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TORTS

Ralph Michael Stein*

I. INTRODUCTION

During the 1986 *Survey* year, a number of cases of interest to practitioners were decided by the courts of New York. There have been several new legislative enactments which will also have a direct impact upon the practice of tort law. These enactments are analyzed elsewhere in this *Survey* volume.¹ Following past practice, cases of the greatest significance will be highlighted, as well as those oddities which make tort law a stage for the human comedy.

II. MEDICAL MALPRACTICE

A. *Introductory Comment*

The medical malpractice problem continues to be viewed as a major crisis in the provision of health services. The attendant costs of medical malpractice litigation are viewed by many—mostly from the doctor and hospital camp—as intolerable. Draconian measures, always expressed as “reforms,” continue to be proposed. Recent efforts by the New York State Legislature and Governor Cuomo in securing the enactment of a series of substantive-procedural changes may temporarily alleviate the situation. Governor Cuomo’s recent announcement that a lengthy study of malpractice problems in New York will soon be undertaken may mean that attorneys, health care providers and consumers will benefit from an unbiased and unhurried examination of what has become a hyperemotional issue.² On the other hand, we may have just one more study which breeds estrangement rather than consensus and a commitment to

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1. See Carlisle, *Civil Practice*, *supra* this *Survey*.

2. Stories about medical malpractice litigation flood the media and these lawsuits have been attributed as a cause to everything from defensive medicine to suicides by doctors. In New York State, the high power media blitz campaigns by both the medical and the legal professions have, in my view, brought fear and confusion rather than enlightenment to the public.

both quality health care and due regard for the problem of professional incompetence.

As the continued flow of verdicts for plaintiffs in medical malpractice cases indicate, want of ordinary care by physicians and institutional health care providers is neither isolated nor unusual. At the same time, the continued ability of numerous defendants to prevail at trial demonstrates the continuing vitality of the common law tradition, the ability of juries to comprehend vast amounts of technical and scientific data, and to reach a verdict not dictated by plaintiff's injuries alone.

B. Informed Consent

This past *Survey* year was marked by a dearth of noteworthy informed consent cases. Hopefully, this is not simply an aberration because, as noted in prior articles,³ there is no segment of the medical malpractice spectrum more amenable to elimination than the cause of action for lack of informed consent.⁴ Perhaps we are now seeing the fruits of a trend which began gathering momentum three or four years ago whereby physicians increasingly are recognizing and honoring the patient's right of decision by providing relevant and comprehensible information.

C. Malpractice

Last year's *Survey*⁵ discussed the unusual case of *Suria v. Shiffman*.⁶ *Suria* involved a breast augmentation procedure on a transsexual patient.⁷ A series of negligent acts by several physicians were found to have resulted in painful and permanent injuries to the plaintiff.⁸ During the past year, the Court of Appeals affirmed the jury verdict for the plaintiff but so modified the judgment as to relieve one of the defendants, Avtar S. Dhaliwal, of the rank of joint tortfeasor and reduce him to the supporting role of successive tortfeasor.⁹

3. See, e.g., Stein, *Torts, 1984 Survey of N.Y. Law*, 36 SYRACUSE L. REV. 595, 597 (1985).

4. See *id.*

5. See Stein, *Torts, 1985 Survey of N.Y. Law*, 36 SYRACUSE L. REV. 719, 721-22 (1986) (analysis of this case at appellate division stage).

6. 67 N.Y.2d 87, 490 N.E.2d 832, 499 N.Y.S.2d 913 (1986).

7. See *id.* at 91-92, 490 N.E.2d at 833, 499 N.Y.S.2d at 914.

8. See *id.* at 94-95, 490 N.E.2d at 834, 499 N.Y.S.2d at 915-16.

9. See *id.* at 98-99, 490 N.E.2d at 837, 499 N.Y.S.2d at 918.

The vicarious liability of a physician who owns a clinic but does not control the actions of a treating doctor or participate in the treatment process of a patient-turned-plaintiff was analyzed by New York's highest court in *Hill v. St. Clare's Hospital*.¹⁰ The plaintiff in *Hill* sustained a work-related injury and was removed to St. Clare's Hospital where he was, as the trial court subsequently determined, mistreated.¹¹ Advised to see a company doctor, he went to a physician who was practicing in an industrial clinic named the Benjamin A. Gilbert Medical Clinic.¹² Dr. Gilbert was *hors d'combat* because of his own medical problems and had solicited a friend and colleague, Dr. Bono, to practice under his trade name while he was recuperating.¹³ In fact, Dr. Gilbert "also arranged for two secretaries and two physicians . . . formerly with Dr. Gilbert to move" to offices which Dr. Gilbert's friend, Dr. Bono had leased.¹⁴ "Dr. Gilbert never practiced at the West 44th Street office, however, because the ailment which caused his hospitalization proved fatal."¹⁵ The new owner and operator of the Gilbert Clinic, Dr. Bono, did not examine or treat Hill.¹⁶ Hill, however, had used the services of the Gilbert Clinic in the past.¹⁷ He returned to the facility that had changed location, not an uncommon occurrence in Manhattan, but was still operating under the same name.¹⁸ In apportioning the successive culpability of St. Clare's Hospital and Dr. Bono, the trial court found the hospital to be liable for thirty percent of plaintiff's harm while the non-treating physician, Dr. Bono, was found responsible for seventy percent.¹⁹

The key question in this case was the existence of liability on the part of a physician who, in a proprietary sense, owns a medical clinic open to the general public but who did not in any way participate in the treatment of a patient.²⁰ Writing for the Court, Judge Meyer first squarely found:

10. 67 N.Y.2d 72, 490 N.E.2d 823, 499 N.Y.S.2d 904 (1986).

11. *See id.* at 78, 490 N.E.2d at 825, 499 N.Y.S.2d at 906.

12. *See id.*

13. *See id.* Dr. Gilbert apparently fully intended to resume practice under his own name after recovering. *See id.*

14. *See id.*

15. *See id.*

16. *See id.* at 76, 490 N.E.2d at 825, 499 N.Y.S.2d at 906.

17. *See id.*

18. *See id.*

19. *See id.* at 78, 490 N.E.2d at 826, 499 N.Y.S.2d at 907.

20. *See id.* at 79, 490 N.E.2d at 827, 499 N.Y.S.2d at 908.

[T]hat a physician who owns a medical clinic which is held out to the public as offering medical services may be held vicariously liable for the malpractice of a treating doctor even though the owner-physician neither participates in nor controls the diagnosis made or treatment prescribed.²¹

Judge Meyer provided a succinct discussion of institutional liability for independent physicians practicing within a hospital.²² He noted the general rule that, absent special factors, a hospital is generally not responsible for the acts of independent physicians who maintain privileges at the hospital.²³

In the present case, Judge Meyer noted that Dr. Bono acknowledged ownership of the clinic and that medical reports to the Workers' Compensation Board were signed by Bono with the forms provided by Bono listing the clinic as the business entity.²⁴ It is also clear that while Dr. Bono did not participate in any way in the mistreatment of the plaintiff, he did exercise considerable control over both the clinic and the physician who diagnosed and treated Hill.²⁵ Fees for clinic patients, as distinct from personal patients of the other two doctors, were set by Dr. Bono.²⁶ It also appears that this was a "mixed" practice with private patients of the individual doctors mingling in the waiting room with patients such as the plaintiff who were seeking the attention of a clinic physician.²⁷ Office hours were divided among the three doctors whose names, together with the name of the clinic, were on its door.²⁸ If a patient wished to see a particular doctor, he or she would have to make an

21. *Id.* at 75, 490 N.E.2d at 824, 499 N.Y.S.2d at 906.

22. *See id.*

23. *See id.* at 79, 490 N.E.2d at 827, 499 N.Y.S.2d at 908. The degree of involvement by a hospital with an independent physician is a key point. Generally, a hospital that is not involved in the medical aspects of treating a patient will not be liable if those medical aspects of care reflect malpractice. To the extent that a hospital recommends or endorses a physician beyond the mere granting of privileges, liability is a distinct possibility. In the *Hill* situation, the doctor who treated the plaintiff, Dr. Carranza, filled two roles within the clinic. He shared space with others so that he could conduct his private practice and he was subordinate to the direction of Dr. Bono for that part of the office's practice that dealt with patients seeking the services of the clinic. Determining the role being performed is vital because Dr. Bono could not be held accountable for Dr. Carranza's malpractice in treating his own, private patients. *See id.*

24. *See id.* at 81-82, 490 N.E.2d at 828-29, 499 N.Y.S.2d at 909-10.

25. *See id.*

26. *See id.* at 82, 490 N.E.2d at 829, 499 N.Y.S.2d at 910.

27. *See id.* at 81-82, 490 N.E.2d at 828-29, 499 N.Y.S.2d at 909-10.

28. *See id.* at 82, 490 N.E.2d at 829, 499 N.Y.S.2d at 910.

appointment; if no specific doctor was requested, the patient would be seen by the physician in attendance when the patient arrived.²⁹

On that basis, despite some contradictory evidence, Judge Meyer found:

[T]here was evidence from which the jury could find that Dr. Bono owned the clinic and that plaintiff accepted Dr. Carranza's services in reliance not upon Dr. Carranza's skill or competence but upon the fact that his services, whatever in fact his relationship with the clinic, were offered by the clinic.³⁰

The situation in *Hill v. St. Clare's Hospital* merits attention from the plaintiffs' bar at a time when the private practice of medicine is frequently offered in the form of so-called "proprietary clinics."³¹ While Dr. Bono's non-involvement in the diagnosis and treatment of Hill is apparent, this case suggests the importance of determining, in as timely a manner as possible, the respective roles and responsibilities of all physicians working in the "clinical" setting. The Court of Appeals has demonstrated that mere non-involvement with a semi-independent contracting physician, with regard to the treatment of a plaintiff, will not relieve the owner of a clinic from liability for malpractice.

A New York court also ruled on an action involving the state's Good Samaritan Law. This type of complaint, brought relatively infrequently against a physician-defendant was dismissed in *Rodriguez v. New York City Health & Hospitals*.³² The defendant, with fifty-five years of medical practice, was entering his building when the building superintendent's wife asked him to examine her ill husband.³³ Apparently, one look sufficed to apprise the defendant of the fact that the building would soon need a new superintendent and he told the wife that he could not help her husband whose

29. *See id.*

30. *See id.*

31. Certainly the term "clinic" is used increasingly in a nontraditional sense by lawyers as well as by physicians. It appears that many of these clinics are staffed by doctors with relatively slight assets yet they are not clearly employees so as to allow the almost automatic invocation of the doctrine of *respondeat superior*. There is, of course, a difference between an association of physicians sharing facilities, the true master-servant relationship, and the slightly opaque arrangement reflected by *Hill* and, probably, by many similar practices throughout the state.

32. 132 Misc. 2d 705, 505 N.Y.S.2d 345 (Sup. Ct., Kings Co. 1986).

33. *See id.* at 706, 505 N.Y.S.2d at 346.

"sole, slim chance for survival lay in immediate hospitalization."³⁴ The doctor then called the police to request an ambulance and left.³⁵

The court noted that the actions of the veteran physician did not constitute ordinary negligence, much less gross negligence which is needed to offset the requirements of the Good Samaritan Law.³⁶ This action against the physician is precisely the kind of needless, unethical litigation which the medical profession incorrectly believes forms the mainstay of malpractice trial lawyers. There was simply no basis for including the physician-defendant in this lawsuit.

