N.Y.S.2d 476 (Sup. Ct., N.Y. Co. 1957); *aff'd* 4 A.D.2d 1017, 169 N.Y.S.2d 416 (1st Dep't 1957). Older readers of the *Survey* will remember Sherman Billingsley, owner of New York's Stork Club, who pioneered in the field of live and vacuous television interviews. Bernard "Toots" Shor, who just happened to own a rival establishment, took umbrage at Billingsley's remarks. The case marks one of the first judicial examinations of the impact of defamatory statements uttered on television.

213. 570 F. Supp 150 (S.D.N.Y. 1983).

214. *See id.* at 158.

215. *See id.* at 152-53.

*York News, Inc.*²¹⁶ The first department affirmed the dismissal by the trial judge of a complaint related to an alleged libel concerning the plaintiff's relationship to her deceased son.²¹⁷ The Court of Appeals reversed during the summer of 1984.²¹⁸

C. *Miscellaneous Intentional Torts*

Malicious prosecution is a tort that seldom results in a successful plaintiff's case. The Court of Appeals validated this truth in *Colon v. City of New York*.²¹⁹ The plaintiff, falsely imprisoned by the defendant city, argued that charges against him for second degree murder lacked probable cause and thus constituted malicious prosecution.²²⁰ The Court reviewed the stringent standards needed for a plaintiff to prevail and found that no colorable grounds existed for the malicious prosecution cause of action.²²¹ In effect, the plaintiff challenged the sufficiency of the police investigation that led to his indictment.²²² As the Court noted, however, "[u]ndoubtedly, further avenues of investigation were open to the police before they relied on circumstantial evidence of the killer's identity, but their failure to pursue the investigation is not the equivalent of fraud or the suppression of evidence."²²³

In *Burns Jackson v. Lindner*,²²⁴ the Court of Appeals dismissed a nuisance action that was literally a nuisance in itself. Affirming the dismissal of the action by the second department, the Court found that a law firm could not seek damages from a labor union and selected officers because of inconvenience caused by a transit strike.²²⁵ The harm suffered by the law firm was of the kind experienced by everyone who was discommoded by this particular labor action and, therefore, was not cognizable as legally recover-

216. 95 A.D.2d 315, 466 N.Y.S.2d 321 (1st Dep't 1983), *rev'd*, 62 N.Y.2d 340, 465 N.E.2d 802, 477 N.Y.S.2d 82 (1984).

217. *See* 95 A.D.2d at 329, 466 N.Y.S.2d at 329.

218. *See* 62 N.Y.2d at 351, 465 N.E.2d at 807, 477 N.Y.S.2d at 87.

219. 60 N.Y.2d 78, 455 N.E.2d 1248, 468 N.Y.S.2d 453 (1983).

220. *See id.* at 80, 455 N.E.2d at 1249, 468 N.Y.S.2d at 454.

221. *See id.* at 82-83, 455 N.E.2d at 1250-51, 468 N.Y.S.2d at 455-56.

222. *See id.* at 83, 455 N.E.2d at 1251, 468 N.Y.S.2d at 456.

223. *Id.*

224. 59 N.Y.2d 314, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983), *aff'g* 88 A.D.2d 50, 452 N.Y.S.2d 80 (2d Dep't 1982).

225. *See* 59 N.Y.2d at 324, 451 N.E.2d at 462, 468 N.Y.S.2d at 714-15.

able damages.²²⁶ The Court of Appeals gave this action more attention than it deserved.

In the area of false arrest, the Court of Appeals ruled in *Dabbs v. State*²²⁷ that a John Doe arrest warrant was invalid when the indicted person's name became known and the warrant was executed without adding the name.²²⁸ Liability for false arrest can be predicated upon a defective John Doe warrant.²²⁹

Horseplay with a tragic result was analyzed in *Herman v. Westgate*.²³⁰ The fourth department held that, in an action for assault and battery, a defendant's participation in concerted tortious activity was enough to sustain the assault and battery action.²³¹ It was not necessary for the defendant to personally push the plaintiff into the water.²³²

The second department held, in *Baron v. Jeffer*,²³³ that in a cause of action for intentional infliction of mental distress, "it would be contrary to public policy to recognize the existence of this type of tort in the context of disputes, as here, arising out of the differences between persons who, although not married, have been living together as husband and wife for an extended period of time" ²³⁴ Because New York law shies away from applying this tort to married couples, it is rational to withhold the cause of action from those who choose to live together.

In the age of the national hotel chain, the innkeeper's rights and duties are still litigated regularly. The first department, in *Pollock v. Holsa Corp.*,²³⁵ denied recovery for wrongful eviction from a motel room "in the middle of the night,"²³⁶ insofar as the damages sought were for humiliation and psychic distress or were based on punitive damages theory.²³⁷ The plaintiff was entitled, however, to recover on a contract theory for the "physical discom-

226. See *id.* at 334, 451 N.E.2d at 468, 464 N.Y.S.2d at 721.

227. 59 N.Y.2d 213, 451 N.E.2d 186, 464 N.Y.S.2d 428 (1983).

228. See *id.* at 217, 451 N.E.2d at 187-88, 464 N.Y.S.2d at 429-30.

229. See *id.* at 218, 451 N.E.2d at 188, 464 N.Y.S.2d at 430 (without a facially valid warrant, the burden is on the state to show that the arrest was otherwise privileged).

230. 94 A.D.2d 938, 464 N.Y.S.2d 315 (4th Dep't 1983).

231. See *id.* at 939, 464 N.Y.S.2d at 316.

232. *Id.*

233. 98 A.D.2d 810, 469 N.Y.S.2d 815 (2d Dep't 1983).

234. *Id.* at 811, 469 N.Y.S.2d at 817.

235. 98 A.D.2d 265, 470 N.Y.S.2d 151 (1st Dep't 1984).

236. *Id.* at 266, 470 N.Y.S.2d at 152.

237. See *id.*

fort" of being evicted.²³⁸ The fact that the hotel clerk was courteous defeated any claim for tort-based damages for breach of an innkeeper's duty.²³⁹

VI. CONCLUSION

Tort law remains, in most areas, a viable basis for determining rights and duties in a complex society. The common law of torts will continue in the next year to be pushed, prodded, tested, praised, and damned. There are critical problems. The courts must recognize that, apart from waiting passively for legislative action dealing with the medical malpractice situation, judges and lawyers share a duty to assure that compensation for the negligently injured be rationally and justly achieved without contributing to waste, irrational and prejudicial awards, and a growing public perception that views malpractice litigation as a quasi-pastime. The upholding of arbitration clauses where appropriate should be a goal for trial courts to reach or for appellate courts to mandate.

238. *See id.* at 266-67, 470 N.Y.S.2d at 152.

239. *See id.*