There is currently great concern over communicable diseases and the issue of the legal duty of doctors and hospitals to warn potential victims of diseases has been examined in a number of cases. Understandably, the families of health care providers are both concerned and at risk. In *Knier v. Albany Medical Center Hosp.*,³⁷ Justice Hughes granted the defendant's motion for summary judgment in an action brought by the spouse and children of a nurse who had contracted scabies from a patient.³⁸ The nurse's husband and two children subsequently also contracted scabies.³⁹

While the plaintiffs alleged that the hospital had failed to follow its patient care procedures, Justice Hughes noted that "[p]atient care procedures are not designed to protect the staff's family members or friends."⁴⁰ Although there appeared to be some

34. *See id.* There is nothing in the opinion to suggest that any physician could have rendered any meaningful medical help by remaining on the scene. *See generally id.*

35. *See id.*

36. The state's Good Samaritan Law, Public Health Law section 3000-a provides, in relevant part:

Any person who voluntarily and without expectation of monetary compensation renders first aid or emergency treatment at the scene of an accident or other emergency outside a hospital, doctor's office or any other place having proper and necessary medical equipment, to a person who is unconscious, ill, or injured, shall not be liable for damages for injuries alleged to have been sustained by such person or for damages for the death of such person alleged to have occurred by reason of an act or omission in the rendering of such emergency treatment unless it is established that such injuries were or such death was caused by gross negligence on the part of such person.

N.Y. PUB. HEALTH LAW § 3000-a (McKinney 1985).

37. 131 Misc. 2d 414, 500 N.Y.S.2d 490 (Sup. Ct., Albany Co. 1986).

38. *See id.* at 414, 500 N.Y.S.2d at 491.

39. *See id.*

40. *See id.* at 415, 500 N.Y.S.2d at 491.

issue as to whether plaintiff Knier and the nurse were legally married, the real issue in this case was the scope of the zone-of-danger, inherently a policy decision.⁴¹ The court refused to impose a duty upon the hospital to warn the general public that one of its staff members had been exposed to an infectious disease.⁴² It found that such a requirement would be impractical and would unduly extend the responsibility and liability of health care institutions.⁴³ For example, how would a defendant meet a duty to warn all residents within the local metropolitan area that one of its employees had been exposed to scabies?⁴⁴

While the disposition of this case is correct, the analysis can be drawn more narrowly. First, there ought to be recognition of nurse Mary Ann Warner's degree of expert knowledge as to the likelihood of an infectious disease in a patient for whom she was caring, her ability to ascertain the actual diagnosis, and her own duty—legal and moral—to convey information about exposure to an infectious disease to family members and friends. Second, the court should have examined the nature of the particular infectious disease with a duty analysis to reflect the likelihood of cross-infection and the severity of resultant morbidity in exposed persons. Scabies is not a common cold, but neither is it a massively lethal disease such as Marburg Fever. An argument can be made that a duty to warn identifiable possible victims, as opposed to everyone living in Albany, can be made where the disease vector is potentially lethal. At the least, due care may require a showing that the hospital attempted to convey the reality of the situation to the exposed employee.

Failure to diagnose, and especially failure to diagnose cancer, is a leading source of plaintiff success in medical malpractice actions. In *Talmatch v. Samet*,⁴⁵ Justice McCaffrey dealt with a procedural matter with underlying substantive significance.⁴⁶ A plaintiff sought to amend a complaint to include an action for wrongful death based upon certain information contained in a death certifi-

41. See *id.* The sure clue is the reliance of the court on *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). See *Kiner*, 131 Misc. 2d at 415, 500 N.Y.S.2d at 491.

42. See *id.* at 416, 500 N.Y.S.2d at 492.

43. See *id.* at 415-16, 500 N.Y.S.2d at 491-92.

44. See *id.* at 416, 500 N.Y.S.2d at 492.

45. ___ Misc. 2d ___, 504 N.Y.S.2d 997 (Sup. Ct., Nassau Co. 1986).

46. See *id.*

cate.⁴⁷ The death certificate indicated that the cause of death was metastatic cancer from an original lung carcinoma.⁴⁸ The plaintiff relied on *Rosenberg v. New York University Hospital*⁴⁹ for her contention that the death certificate in itself, without a physician's statement of merits, was sufficient to allege a cause of action.⁵⁰ Justice McCaffrey refused to apply *Rosenberg*, and found that the required affidavit of merits must be made by a physician and must establish a causal connection between the alleged malpractice and the new cause of action to be pleaded.⁵¹ This information is not contained in a certificate of death.⁵²

Justice McCaffrey has applied the logical interpretation. The public policy of the state is to attempt to eliminate frivolous and poorly founded medical malpractice suits by demanding a physician's examination of the alleged merits of a potential case. When such an examination is made, the physician asked to provide the certificate is aware of the significance of her role. Death certificates, on the other hand, are often based on quick clinical impressions by a doctor who is no longer concerned with the care of the patient. The death certificate, in non-suspicious cases, is often viewed as a ritual, closeout requirement rather than a time for reflective analysis. To allow the death certificate to supplant the certificate of merits would be counterproductive.

Two actions involving the doctrine of *res ipsa loquitor* merit brief attention. In *Schoch v. Dougherty*,⁵³ the Appellate Division, Third Department, found that a *res ipsa loquitor* charge to the jury was unwarranted where the plaintiff had undergone two, separate surgical procedures on his knee.⁵⁴ It found that the question of lack of due care was dependent on expert testimony as opposed to lay analysis.⁵⁵

47. *See id.* at ___, 504 N.Y.S.2d at 998.

48. *See id.*

49. 128 Misc. 2d 90, 488 N.Y.S.2d 599 (Sup. Ct., N.Y. Co. 1985).

50. *See Talmatch*, ___, Misc. 2d at ___, 504 N.Y.S.2d at 998.

51. *See id.* at ___, 504 N.Y.S.2d at 999.

52. *See id.*

53. 122 A.D.2d 467, 504 N.Y.S.2d 855 (3d Dep't 1986).

54. *See id.* at 469, 504 N.Y.S.2d at 857.

55. *See id.* The court stated:

Our review of the record confirms that this is not a case in which such an inference could have been made . . . [T]he injury here did not occur in an area remote from the operative site, but occurred during an intricate part of the surgical procedure when the nerve was retracted to allow access . . . Whether the resulting injury

In *Gravitt v. Newman*,⁵⁶ the Appellate Division, Second Department, found that the plaintiff had laid a proper evidentiary foundation so as to allow invocation of *res ipsa loquitor*.⁵⁷ Unlike the medically complex case of *Schoch v. Dougherty*,⁵⁸ this case involved the more simple problem of surgical equipment left inside the patient.⁵⁹ This case provides an excellent model for demonstrating the utilization of *res ipsa loquitor* in a medical malpractice setting.

An interesting medical malpractice case with first amendment free exercise of religion dimensions was decided by the Appellate Division, First Department. In *Randolph v. City of New York*,⁶⁰ plaintiff's decedent, an obese woman of forty-five, was pregnant and a caesarean section was necessary.⁶¹ A condition involving her just-delivered baby's placenta necessitated the surgical procedure.⁶² During the procedure, the patient began massively hemorrhaging due to a surgical laceration.⁶³ Although immediate transfusions were medically indicated, the patient had previously "competently and unequivocally advised the defendant doctor that, in view of the fact that she was a Jehovah's Witness, blood transfusions were not to be administered to her under any circumstances."⁶⁴

Despite the hemorrhaging, the treating physician honored the patient's religious objections and attempted to use substitutes for whole blood.⁶⁵ As the situation worsened, a physician secured telephonic authorization for transfusions and the process was begun

constituted a deviation from accepted medical practice is surely not a matter within the competence of laymen to evaluate, but necessitated expert testimony to establish a prima facie case.

Id.

56. 114 A.D.2d 1000, 495 N.Y.S.2d 439 (2d Dep't 1985).

57. *See id.* at 1000-01, 495 N.Y.S.2d at 440.

58. 122 A.D.2d 467, 504 N.Y.S.2d 855.

59. *See Gravitt*, 114 A.D.2d at 1000, 495 N.Y.S.2d at 440.

60. 117 A.D.2d 44, 501 N.Y.S.2d 837 (1st Dep't 1986).

61. *See id.* at 46-47, 501 N.Y.S.2d at 839.

62. *See id.* at 47, 501 N.Y.S.2d at 839.

63. *See id.* If the laceration was, of itself, severe enough to cause death and if the laceration was inflicted through negligence, a cause of action might have been maintainable without reference to the blood transfusion issue. *See id.*

64. *See id.* at 46, 501 N.Y.S.2d at 838.

65. *See id.* at 47, 501 N.Y.S.2d at 839. The treating physician attempted to maintain Mrs. Randolph's fluid volume by administering a fluid substitute. *See id.*

but failed.⁶⁶

Justice Ross' opinion for the majority deals extensively with the complex issues raised by this case.⁶⁷ Factual issues tried included the question of whether any defendant's negligence caused the decedent to be placed in mortal peril.⁶⁸ There was also evidence that at the time the transfusion process was initiated, it was too late to prevent the patient's death.⁶⁹

The court noted the importance of upholding an individual's right to withhold consent for medical care forbidden by the weight of religious convictions.⁷⁰ As there was no doubt that Mrs. Randolph was competent when she conveyed her wishes concerning blood transfusions, it is clear "that the defendants would not have been liable, if Dr. Foster had not undertaken to transfuse Mrs. Randolph, because he would have been merely following her wishes."⁷¹ The respondent raised the novel and untenable argument that medical practitioners have a duty to ignore religious convictions and provide blood transfusions if they are aware that the death of the patient will leave the patient's children with inadequate support.⁷²

The First Department, in reversing the verdict for the plaintiff, found that the trial court had erred in determining that a sufficient basis had been laid to connect alleged negligence in the transfusion process with the actual cause of Mrs. Randolph's death.⁷³ In reality, what concerned the majority was not the usual analytic problem of proximate cause but the underlying dilemma of the physician who does not practice according to the appropriate degree of care because he attempts to respect the religious wishes of a patient.⁷⁴

66. *See id.* at 47-48, 501 N.Y.S.2d at 839-40.

67. *See id.* at 47, 501 N.Y.S.2d at 839.

68. *See id.* at 48-49, 501 N.Y.S.2d at 840.

69. *See id.*

70. *See id.* at 49-50, 501 N.Y.S.2d at 841.

71. *See id.* at 49, 501 N.Y.S.2d at 840.

72. *See id.* at 50, 501 N.Y.S.2d at 841. Acceptance of such a position would allow only the single person to refuse medical care based on religious objections.

73. *See id.*

74. *See generally id.* at 50-51, 501 N.Y.S.2d at 841-42. Justice Ross stated:

To this writer, to require a physician to stand by helplessly, while a patient is dying, and, when it is too late to save the patient, the doctor is instructed to proceed to use his skills to save her, and, to then attempt to apply liability for his actions, is just unacceptable.

Justice Ellerin's dissent took issue with the majority's analysis of the weight of the evidence concerning the possibility of saving Mrs. Randolph at several stages during her critical and final illness.⁷⁵ Basing his opinion on the general doctrine that reversal of a jury verdict should be a highly limited option for an appellate court, the dissenting justice believed that there was sufficient evidence in the record to allow a jury to find that Mrs. Randolph's condition had not become irreversible until shortly before her death.⁷⁶

The court did not comment on the process by which a municipal attorney may authorize transfusions while a patient is insensate.⁷⁷ While the majority strongly reaffirms New York's statutory and decisional policy recognizing a competent adult's right to refuse lifesaving treatment, had Mrs. Randolph been saved by the transfusions she would have emerged from her brush with death with her deepest religious principles violated and no available cognizable redress for her injury. The opinion in *Randolph* pays lip service to the right of a patient to refuse care but apparently only insures that a competent adult who rejects blood transfusions will not have the process imposed when he/she is suffering from a condition for which there is no medical need to transfuse. Law and reality ought to be made congruent in this sensitive area. A competent, clearly articulated rejection of blood transfusions—or rejection of any other kind of medical care—should be respected at the very moment when the patient is least able to reaffirm the prior declaration.

In *Cocomello v. Columbia Presbyterian Medical Center*,⁷⁸ disputed testimony over what a physician may or may not have said to reassure a parent was the foundation of a claim of a missed appendicitis diagnosis.⁷⁹ The Appellate Division, First Department, found, however, that a statement made to the mother, by one of the defendant physicians, advising her to bring her child to another doctor better qualified to treat the child, coupled with the mother's compliance with that recommendation, failed to raise any

Id. at 52, 501 N.Y.S.2d at 843.

75. *See id.* at 53-56, 501 N.Y.S.2d at 843-45 (Ellerin, J., dissenting).

76. *See id.* at 55-57, 501 N.Y.S.2d at 845-46.

77. *See id.*

78. 120 A.D.2d 357, 502 N.Y.S.2d 9 (1st Dep't 1986).

79. *See id.*

material fact issue as to the liability of that physician.⁸⁰ While the court found the alleged reassurance to be inconsistent with the advice to obtain assistance from another doctor, it is clear that reassuring words to a parent coupled with straight advice do not add up to a colorable basis for a cause of action.⁸¹

Reversing a judgment for an infant plaintiff in *Kenigsberg v. Cohn*,⁸² the Appellate Division, Second Department, dealt with the nemesis of organized medicine's campaign against what it invariably terms "the Malpractice Crisis."⁸³ In *Kenigsberg*, a fifteen-month-old baby girl sustained severe burns.⁸⁴ A skin graft was subsequently performed by the defendant doctor.⁸⁵ "No claim of malpractice was made with respect to treatment of the burn wound itself."⁸⁶ The plaintiff sought to prevail at trial by showing that a better result would have been obtained at a specialized burn care facility.⁸⁷ No evidence suggested that the defendant in any way attempted to prevent or obstruct transfer of the patient to such a facility nor was there evidence that the type of skin graft which he performed was beyond the scope of his practice.⁸⁸

This is a prototypical "bad results" case in that the true gravamen of the plaintiff is the reality of the inequality of health care services. Certainly some facilities have higher success rates than others and this is especially true in extremely difficult services such as burn care where only a handful of facilities develop the

80. See *id.* at 357-58, 502 N.Y.S.2d at 10.

81. See generally *id.* at 357-58, 502 N.Y.S.2d at 10.

82. 117 A.D.2d 652, 498 N.Y.S.2d 390 (2d Dep't 1986).

83. See *id.* at 652, 498 N.Y.S.2d at 391.

84. See *id.*

85. See *id.*

86. *Id.* at 653, 498 N.Y.S.2d at 391. The plaintiff also alleged that the defendant's liability was predicted on his refusal to facilitate the planned transfer of the child by certifying that the care required by the child could not be obtained in the institution where the defendant practiced. See *id.* The court noted that because there was no basis for suggesting that, in fact, adequate care could not be obtained at the original treating facility, liability could not be predicted on the defendant's refusal to give a false answer. See *id.* at 653-54, 498 N.Y.S.2d at 391.

87. See *id.* at 653, 498 N.Y.S.2d at 391.

88. See *id.* The appellate panel noted:

Given that there was no testimony that the skin graft procedure would have been done any differently at Cornell, such testimony falls far short of the necessary threshold showing for proximate cause, *viz.*, that the conduct depriving the infant plaintiff of a better chance of success more probably than not resulted in her injury.

Id. at 653-54, 498 N.Y.S.2d at 391.

needed expertise. This reality of life cannot be reduced to an concept of liability.

D. Birth-related Negligence

Medical malpractice cases related to obstetrical and neonatal care are often unusually difficult from a technical viewpoint. From the plaintiffs' perspective, such actions mirror extreme emotional responses to the loss of a pregnancy or the birth of a deformed child. Throughout the United States, plaintiffs' counsel have been trying to enlarge the scope of such malpractice actions and hardly a *Survey* year passes without at least a few relevant cases in our own state.

Two Appellate Division, Second Department, cases merit brief consideration. In *Martinez v. Long Island Jewish Hillside*,⁸⁹ the court, in a memorandum opinion, reversed a finding for the plaintiff for emotional injuries caused by negligent advice which had persuaded the plaintiff patient to obtain an abortion.⁹⁰ Citing controlling law in the area of negligent infliction of emotional distress, the majority found that "[n]o cause of action exists to recover solely upon a claim of emotional injuries suffered by a mother as the result of physical harm done to her child *in utero*."⁹¹

Noting that "[t]his case is as simple as it is tragic,"⁹² Justice Gibbons penned a thoughtful dissent which argued that *Martinez* is clearly distinguishable from the cases relied upon by the majority.⁹³ In this case, Mrs. Martinez was advised to obtain an abortion because the defendant had erroneously miscalculated the quantity of a drug she had taken during pregnancy.⁹⁴ The amount calculated by the defendant would almost certainly have resulted in a deformed child while the actual amount ingested was unlikely to have had any significant effect on normal fetal development.⁹⁵ Justice Gibbons noted:

89. 122 A.D.2d 122, 504 N.Y.S.2d 693 (2d Dep't 1986).

90. See *id.* at 122-24, 504 N.Y.S.2d at 693-94. This case is made more tragic by the fact that the plaintiff had to overcome her own religious beliefs in order to undergo an abortion. See *id.* at 122, 504 N.Y.S.2d at 694.

91. See *id.* at 122, 504 N.Y.S.2d at 693.

92. *Id.* (Gibbons, J., dissenting).

93. See *id.* at 122, 504 N.Y.S.2d at 694.

94. See *id.*

95. See *id.*

Thus, it is apparent that Mrs. Martinez was not injured as a result of physical harm done to her child *in utero*, but, rather, was injured upon being misinformed that her fetus was hopelessly malformed and that an abortion was necessary Her injury was later compounded upon learning of the appellant's tragic error after she had aborted the healthy fetus.⁹⁶

Justice Gibbons' analysis is persuasive. *Martinez* is much more akin to the emotional distress cause of action based on a faulty diagnosis, such as of cancer, than it is to the cases cited by the majority where the fetus was harmed directly and the pregnant woman suffered emotional harm.

In the delivery of a baby, obstetrical and pediatric functions are closely entwined. Whether a pediatrician's negligence, following an obstetrician's departure from a reasonable standard of care, constitutes successive or joint negligence was before the Appellate Division, Second Department, in *Ravo v. Rogatnick*.⁹⁷ To avoid joint and several liability, the pediatrician claimed that his negligence was independent of the obstetrician's.⁹⁸ The court noted:

The evidence shows . . . that after a difficult delivery involving brain damage, which was determined by the jury to have involved negligence on the part of the obstetrician, the infant plaintiff had a very high bilirubin and hematocrit level, both known to indicate conditions which cause brain damage. Harris' [the pediatrician] negligence was the failure to act promptly with respect to the infant plaintiff's condition existing at birth and for some time thereafter which indicated that severe brain damage was implicated.⁹⁹

A finding of joint and several liability was correct because there was no testimony which would have allowed a jury to apportion the injury.¹⁰⁰

It is clear that causes of action based on the inevitable emotional distress consequent to medical malpractice where the only palpable harm to the pregnant woman is the loss of the fetus, or deformation of the fetus, continue not to be recognized in New

96. *Id.*

97. 122 A.D.2d 705, 503 N.Y.S.2d 890 (2d Dep't 1986).

98. *See id.* at 706, 503 N.Y.S.2d at 891.

99. *Id.* at 706, 503 N.Y.S.2d at 891-92.

100. *See id.* at 706, 503 N.Y.S.2d at 892.

York.¹⁰¹

E. Damages in Medical Malpractice Actions

As always, in negligence law in general, and medical malpractice cases in particular, a number of verdicts were set aside as excessive.¹⁰² The opinions sustaining or directing the reduction of verdicts in medical malpractice cases did not provide any new analyses during the past year.

F. Miscellaneous Malpractice Cases

In *Landon by Landon v. New York Hospital*,¹⁰³ the Court of Appeals, without opinion, affirmed the appellate division's dismissal of the plaintiffs' emotional distress claims.¹⁰⁴ The plaintiffs, whose child was deteriorating from bacterial meningitis, claimed emotional harm from observing the child's grave condition while also experiencing fears of contracting the disease themselves.¹⁰⁵

The dissent viewed the relationship between treating physicians and the parents of an ill child as creating a duty running to the parents to provide accurate and reasonable information.¹⁰⁶ "Since there exists a direct duty to the parents independent of that owed by the physicians to the child, appellant's cause of action seeking damages for emotional harm is cognizable at law."¹⁰⁷

If viewed on an independent duty basis, for which the dissent claimed there was authority,¹⁰⁸ the parents should have been permitted to attempt to prove their cause of action.

101. See, e.g., *Wittrock v. Maimonidies Medical Center-Maimonidies Hosp.*, 119 A.D.2d 748, 501 N.Y.S.2d 684 (2d Dep't 1986) (no recovery for both the emotional and physical harm resulting from a still birth); *Gastwirth v. Rosenberg*, 117 A.D.2d 706, 499 N.Y.S.2d 95 (2d Dep't 1986) (no recovery for emotional harm caused by malpractice resulting in *in utero* death); *Mc Bride v. Brookdale Hosp. Medical*, 130 Misc. 2d 999, 498 N.Y.S.2d 256 (Sup. Ct., Kings Co. 1986) (recovery for malpractice to mother for emotional distress distinct from recovery for distress linked to loss of fetus).

102. See *Vialva v. City of New York*, 118 A.D.2d 701, 499 N.Y.S.2d 977 (2d Dep't 1986) (excessive pain and suffering award); *Trocchia v. Long Island College Hosp.*, 122 A.D.2d 626, 503 N.Y.S.2d 651 (2d Dep't 1986) (trial court erred in finding jury verdict inadequate).

103. 65 N.Y.2d 639, 481 N.E.2d 239, 491 N.Y.S.2d 607 (1985).

104. See *id.* at 640, 481 N.E.2d at 239, 491 N.Y.S.2d at 607.

105. See *id.* at 639-40, 481 N.E.2d at 239, 491 N.Y.S.2d at 607.

106. See *id.* at 640-41, 481 N.E.2d at 239-40, 491 N.Y.S.2d at 608 (Jasen, J., dissenting).

107. See *id.* at 641, 481 N.E.2d at 240, 491 N.Y.S.2d at 608.

108. See *id.* at 641-42, 481 N.E.2d at 240-41, 491 N.Y.S.2d at 608-09.

III. LEGAL MALPRACTICE

Query: why are there so few reported legal malpractice cases? Are they settled prior to trial? Before verdict? After judgment is entered? There must be a reason why the malpractice insurance rates of most New York attorneys, while they are in no way comparable to those of physicians, continue to climb.

The Appellate Division, Second Department, decided two legal malpractice cases during the *Survey* year, neither of earthshaking importance. In *Green v. Leibowitz*,¹⁰⁹ both fraud and legal malpractice were alleged.¹¹⁰ The plaintiff essentially sought damages for emotional distress and claimed that intentional misrepresentation by the plaintiff's former attorney in his handling of a disability claim constituted intentional infliction of mental distress.¹¹¹ The Second Department disagreed, finding that the plaintiff failed to allege a prima facie cause of action for intentional infliction of mental distress and that psychic injury could not be claimed in legal malpractice and fraud causes of action.¹¹²

A significant percentage of legal malpractice actions arise from the failure of counsel to initiate litigation within the requisite statute of limitations. The question of what damages are recoverable in such an event is fairly well settled, but questions continue to arise. In *Chiaffi v. Wexler, Bergerman & Crucet*,¹¹³ the court stated the prevailing American rule that "[t]he determination of an award of damages requires plaintiffs to establish the injuries suffered and their value Therefore, in a legal malpractice action, the collectibility of a hypothetical judgment against the underlying tortfeasor is a factor to be considered by the trier of facts."¹¹⁴

Perhaps this rule, not illogical in itself, helps to explain the dearth of legal malpractice actions. Unlike medical malpractice suits, legal malpractice actions which are based on alleged failure to comply with statute of limitations requirements result in a trial-within-a-trial. The merits of the plaintiff's lost cause of action must be assessed but without the discovery, witnesses and evi-

109. 118 A.D.2d 756, 500 N.Y.S.2d 146 (2d Dep't 1986).

110. *See id.*

111. *See id.* at 756-57, 500 N.Y.S.2d 146-47.

112. *See id.* at 758, 500 N.Y.S.2d at 149.

113. 116 A.D.2d 614, 497 N.Y.S.2d 703 (2d Dep't 1986).

114. *See id.* at 615, 497 N.Y.S.2d at 704.

dence which would have been part of the original action. A legal malpractice action is risky because few negligence or contract actions begin with a plaintiff's certitude of victory. While it is doubtful that the bar benefits from this situation, individual attorneys who have failed to file an action within the applicable statutory period assuredly do. The courts should develop a theory of an initial presumption of minimal damages because of counsel's negligence in failing to initiate litigation. Such a development may well act as a deterrent to such negligence. The present doctrine certainly does not.

IV. NEGLIGENCE

No major doctrinal developments in the general substantive law of negligence emerged during the *Survey* year. A number of decisions are of interest as they reflect the courts' continuing attempts to resolve the numerous, and occasionally novel, injury-producing civil disputes which occupy so much court time.

In *Panzer v. Harding*,¹¹⁵ the Appellate Division, Second Department, affirmed a rare jury verdict for dog owners whose animal had bitten a child.¹¹⁶ The dog in question had a clean record and was a known friend of children.¹¹⁷ For years, cases involving dogs who bite little children had been decided functionally, if not doctrinally, on the basis of strict liability. *Panzer* has given hope for a reversal of this trend.

*Gordon v. American Museum of Natural History*¹¹⁸ is a rare case in which both the appellate division and Court of Appeals decisions were reported within the same *Survey* year.¹¹⁹ This was a slip and fall case in which the plaintiff sustained injuries on the front entrance steps of a museum.¹²⁰ He claimed that he saw a piece of "white, waxy paper"¹²¹ while he was in midair.¹²² The First Department sustained an entry of judgment against the defendant,

115. 118 A.D.2d 842, 500 N.Y.S.2d 328 (2d Dep't 1986).

116. *See id.* at 843, 500 N.Y.S.2d at 329.

117. *See id.*

118. 67 N.Y.2d 836, 492 N.E.2d 774, 501 N.Y.S.2d 646 (1986).

119. *See id.* at 837, 492 N.E.2d at 774, 501 N.Y.S.2d at 646.

120. *See id.*

121. *See id.*

122. *See id.*

but the Court of Appeals reversed in a memorandum opinion.¹²³ The Court noted:

There is no evidence in the record that defendant had actual notice of the paper and the case should not have gone to the jury on that theory. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it.¹²⁴

Recalling to mind classic cases involving the pigmentation of banana skins, the Court found that the plaintiff did not even describe the paper as dirty, thus failing to establish a minimum basis for alleging neglect in not policing the area.¹²⁵

Reaching the Court of Appeals was *Strauss v. Belle Realty Co.*,¹²⁶ a case arising out of in New York's second great blackout, the July 13, 1977 adventure in neighborliness and looting.¹²⁷ The plaintiff-tenant had sustained personal injuries during the blackout while traversing a common area of his apartment building.¹²⁸ The appellate division dismissed the complaint and the Court of Appeals affirmed.¹²⁹ Justice Kaye, writing for the Court, found that liability, following a cataclysmic event such as a citywide power

123. See *id.* at 838, 492 N.E.2d at 775, 501 N.Y.S.2d at 647.

124. *Id.* (citations omitted).

125. Even if the paper had been dirty, a reasonable standard of care for a museum, attracting thousands of persons a day with its approaches besieged by vendors of every type offering food and trinkets, cannot possibly maintain steps clear of slips of paper. There is a difference between the museum's setting and the indoor setting where failure to reasonably police the premises may be the basis for a successful slip and fall judgment for the plaintiff. See *Rabinowitz v. New York Tel. Co.*, 119 A.D.2d 741, 501 N.Y.S.2d 152 (2d Dep't 1986). In this case the Appellate Division, Second Department, reversed a jury verdict of over \$112,000 entered for a plaintiff who suffered a severe neck injury when, while using a public telephone owned by the defendant, he turned and was cut in the neck by a sharp metal telephone cord. See *id.* at 741, 501 N.Y.S.2d at 153. The court found that the judgment could not be sustained because of the total lack of proof that any notice, actual or constructive, about the condition of the phone booth, was made to the phone company. See *id.* at 742, 501 N.Y.S.2d at 153. The issue of demonstrating not only control but awareness of a defect is vital in establishing a prima facie negligence case where the defendant is responsible for the condition of either equipment or premises visited by large numbers of unsupervised people who actually create the hazardous conditions which cause injury. In many instances, the defendant can be shown to have had actual or constructive notice, but this information is rarely volunteered. Aggressive and effective discovery is essential.

126. 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985).

127. See *id.* at 401, 482 N.E.2d at 35, 492 N.Y.S.2d at 556.

128. See *id.*

129. See *id.* at 405, 482 N.E.2d at 38, 492 N.Y.S.2d at 559.

ou tage, "should, as a matter of public policy, be limited by the contractual relationship."¹³⁰ Justice Kaye seemed to be especially concerned with the implications of recognizing tort liability in this type of situation because of the logical likelihood that the potential group of plaintiffs would grow to include customers of stores and social guests.¹³¹

In an excellent and well-reasoned dissent, Justice Meyer found the majority's approach to be one-sided and inadequate for the problem presented.¹³² Creatively citing *Tarasoff v. Regents of University of California*,¹³³ a case creating an unrelated doctrine which has not been accepted in New York, Justice Meyer demonstrated that there exists extensive criteria for analyzing the duty issue raised by Consolidated Edison's clear and gross negligence in assuring a blackout of monstrous proportions.¹³⁴ Of equal importance, Justice Meyer rejected the protectionist stance adopted by the majority which maintained that the public cannot afford to have Consolidated Edison held accountable for its negligence on a grand scale because the utility might succumb to litigation and judgments.¹³⁵

The responsibility of a driver who is speeding and is involved in an accident caused by another driver crops up occasionally in both the criminal and tort law fields. The key to securing a judgment against such a driver lies in demonstrating that he or she was acting in concert with the injury-producing tortfeasor rather than simply acting irresponsibly alone. In *Shea v. Kelly*,¹³⁶ the Appellate Division, Second Department, reversed a verdict against a

130. *Id.* at 401, 482 N.E.2d at 35, 492 N.Y.S.2d at 556.

131. *See id.* at 405, 482 N.E.2d at 38, 492 N.Y.S.2d at 559.

132. *See id.* (Meyers, J., dissenting).

133. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

134. *See Strauss*, 65 N.Y.2d at 407-08, 482 N.E.2d at 39-40, 492 N.Y.S.2d at 560-61.

135. *See id.* at 409, 482 N.E.2d at 41, 492 N.Y.S.2d at 562. The jurist has raised a major ethical and policy issue in contemporary torts. Should Union Carbide be shielded from the consequences of the Bhopal disaster, or a subsequent American toxic calamity, if it can be shown that the corporation would fail? Does anyone really believe that tort litigation against a major public utility might result in the lights of Broadway and the rest of New York City going dark? If the majority's approach is valid, what principled guidelines, do courts have to distinguish the tortfeasor whom public policy must insulate from judgments from all those who regularly expire with or without satisfying judgments entered? Justice Meyer's dissent merits thoughtful and respectful attention.

136. 121 A.D.2d 620, 503 N.Y.S.2d 649 (2d Dep't 1986).

speeding third-party driver.¹³⁷ The court found that "[a]s the evidence only established that the two drivers were simultaneously operating their vehicles at high speeds, it cannot, without more, be found to support an inference of an intent to race."¹³⁸ It is clearly the plaintiff's burden to prove concert of action and plaintiff's counsel's responsibility to thoroughly investigate the relationship, if any, between potential defendants.¹³⁹

Each year, the issue of negligent supervision of children arises in one form or another. In *Walden By Walden v. Rensselaer Polytechnic Institute*,¹⁴⁰ the defendant raised a counterclaim and requested contribution or indemnification from the parents of the injured child.¹⁴¹ The child fell onto broken glass on the defendant's property which adjoined land owned by the plaintiff's father.¹⁴² The Appellate Division, Third Department, reviewed recent case law concerning negligent supervision of children and found no cause of action or counterclaim based on negligent supervision could survive.¹⁴³ It found that any negligence arising from the father's knowledge of a dangerous condition created by his daughter did not give rise to a general duty independent of the family relationship.¹⁴⁴

While some cases are clear as to whether negligent supervision or negligence as a reflection of a general duty is the actual basis for a cause of action, this is an area in which vague or careless pleading will cause great problems. Counsel drafting defenses and counterclaims alleging some failure on the part of a child's parent must be sure that they understand the distinctions that have been cre-

137. *See id.* at 620, 503 N.Y.S.2d at 650.

138. *Id.* at 621, 503 N.Y.S.2d at 650.

139. *See id.*

140. 116 A.D.2d 963, 498 N.Y.S.2d 289 (3d Dep't 1986).

141. *See id.*

142. *See id.* at 963, 498 N.Y.S.2d at 290.

143. *See id.* at 964-65, 498 N.Y.S.2d at 291.

144. *See id.* at 964, 498 N.Y.S.2d at 291. The court found:

Insofar as defendant alleged that the father had dominion over or ownership of the property on which his daughter fell and breached a general duty to care for and maintain it, we are of a view that the counterclaim is maintainable. On the other hand, to the extent that the negligence, defendant assigns to him, is his knowing acquiescence in the creation of a dangerous condition by his daughter, that inactivity bespeaks not of any breach of a general duty independent of the familial relationship, but rather of the failure of the parent to properly supervise the child.

Id.

ated by New York law and restated in *Walden*.

The importance of careful pleading in negligence cases was also demonstrated by *Vaill v. Oneida Dispatch Corp.*¹⁴⁵ The sole cause of action pled was negligence.¹⁴⁶ The plaintiff, without her consent or knowledge, was the subject of a personals advertisement in the defendant's newspaper.¹⁴⁷ The advertisement featured her first name and correct telephone number and solicited male companionship.¹⁴⁸ Plaintiff sought damages for mental anguish as she was harassed by persons who responded to the advertisement and by an individual who showed up at her door, having somehow learned her address.¹⁴⁹ Justice Alois, sitting in the Supreme Court, Oneida County, held that plaintiff could not recover under existing law and entered summary judgment for the defendant.¹⁵⁰

Although the problem of "Personals" advertisements is discussed below in connection with a particularly egregious case,¹⁵¹ it ought to be obvious that New York's law of negligent infliction of mental distress, never viewed as ground breaking anywhere, should recognize a category of psychic harm related to the placement of spurious personal advertisements. If these advertisements are an accepted way of soliciting personal relationships, and they clearly are, the parties benefiting economically from these services must be forced to deal responsibly with the absolutely foreseeable problem of spurious ads. The burden of care which would be placed on those publications which run personal ads would be minimal and cost effective. The harm prevented also would be great. While the courts could wait until such an advertisement results in physical harm, rape, or death to an innocent victim, it is preferable to see the issue addressed sooner.

A. Damages

The issue of damages is always with us. In *Klump v. Bowman*,¹⁵² the plaintiff was injured in a fall off a stepladder at a "pick

145. 129 Misc. 2d 477, 493 N.Y.S.2d 414 (Sup. Ct., Oneida Co. 1985).

146. *See id.*

147. *See id.*

148. *See id.*

149. *See id.* at 478, 493 N.Y.S.2d at 414.

150. *See id.* at 482, 493 N.Y.S.2d at 417.

151. *See infra* notes 219-26 and accompanying text.

152. 117 A.D.2d 857, 498 N.Y.S.2d 561 (3d Dep't 1986).

your own" apples orchard.¹⁵³ The trial court ordered, following a verdict for plaintiff, a new trial unless the defendant stipulated to an almost one hundred percent increase in damages.¹⁵⁴ The Appellate Division, Third Department, however, found that the record reflected permanent and disabling injuries and a new trial on damages alone was ordered.¹⁵⁵

Fifteen-year-old boys are often viewed as a pain in the posterior but just how much is actual damage to a boy's posterior worth? In *Miller v. Cattabiani*,¹⁵⁶ we learn that birdshot in the left buttocks is not worth \$150,000 to the victim and \$35,000 to the mother for loss of services.¹⁵⁷ The boy's verdict was reduced to a still respectable \$100,000 while the mother had to be happy with \$18,849.91.¹⁵⁸

Appellate *additurs*¹⁵⁹ are fairly rare creatures. In *Berman v. National Council of Beth Jacob*,¹⁶⁰ the Appellate Division, Second Department, increased a plaintiff's principal recovery from \$30,000 to \$50,000.¹⁶¹ The cause had been tried by the court and the appellate court did not feel constrained to accept the trial judge's findings.¹⁶² In some instances, there may be a special advantage with regard to damages in trying a case without a jury. If a plaintiff's verdict is deemed to be insufficient, trial counsel should recognize that the appellate court has a basis for increasing the verdict which it would lack if a trial by jury had taken place.

B. State and Municipal Entities

Most of the cases decided during the past *Survey* year reflect

153. *See id.*

154. *See id.* at 857, 498 N.Y.S.2d at 562.

155. *See id.* at 858, 498 N.Y.S.2d at 563.

156. 119 A.D.2d 864, 500 N.Y.S.2d 430 (3d Dep't 1986).

157. *See id.* at 865, 500 N.Y.S.2d at 431. The dissenting justice would not have reduced the verdict because there was evidence of permanent nerve damage and the victim was no longer acceptable for military service. *See id.* at 868, 500 N.Y.S.2d at 433 (Mikoll, J., dissenting).

158. *See id.* at 867, 500 N.Y.S.2d at 432.

159. "The power of trial court is to assess damages or increase amount of an inadequate award made by jury verdict, as condition of denial of motion for new trial, with consent of defendant whether or not plaintiff consents to such action." BLACK'S LAW DICTIONARY 36 (5th ed. 1979).

160. 119 A.D.2d 787, 501 N.Y.S.2d 413 (2d Dep't 1986).

161. *See id.* at 788, 501 N.Y.S.2d at 413.

162. *See id.* at 788, 501 N.Y.S.2d at 414.

established law and call for neither notice nor comment. Some provide practice pointers and, occasionally, sharp reminders. The most interesting cases often arise from the law enforcement area.

1. *Law Enforcement*

For the past several years, an increasingly intensive national and statewide campaign to curb drunken driving has resulted in a major increase in arrests and prosecutions for driving while intoxicated (DWI). In New York, persons arrested for DWI are generally released after processing if a sober friend or relative is available to accept responsibility. DWI arrests are generally nocturnal and the offenders are not usually charged with major crimes in addition to DWI. Most departments are only too happy to see the arrested persons released on an appearance ticket because confinement facilities are limited.¹⁶³

Probably most such released persons are grateful to just sleep it off in a non-institutional bed. One person who did not was Bradley D. Kelly who, two hours after having been arrested for DWI, killed a motorist while driving.¹⁶⁴ In *Shea v. Town of Fishkill*,¹⁶⁵ the plaintiffs sought recovery by alleging that the town was negligent in releasing Kelly into the custody of friends.¹⁶⁶ Kelly had

163. Chief of Police Donald L. Singer of the Greenburgh, New York Police Department, a recognized authority on modern police administration and a member of the New York Bar, was interviewed in connection with the preparation of this Article. Singer stated:

Police departments today are experiencing unprecedented tort litigation. Some of the cases arise from alleged negligence with regard to the care of people in temporary custody at police stations. Aggravating the situation is the increase in driving while intoxicated arrests. These subjects have rarely been arrested before, are frightened often, and can react to close confinement with behavior that can produce injury. I inaugurated a special driving while intoxicated program years before the major campaigns began and I learned that releasing charged persons into the care of competent, that is sober, friends or relatives, was usually the most effective way of handling the situation and reducing the possibility of liability. It is absolutely incumbent, however, on either the arresting officer or the desk officer, to direct the person being released not to drive again until complete sobriety has returned, to also give that information to the people picking the subject up, and to document that this direction has been given.

Telephone interview with Donald L. Singer, Chief of Police, Greenburgh, N.Y. Police Department (Sept. 9, 1986).

164. *Shea v. Town of Fishkill*, 121 A.D.2d 375, 376, 502 N.Y.S.2d 804, 804 (2d Dep't 1986).

165. *See id.*

166. *See id.*

been instructed by police not to drive again that night.¹⁶⁷ The Appellate Division, Second Department, affirmed dismissal of the cause of action and restated the rule that no special relationship exists between a municipality and the victims of an intoxicated driver where the police take no affirmative action to prevent the intoxicated person from further driving.¹⁶⁸

While it is impossible not to empathize with the plaintiffs in this action, the public welfare would not be served by holding intoxicated drivers until they become sober. The majority do not attempt to drive while intoxicated and the potential tort liability of short term incarceration, considering the number of arrests being made for DWI, is significant.

An issue as to whether a general duty to the public exists was also analyzed in *Coyne v. State*.¹⁶⁹ The Appellate Division, Third Department, found that the plaintiff could not state a cause of action in negligence and was barred by the statute of limitations from bringing a false arrest and malicious prosecution cause of action.¹⁷⁰ Coyne claimed that he would not have been arrested if the arresting state police investigator had been properly conducting an investigation of a report that unlawful dealing with a minor was occurring.¹⁷¹ The court correctly found that "[t]he case law is well settled that, on public policy grounds, no legally cognizable cause of action exists for negligent investigation of a crime and claimant's only avenue of relief is by way of the traditional remedies of false arrest and malicious prosecution suits."¹⁷² A cause of action against the police on a general theory of negligence in conducting investigations would undermine the entire apparatus of law enforcement and no such theory has been accepted anywhere.

Police discretion in determining adequate grounds to establish probable cause for an arrest is a key issue in many preliminary criminal proceedings. It is also a possible basis for civil damages against a municipality.¹⁷³ In *Orndorff v. De Nooyer Chevrolet*,

167. *See id.*

168. *See id.* at 376, 502 N.Y.S.2d at 805 (citations omitted).

169. 120 A.D.2d 769, 501 N.Y.S.2d 505 (3d Dep't 1986).

170. *See id.* at 770, 501 N.Y.S.2d at 506.

171. *See id.* at 769, 501 N.Y.S.2d at 506.

172. *See id.* at 770, 501 N.Y.S.2d at 506 (citations omitted).

173. *See Orndorff v. De Nooyer Chevrolet, Inc.*, 117 A.D.2d 365, 503 N.Y.S.2d 444 (3d Dep't 1986).

Inc.,¹⁷⁴ the Appellate Division, Third Department, sustained a jury verdict in favor of the plaintiff against the Town of Colonie.¹⁷⁵ The plaintiff had left his car for repairs with defendant De Nooyer Chevrolet.¹⁷⁶ After receiving less than attentive responses to his repeated requests, he asked the defendant's employee Nelson what he had to do to retrieve his car.¹⁷⁷ "Nelson allegedly replied in a flippant manner, '[d]o whatever you like.'"¹⁷⁸ Shortly thereafter the plaintiff entered the lot where his car was and drove it away.¹⁷⁹ Subsequently, Nelson reported the car as stolen but also informed police that the "[c]ar may be in possession of owner; owner possibly took car and did not pay \$4000 bill."¹⁸⁰ On this basis, the car was entered into the computer system as a stolen vehicle.¹⁸¹ A few days later, plaintiff was stopped by police, arrested, processed, and held overnight in the Albany County Jail.¹⁸² He was charged with the nonexistent crime of theft of what amounted to a disputed debt, a charge dismissed in court.¹⁸³ The Third Department affirmed a judgment against the Town of Colonie for \$31,250 for both false arrest and malicious prosecution.¹⁸⁴

The officer on patrol who stopped Orndorff had reasonable grounds for both the stop and field investigation. The car might, indeed, have been stolen. The information furnished by Nelson, however, should have been available to officers in the field. To proceed to arrest the registered owner of a car, a person unlikely to disappear if a further investigation developed, was gross negligence.¹⁸⁵

174. *See id.*

175. *See id.* at 366, 503 N.Y.S.2d at 445.

176. *See id.*

177. *See id.* at 366, 503 N.Y.S.2d at 446.

178. *Id.*

179. *See id.*

180. *See id.* at 367, 503 N.Y.S.2d at 446.

181. *See id.*

182. *See id.* at 368, 503 N.Y.S.2d at 447.

183. *See id.*

184. *See id.* It is hard to conceive of a better textbook case to establish municipal tort liability. There was no colorable basis for the arrest of Orndorff. The report filed by Nelson in itself should have alerted the desk sergeant or officer taking the report that while the car might have been stolen, its possession by the owner of record would be at most a civil matter between the person reporting the alleged theft and the owner.

185. *See id.* at 368-69, 503 N.Y.S.2d at 447. Counsel for police departments and municipalities can appraise this case in two ways. It may be viewed as a certain indicator of how their police department will fare at trial under similar facts or it may suggest the need for

The Court of Claims reviewed the rationale and validity of the traditional "Fireman's Rule" in *Santangelo v. State*.¹⁸⁶ Several police officers asserted that the injuries they incurred while apprehending a dangerous escaped mental patient were proximately related to the state's negligent confinement of the patient.¹⁸⁷ The patient had a history of both escape and violence.¹⁸⁸

Judge Benza dismissed the claims of the officers.¹⁸⁹ The state both denied that its employees had been negligent, a question of fact, and asserted the absence of any duty to the injured officers, a primary issue of law.¹⁹⁰ Judge Benza noted that the traditional rule which precludes recovery by police officers and fire fighters for negligence which gives rise to a call for their special services has little explanatory and interpretive case law in New York.¹⁹¹ The weight of case law demonstrates, however, that the "Fireman's Rule" has been consistently followed.¹⁹²

Although there is an exception to the "Fireman's Rule" involving a duty to warn potential victims of a known danger, Judge Benza found that this exception does not apply to police who may not avoid the very danger represented by the threat.¹⁹³ "It would strain statutory interpretation to agree that a regulation or statute seeking to warn a person of a specific danger would at the same time mandate this individual to seek out and apprehend that very danger to prevent injury, ostensibly to himself."¹⁹⁴

continuing education of police as to both constitutional and tort law guidelines. The latter approach is believed to be the right one. Few municipalities today can afford tort judgments and prevention is better than defending avoidable, losing cases.

186. 129 Misc. 2d 898, 494 N.Y.S.2d 49 (Ct. Cl. 1985).

187. *See id.* at 899, 494 N.Y.S.2d at 49.

188. *See id.*

189. *See id.* at 908, 494 N.Y.S.2d at 55.

190. *See id.* at 901, 494 N.Y.S.2d at 51.

191. *See id.* at 903-04, 494 N.Y.S.2d at 52-53.

192. *See id.* at 903, 494 N.Y.S.2d at 52.

193. *See id.* at 907, 494 N.Y.S.2d at 55.

194. *Id.* The judge's interpretation of the non-applicability of the "Fireman's Rule" exception to the facts in *Santangelo* is compelling. The paradox created by the plaintiffs' theory is that it would, as the judge noted, "impose on the public a duty to provide a policeman with a work environment free of potential danger." *See id.* Potential danger is, of course, at the heart of the calling of both the police and fire fighting vocations. "Public policy is better served by the continuation of the fireman's rule in New York and, as the injuries sustained by the claimants were a direct result of the negligence which occasioned their presence at the place of the occurrence, their claims are dismissed."

In *Smith v. City of New York*,¹⁹⁵ the Appellate Division, Second Department, affirmed the dismissal by the trial court of an action brought by hospital employees who had been taken hostage by an inmate brought to the hospital for treatment.¹⁹⁶ The plaintiffs claimed both physical and psychic injuries.¹⁹⁷ The problem with the plaintiffs' case was that it "failed to establish the existence of a special relationship between themselves and the New York City Department of Corrections . . . which would have protected them from the dangers posed by an escaped inmate."¹⁹⁸ The major evidentiary failing is that while the plaintiffs asserted reliance on the defendant for protection, no evidence to indicate such reliance was presented to the trial court.¹⁹⁹ While this case was correctly decided, it is unclear if plaintiffs' defeat on the merits was due to inadequate presentation of evidence or actual lack of supportive facts.²⁰⁰

The liability of a landlord for criminal activities committed by third parties against tenants is a major area of housing law. A somewhat different fact pattern was presented in *Waters v. New York City Housing Authority*.²⁰¹ A junior high school student was accosted outside a housing project owned and operated by the defendant.²⁰² She was forced at knife point into a project building through an unlocked door, taken to the roof, robbed, and repeatedly sexually abused.²⁰³ The housing authority was aware that there was a broken door lock used as the point of entry and that the tenants were concerned about potential incidents resulting from the unlocked door.²⁰⁴

Justice Weinstein, writing for the majority, affirmed the granting of summary judgment for the housing authority.²⁰⁵ While recognizing that landlords owe a duty to exercise some care to prevent the criminal victimization of both tenants and visitors to buildings,

195. 122 A.D.2d 133, 504 N.Y.S.2d 696 (2d Dep't 1986).

196. *See id.* at 133, 504 N.Y.S.2d at 697.

197. *See id.*

198. *Id.* (citations omitted).

199. *See id.* at 134, 504 N.Y.S.2d at 697-98.

200. *See id.*

201. 116 A.D.2d 384, 501 N.Y.S.2d 385 (2d Dep't 1986).

202. *See id.* at 385, 501 N.Y.S.2d at 386.

203. *See id.* Her assailant was neither identified nor subsequently apprehended. *See id.*

204. *See id.*

205. *See id.* at 385, 501 N.Y.S.2d at 385-86.

the court found that "it is clear that a duty of care does not devolve upon the defendant New York City Housing Authority with respect to all persons who regularly traffic the city streets and sidewalks."²⁰⁶ The court noted that the infant victim in *Waters* was not a visitor to the building and that the authority had no knowledge of the presence of a dangerous person near their premises.²⁰⁷ The majority reasoned that the result of finding the existence of a duty in this fact pattern would be to potentially establish liability in virtually all cases where a possessor of a building failed to install or use locks.²⁰⁸

New York has, of course, abandoned the traditional classification of visitors to land as the measuring stick of duty.²⁰⁹ The modern rule is that property must be maintained based upon a reasonable standard of care and foreseeability is relevant to determine whether a possessor of land departed from the duty owed to virtually all.²¹⁰ Thus, the abrogation of the hoary traditional duty concept has not brought with it, nor could it, unlimited and ruinous liability for land owners and landlords.²¹¹

If the modern duty concept had been properly applied in *Waters*, the housing authority would be viewed as owing a duty of reasonable care to all who *found themselves* on its premises. Whether the authority deviated from the required standard of care would be a jury question and it is quite possible the authority would have prevailed.²¹²

206. See *id.* at 386-87, 501 N.Y.S.2d at 387.

207. See *id.* at 387, 501 N.Y.S.2d at 387.

208. See *id.* at 388, 501 N.Y.S.2d at 388. Justice Eiber, penning a dissent in which Justice Brown concurred, identified the fatal reasoning adopted by the majority.

Contrary to the view of the majority, this case centers not on the duty of a landlord to control the criminal acts of third parties, but, rather, on the duty of a landlord to maintain its premises in a reasonably safe condition. Because the majority would, contrary to established precedent, adopt a position which makes the status of an entrant onto land the dispositive factor in determining whether a duty is owed to that party, because they have opted to draw a concededly arbitrary line of demarcation with respect to the scope of liability, and because the majority's holding would effectively usurp the power to determine issues which should properly lie within the province of the jury, I respectfully dissent.

Id. at 388-89, 501 N.Y.S.2d at 388 (Eiber, J., dissenting).

209. See *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976).

210. See *Waters*, 116 A.D.2d at 386-87, 501 N.Y.S.2d at 387.

211. See, e.g., *id.*

212. The majority's unacknowledged but real dependence on a rejected model of duty deprived the plaintiff of having the opportunity to establish that at minimal cost and care,

Away from the world of crime, the Court of Appeals, in *Dermatossian v. New York City Transit Authority*,²¹³ reversed the appellate division which had affirmed a judgment in favor of the plaintiff.²¹⁴ The plaintiff had supposedly sustained injuries when he hit his head on a bus grab handle which was defective.²¹⁵ Judge Hancock, writing for a unanimous Court, examined the two issues presented.²¹⁶ The first issue arose over a trial court ruling permitting the admission into evidence of proof of the defendant's payment of no-fault, first party benefits.²¹⁷ The second issue was raised by the plaintiff's reliance on the doctrine of *res ipsa loquitor*.²¹⁸ The Court found for the defendant on both issues on appeal.²¹⁹

Judge Hancock found that the trial court admitted evidence on the payment of first party benefits because it reflected an admission by the defendant that the plaintiff had, in point of fact, sustained an injury on the defendant's bus.²²⁰ The jurist noted, however:

The payment of no-fault benefits, in response to plaintiff's facially valid sworn claim that he had been hurt on the bus, proved nothing more than that, at the time of payment, defendant had determined that there was no valid basis for challenging the truth of plaintiff's assertions . . . and, thereby, avoiding its statutory obligation to pay first party benefits promptly after loss

her assailant would not have been able to force her through the unlocked door to face rape and sodomy. Beyond the scope of this infant plaintiff's tragic encounter with a dangerous criminal, the duty analysis in *Waters* does nothing to advance the goal of encouraging landlords to survey their premises and attempt to prevent both minor offenses and major crimes. Departure from the ancient duty rule was compatible with modern expectations about buildings and their owners and managers. Public housing officials ought to be under no less a duty than their private sector counterparts.

It will hardly surprise any reader to learn that the majority of municipal housing projects in New York City are in exactly those neighborhoods where the type of crime *Waters* encountered is a serious problem. The hairsplitting and anachronistic reasoning in this case does little to help control this crime.

213. 67 N.Y.2d 219, 492 N.E.2d 1200, 501 N.Y.S.2d 784 (1986), *rev'g*, 109 A.D.2d 1106, 487 N.Y.S.2d 451 (1st Dep't 1985) (mem.).

214. *See id.* at 228, 492 N.E.2d at 1205, 501 N.Y.S.2d at 789. It might have been better to describe the handle as broken or damaged.

215. *See id.* at 221, 492 N.E.2d at 1201, 501 N.Y.S.2d at 785.

216. *See id.* at 221-22, 492 N.E.2d at 1201, 501 N.Y.S.2d at 785.

217. *See id.*

218. *See id.*

219. *See id.* at 222, 492 N.E.2d at 1201, 501 N.Y.S.2d at 785.

220. *See id.* at 222-23, 492 N.E.2d at 1202, 501 N.Y.S.2d at 786.

is incurred.²²¹

Judge Hancock's interpretation for the Court is important in assuring that potential negligence defendants do not hesitate to alleviate and perhaps minimize injuries through the prompt payment of first party benefits for fear that such payment will constitute damning evidence inferring liability at trial. The viewpoint expressed by the plaintiff would have effectively thwarted the public policy purpose underlying first party payments without aiding in resolving litigation.²²²

Justice Hancock's analysis of the *res ipsa loquitor* issue is less satisfying. After reviewing the New York doctrine of *res ipsa loquitor*,²²³ Justice Hancock directed his focus to the element of exclusive control.²²⁴ He found:

[T]he plaintiff did not establish control of the grab handle by defendant of sufficient exclusivity to fairly rule out the chance that the defect in the handle was caused by some agency other than defendant's negligence. The proof did not adequately exclude the chance that the handle had been damaged by one or more of defendant's passengers who were invited to use it.²²⁵

This treatment of the element of exclusive control, as interpreted by Judge Hancock and applied to the facts disclosed by the record, is not mandated by New York case law. A plaintiff need not exclude virtually every possibility that tampering by or the negligence of someone other than the defendant caused the dangerous injury-producing condition.²²⁶

Mesick v. State,²²⁷ decided by the Appellate Division, Third

221. *Id.* at 222, 492 N.E.2d at 1202, 501 N.Y.S.2d at 786.

222. *See id.* at 225, 492 N.E.2d at 1203-04, 501 N.Y.S.2d at 787-88.

223. *See id.* at 226, 492 N.E.2d at 1204, 501 N.Y.S.2d at 788.

224. *See id.* at 227-28, 492 N.E.2d at 1205, 501 N.Y.S.2d at 789.

225. *Id.* at 228, 492 N.E.2d at 1205, 501 N.Y.S.2d at 789.

226. Here the bus was in the general and exclusive control of the defendant. Even New York City buses receive some minimum maintenance each day, but the documentation is probably not equal to that found in the airline industry. The likelihood that a relatively minor defect, such as the one which injured plaintiff, would be both noticed and ignored, is an inference permissible under the doctrine of *res ipsa loquitor* and probably true in this case. The key issue is not whether the defendant itself, through an employee, created the defect, a highly improbable possibility, but rather whether the existence of the defect, whoever caused it, was the underpinning for the negligence of the defendant in not detecting, documenting and correcting it in a bus under its exclusive control before the defect caused harm.

227. 118 A.D.2d 214, 504 N.Y.S.2d 279 (3d Dep't 1986). For a discussion of this case,

Department, is a case crying for reversal by the Court of Appeals. A seventeen year-old boy was rendered a quadriplegic when he fell onto rocks near a hole where he was swimming with friends.²²⁸ He had been attempting to use a rope to dive into the water.²²⁹ The property on which the horrible accident took place was state-owned and "[t]he area was posted with signs limiting the permissible use of the area to fishing."²³⁰ The majority found that the state was aware that the pool dedicated for fishing use was also used for swimming, and that a girl had been injured two years before plaintiff's injury while using a rope to dive from.²³¹ "Since the proof established a likelihood of injury and the foreseeability of claimant's presence on the property, a duty of care arose on the part of the State."²³²

Because it appeared to be clear to the majority that mere removal of the rope would have been an inadequate exercise of care, ropes being easily replaced by adolescent swimming hole enthusiasts, the court suggested that "the risk could have been avoided by the simple expedient of cutting the tree down."²³³

In his dissent, Justice Casey first tackled the duty issue.²³⁴ He noted that the state developed and used the land where the accident occurred solely for public fishing and that notices to that effect were posted.²³⁵ Applying General Obligations Law section 9-103,²³⁶ Justice Casey noted that fishing is a "use" therein enumerated.²³⁷ He found it illogical to impose upon the state the far broader standard of reasonable care on the theory that claimant sustained his injuries while actually engaged in an activity not enumerated in General Obligations Law section 9-103.²³⁸

Even if the standard of reasonable care had been applied,

see Gallub, *Assessing Culpability in the Law of Torts: A Call for Judicial Scrutiny in Comparing "Culpable Conduct" Under New York's CPLR 1411*, 37 SYRACUSE L. REV. 1079 (1987).

228. See *id.* at 216, 504 N.Y.S.2d at 280-81.

229. See *id.*

230. See *id.* at 216, 504 N.Y.S.2d at 280.

231. See *id.* at 215-16, 504 N.Y.S.2d at 280.

232. *Id.* at 217, 504 N.Y.S.2d at 281.

233. See *id.*

234. See *id.* at 221, 504 N.Y.S.2d at 284 (Casey, J., dissenting).

235. See *id.*

236. N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1978).

237. See *Mesick*, 118 A.D.2d at 221, 504 N.Y.S.2d at 284.

238. See *id.*; see also, N.Y. GEN. OBLIG. LAW § 9-103.

rather than duty analysis under the aforementioned statute,²³⁹ Justice Casey would still have found for the defendant as he found that the area was only dangerous to those engaged in a prohibited activity.²⁴⁰ Justice Casey then identified the real evil underlying a finding that the state breached a duty of reasonable care in maintaining the fishing site.²⁴¹ "[T]he State should not be required to undertake drastic measures, which would destroy the scenic and natural beauty of the site and perhaps render it unfit for its intended purpose"²⁴²

Twin fallacies underlie the majority's affirmation of the verdict for the plaintiff. The first is that any governmental entity can absorb multi-million dollar verdicts, such as that rendered here, and still provide recreational sites and refuges under all but the most tightly controlled situations. If tight supervision and ongoing control is mandated, the number of sites must decrease and the first to go will be the barely improved natural sites so vital not only for recreation but for conservation. The second fallacy is that the common law requires the mutilation or destruction of natural features of public lands so as to make those properties safer for those who will not, or cannot, comply with clearly posted restrictions. The majority's argument here is on the classical slippery slope. Once established as a doctrine, a duty to efface natural features of property becomes a mandate for wholesale obliteration as additional injuries are reported and bureaucrats and administrators place greater value on preventing harm than on preserving nature. Thus, the majority's formulation is inherently impossible to achieve as a workable standard of due care. The common law has never equated a reasonable standard of care with the unmeasurable, the unquantifiable, and the unachievable.

239. See *Mesick*, 118 A.D.2d at 221, 504 N.Y.S.2d at 284.

240. See *id.* Justice Casey reasoned:

The rocky slope where claimant sustained his injuries was not dangerous to those who used the premises for its only authorized purpose—fishing. The condition was dangerous only to those who sought to *enhance the thrill of engaging in the prohibited activity* of swimming by using an inherently perilous method of entering the water. As to those persons, the condition was clearly dangerous upon mere inspection.

Id. (emphasis added).

241. See *id.*

242. *Id.*

V. STRICT LIABILITY

A. *Products Liability*

New York products liability law continues to develop along its own track. It is interesting that a fair number of practitioners have failed, still, to grasp that an action for personal injuries or property damage caused by a defective product sounds in tort. Counsel continue to bring actions with one cause of action in strict products liability and a second in breach of warranty without any prayer for relief under the warranty cause different from that sought under the strict products liability cause. Perhaps no harm to case or client is caused by this form of pleading but a reasonably close study of New York case law demonstrates that this approach is doctrinally incorrect. Breach of warranty should only be brought when a plaintiff is seeking damages recoverable in tort law.

The Court of Appeals decided three products liability cases during the *Survey* year worthy of mention. In *Rosado v. Proctor & Schwartz, Inc.*,²⁴³ the Court affirmed the dismissal of a cause of action seeking indemnification.²⁴⁴ Judge Titone, writing for a unanimous Court, stated:

The issue is whether a manufacturer of a defective product may obtain indemnification from the purchaser where the sales contract contains a provision requiring the purchaser to install certain safety devices and the purchaser's employee, who is injured by the failure to install such devices, brings an action against the manufacturer predicated on the manufacturer's marketing of a machine that is not reasonably safe.²⁴⁵

The plaintiff was injured by a machine used in the textile industry.²⁴⁶ Barred from suing his employer for this industrial accident because of Workers' Compensation, the injured employee brought a products liability action against the manufacturer of the machine.²⁴⁷ After the trial began but before a verdict was returned, Proctor & Schwartz, Inc. (Proctor) settled with Rosado.²⁴⁸

243. 66 N.Y.2d 21, 484 N.E.2d 1354, 494 N.Y.S.2d 851 (1985).

244. *See id.*

245. *Id.* at 22, 484 N.E.2d at 1355, 494 N.Y.S.2d at 852.

246. *See id.* at 23, 484 N.E.2d at 1355, 494 N.Y.S.2d at 852. The machine is known as a garnett and is used to convert bunches of clumped fiber into matting.

247. *See id.*

248. *See id.* at 23, 484 N.E.2d at 1356, 494 N.Y.S.2d at 853.

Proctor, not surprisingly, wished to shift all or part of its liability to Rosado onto Comet Fibers, Inc. (Comet), Rosado's employer and the purchaser of the injury-producing machine.²⁴⁹ New York law permits, as a general matter, actions for contribution and indemnification by product manufacturers against the employers of persons injured by their defective products.²⁵⁰ The ability to maintain such an action is, however, dependent on factors not present in *Rosado*.²⁵¹

Proctor, in its third-party action, sought indemnification based on the failure of Comet to perform according to the sales contract that required installation of certain safety devices.²⁵² Proctor actually wished to place upon Comet full responsibility for the injury sustained by Rosado.²⁵³

The Court rejected Proctor's arguments.²⁵⁴ The essential purpose of strict liability is to hold the manufacturer of a product accountable for those defects that cause injury.²⁵⁵ Judge Titone found:

[W]here, as here, the manufacturer is in the best position to know the dangers inherent in its product, and the dangers do not vary depending on job site, it is also in the best position to determine what safety devices should be employed Preventing injuries in the first place is the primary public policy underlying the doctrine of strict products liability. To allow a manufacturer like Proctor . . . to shift the ultimate duty of care to others through boilerplate language in a sales contract, would erode the economic incentive manufacturers have to maintain safety and give sanction to the marketing of dangerous, stripped down machines.²⁵⁶

This well-reasoned, unanimous decision should set straight the boundaries of permissible third-party claims for relief in the industrial accident field. It is natural that machinery and product manufacturers, obviously aware that the institution of litigation against them is often at least partially spurred by the unavailability to the

249. See *id.* at 23, 484 N.E.2d at 1355-56, 494 N.Y.S.2d at 852-53.

250. See, e.g., *Dole v. Dow Chem. Co.*, 35 A.D.2d 149, 316 N.Y.S.2d 348 (1970), *rev'd*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

251. See *Rosado*, 66 N.Y.2d at 23, 484 N.E.2d at 1355, 494 N.Y.S.2d at 852.

252. See *id.* at 22-23, 484 N.E.2d at 1355, 494 N.Y.S.2d at 853.

253. See *id.* at 23, 484 N.E.2d at 1356, 494 N.Y.S.2d at 853.

254. See *id.* at 25, 484 N.E.2d at 1357, 494 N.Y.S.2d at 855.

255. See *id.*

256. *Id.* at 26-27, 484 N.E.2d at 1358, 494 N.Y.S.2d at 855.

plaintiff of a tort remedy against an employer, would look to the employer to share or absorb the burden. Judge Titone's opinion states that this is unacceptable in what, on analysis, is the majority of lawsuits brought by injured employees. Manufacturers concerned about this liability and who are in a strong bargaining position—the purchaser needs the supplier more than the supplier needs the purchaser—ought to incorporate clear indemnification provisions in sales contracts. This form of potential loss shifting does not raise any public policy issues or problems discussed by Judge Titone in *Rosado*.

Although not discussed in the Court's opinion in *Rosado*, it seems fairly clear that sales contracts in which a purchaser undertakes to install safety equipment that the seller knows should be furnished before use of the product are very unlikely to be performed as written. An experienced manufacturer, selling highly specialized industrial machinery, is under no illusions as to the operating milieu of his equipment. Proctor could not have seriously expected that most of their customers would hasten to install safety devices mentioned in the sales contract. To allow a manufacturer-seller to rely upon such a provision would make a mockery of the public policy underlying strict products liability.

Illustrating the importance of evidentiary matters in complex products liability litigation is the Court of Appeals decision in *Sawyer v. Dreis & Krump Manufacturing Co.*²⁵⁷ Plaintiff was injured by a sheet metal shaping machine and brought an action against the manufacturer of the machine.²⁵⁸ The manufacturer brought a third-party action against Cambridge Filter Corporation, plaintiff's employer.²⁵⁹ The appellate court affirmed a jury verdict for the plaintiff but New York's final judicial forum reversed and granted a new trial.²⁶⁰ The Court found error in all the issues under consideration.²⁶¹ "The principal issue . . . is whether the trial court committed error in submitting the question of plaintiff's amnesia to the jury in the absence of expert testimony supporting his claim or causally relating the amnesia to the accident . . . and in permitting plaintiff's engineering expert to testify how the accident

257. 67 N.Y.2d 328, 493 N.E.2d 920, 502 N.Y.S.2d 696 (1986).

258. *See id.* at 331, 493 N.E.2d at 922, 502 N.Y.S.2d at 698.

259. *See id.*

260. *See id.* at 332, 493 N.E.2d at 922, 502 N.Y.S.2d at 698.

261. *See id.*

happened."²⁶²

The Court reviewed what it termed to be the "familiar law"²⁶³ concerning the lessened burden placed upon an accident victim whose amnesia precludes testifying as to the events of the incident.²⁶⁴ The issue to be decided in *Sawyer* was whether an expert was required to establish an evidentiary foundation for amnesia because, as the Court noted, this condition can be feigned.²⁶⁵ Although most prior cases apparently featured expert testimony, the question of whether it is required was novel.²⁶⁶

The Court concluded that the testimony of the plaintiff in which he claimed amnesia alone, without expert testimony, was insufficient to allow him to benefit from the lessened burden of the amnesiac.²⁶⁷ This evidentiary holding, of course, goes beyond products liability litigation. In the future, in all tort actions in which amnesia of a plaintiff is claimed, sufficient foundation by a qualified expert must be presented.²⁶⁸ In *Smith v. Stark*,²⁶⁹ the Court of Appeals affirmed the appellate division's granting of a pool manufacturer's motion for summary judgment.²⁷⁰ The plaintiff was injured when he either dove or was thrown by friends into a pool manufactured by the defendant.²⁷¹ The Court found that if he dove into the pool, he had to have been aware that he was entering the shallow end and if he was thrown into the water, the failure of the manufacturer to place depth markers was irrelevant.²⁷² What is

262. *Id.*

263. *See id.* at 333-34, 493 N.E.2d at 923-24, 502 N.Y.S.2d at 699-700.

264. *See id.* at 333-34, 493 N.E.2d at 923, 502 N.Y.S.2d at 699.

265. *See id.* at 334, 493 N.E.2d at 924, 502 N.Y.S.2d at 700.

266. *See id.*; *see also* Barker, *Evidence*, *supra* this Survey.

267. *See id.* at 335, 493 N.E.2d at 924, 502 N.Y.S.2d at 700. The Court found: Amnesia, like most medical conditions, is beyond the understanding of laymen and expert evidence on the matter is not only helpful, it is required if plaintiff is to prove the condition by clear and convincing evidence [W]ithout the aid of experts, a jury of laymen is not capable of evaluating the effects of a trauma or the symptoms which may verify a loss of memory and indicate that it is real and not feigned. In the absence of expert evidence establishing a loss of memory and its causal relationship to defendant's fault, the jury may not consider the question or apply a lesser degree of proof in evaluating plaintiff's claim

Id. at 334-35, 493 N.E.2d at 924, 502 N.Y.S.2d at 700.

268. *See id.*

269. 67 N.Y.2d 693, 490 N.E.2d 841, 499 N.Y.S.2d 922 (1986), *aff'g*, 111 A.D.2d 913, 490 N.Y.S.2d 811 (2d Dep't 1985).

270. *See id.* at 695, 490 N.E.2d at 842, 499 N.Y.S.2d at 923.

271. *See id.* at 694, 490 N.E.2d at 842, 499 N.Y.S.2d at 923.

272. *See id.*

surprising is that this action seems to have been brought solely sounding in negligence.²⁷³

As discussed in the Medical Malpractice segment,²⁷⁴ actions based on prenatal injuries continue to be brought.²⁷⁵ In the products liability field, similar actions are brought. In *Catherwood v. American Sterilizer Co.*,²⁷⁶ the plaintiffs sought damages for pre-conception harm to the mother because of exposure to the defendant's chemical product.²⁷⁷ The mother's exposure allegedly caused chromosomal alteration in the child subsequently conceived.²⁷⁸

Justice Mintz granted the defendant's motion to dismiss.²⁷⁹ Relying upon *Albala v. City of New York*,²⁸⁰ the justice found that no analytic approach permitted a finding that any tort cause of action exists in New York for alleged preconception harms.²⁸¹ The jurist's concise and well-written opinion is an excellent and precise discussion of this subject.

A twist on the recurrent efforts of employees to find some way to skirt employers' insulation from tort liability because of Workers' Compensation is provided by *Copp v. Corning Glass Works*.²⁸² In *Copp*, an injured employee sued his former employer which had sold the injury causing machine to his present employer.²⁸³ Corning, however, was not the original purchaser of the machine.²⁸⁴ The court affirmed the dismissal of the action, noting that the "defendant, successor to the original purchaser . . . had no part in . . . design or manufacture and had made no modifications which increased the risk of injury."²⁸⁵

While the approach in *Copp* was creative, it lacked any foundation in law. A manufacturer who is a successor to the original manufacturer of a defective product may be liable to a victim, but a successor purchaser certainly is not.

273. *See id.*

274. *See supra* notes 1-62 and accompanying text.

275. *See supra* notes 49-57 and accompanying text.

276. 130 Misc. 2d 872, 498 N.Y.S.2d 703 (Sup. Ct., Erie Co. 1986).

277. *See id.* at 873, 498 N.Y.S.2d at 704.

278. *See id.*

279. *See id.* at 875-76, 498 N.Y.S.2d at 706.

280. 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981).

281. *See Catherwood*, 130 Misc. 2d at 875, 498 N.Y.S.2d at 706.

282. 114 A.D.2d 144, 497 N.Y.S.2d 970 (4th Dep't 1986).

283. *See id.* at 145, 497 N.Y.S.2d at 971.

284. *See id.*

285. *See id.* at 146, 497 N.Y.S.2d at 972.

Numerous injuries are sustained annually because of defective equipment that was purchased in a used condition. Whether strict products liability applies to actions based on harm caused by used equipment requires close factual analysis. In *Sukljian v. Charles Ross & Son Co.*,²⁸⁶ the Appellate Division, Third Department, found, as a matter of law, that strict products liability does not apply when the defendant was an occasional seller not regularly engaged in selling the product, or the type of product, which caused injury.²⁸⁷ In this case, the machinery sold was specifically offered on a "As Is Where Is" basis and was a sale of surplus property.²⁸⁸

In affirming a summary judgment for an equipment manufacturer, the Appellate Division, Second Department, in *Silverstein v. Walsh Press & Die Co.*,²⁸⁹ disposed of an action based upon an injury produced by a machine manufactured in 1947.²⁹⁰ The appellate panel agreed that the plaintiff had failed to demonstrate any proximate causation linking the manufacturer of the thirty-year-old punch press with the defect that caused plaintiff's injury.²⁹¹ The machine had been modified over its service life.²⁹² This is the sort of vexatious case which suggests the wisdom of a statute of repose for New York State.

Intervening conduct, of either a tortious or a criminal nature, may break the chain of causation linking an injury to an alleged defect in a product. The problem, of course, is to determine at what point the conduct of an actor insulates a seller or manufacturer from strict products liability. This point was dealt with by the Appellate Division, Second Department, in *Craft v. Mid Island Department Stores, Inc.*²⁹³ The infant plaintiff, wearing a sweat-shirt manufactured and distributed by the defendants, was severely burned when he and a playmate were pouring gasoline and lighting the fuel.²⁹⁴ It is unclear whether the burned child or the playmate lit the match that caused the injury-producing flash of

286. 116 A.D.2d 9, 499 N.Y.S.2d 466 (3d Dep't 1986).

287. *See id.* at 12, 499 N.Y.S.2d at 468.

288. *See id.*

289. 119 A.D.2d 658, 501 N.Y.S.2d 97 (2d Dep't 1986).

290. *See id.* at 658, 501 N.Y.S.2d at 98.

291. *See id.* at 659-60, 501 N.Y.S.2d at 98.

292. *See id.* at 659, 501 N.Y.S.2d at 98.

293. 112 A.D.2d 969, 492 N.Y.S.2d 780 (2d Dep't 1985).

294. *See id.* at 969, 492 N.Y.S.2d at 781.

fire.²⁹⁵ While recognizing that New York law precludes recovery where a plaintiff has engaged in "serious criminal or illegal conduct,"²⁹⁶ the court found that rule to be inapplicable in the instant case.²⁹⁷ "Here none of the defendants point to any penal statute applicable to the use of gasoline."²⁹⁸ In any event, "the Court of Appeals has permitted plaintiffs to bring suit where they might have been guilty of minor criminal offenses."²⁹⁹

An attempt to hold a trade association strictly liable for its role in the promulgation and dissemination of standards for tires and tire rims was rejected in *Beasock v. Dioguardi Enterprises, Inc.*³⁰⁰ Plaintiff's decedent had succumbed to injuries received when he attempted to inflate a tire mounted on a rim too large for the tire.³⁰¹ While the court recognized the importance of the defendant Tire and Rim Association in the industry,³⁰² the court found that the trade association did not manufacture or market the tire products that were alleged to have caused the injury and, hence, could not be held liable.³⁰³

B. *Dram Shop*

Demon Rum is still with us and along with intoxicating liquors come a continuing host of tort issues. As noted in previous *Survey* articles,³⁰⁴ New York continues to decline, either through judicial decision or legislative enactment, to create liability for social hosts who serve alcohol to inebriated guests who subsequently injure someone.³⁰⁵

295. *See id.*

296. *See id.* at 971, 492 N.Y.S.2d at 782.

297. *See id.*

298. *Id.*

299. *Id.*

300. 130 Misc. 2d 25, 494 N.Y.S.2d 974 (Sup. Ct., Monroe Co. 1985).

301. *See id.* at 26, 494 N.Y.S.2d at 975.

302. *See id.* at 28, 494 N.Y.S.2d at 977.

303. *See id.* at 29, 494 N.Y.S.2d at 978. The court found:

Since TRA does not manufacture or market tires or rims generally and did not manufacture or market the tire or rim alleged to have caused the injury in this case, liability cannot be imposed upon it under the theories of either strict products liability or breach of warranty. These actions impose liability only against defendants who are directly involved in the manufacture or distribution of the product which caused the injury. *See id.*

304. *See, e.g., Torts, 1984 Survey, supra* note 3, at 624; Stein, *Torts, 1983 Survey of N.Y. Law*, 35 SYRACUSE L. REV. 651, 670-71 (1984).

305. *See supra* note 304.

In *Conigliaro v. Franco*,³⁰⁶ the Appellate Division, Second Department, reversed the trial court's denial of the defendants' motion for summary judgment.³⁰⁷ The victim, in *Conigliaro*, sustained serious injuries in a car crash with a man who had recently left the defendants' home after consuming about five cans of beer.³⁰⁸ The plaintiff attempted to bring the defendants within the scope of New York's Dram Shop Act.³⁰⁹ In this case, not only did the plaintiff fail to meet her burden of showing there had been a sale of alcohol to the man who injured her, "but it appear[ed] from the plaintiff's opposition papers that before instituting this action she possessed sufficient facts to indicate that the appellants could not be held liable under the Dram Shop Act"³¹⁰ Not only was the plaintiff's claim legally without merit, but the role of her counsel in bringing this action is open to question.³¹¹

In *Powers v. Niagara Mohawk Power Corp.*,³¹² Justice Mercure refused to apply the provisions of the Dram Shop Act where underage and sober purchasers bought beer from a defendant eight hours before causing an injury in an automobile accident.³¹³ The justice reviewed all relevant legislation and analyzed the legislative history underlying General Obligations Law section 11-100,³¹⁴ which creates a cause of action against a person who furnishes alcohol to anyone under the age of nineteen where the person so provided with alcohol causes physical injury.³¹⁵ Justice Mercure found

306. 122 A.D.2d 15, 504 N.Y.S.2d 186 (2d Dep't 1986).

307. *See id.*

308. *See id.* at 16, 504 N.Y.S.2d at 186.

309. *See* N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1987).

310. *See Conigliaro*, 122 A.D.2d at 16, 504 N.Y.S.2d at 187.

311. *See id.*

312. 132 Misc. 2d 123, 503 N.Y.S.2d 516 (Sup. Ct., Schenectady Co. 1986).

313. *See id.* at 126-27, 503 N.Y.S.2d at 517-18.

314. *See* N.Y. GEN. OBLIG. LAW § 11-100(1) (McKinney Supp. 1987).

315. *See Powers*, 132 Misc. 2d at 125, 503 N.Y.S.2d at 518. New York General Obligations Law section 11-100(1) provides:

Any person who shall be injured in person, property, means of support or otherwise, by reason of the intoxication or impairment of ability of any person under the age of nineteen years, whether resulting in his death or not, shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under age of nineteen years.

N.Y. GEN. OBLIG. LAW § 11-100(1) (the action accrued in 1983, two years before the drinking age was increased to twenty-one).

this provision to be inapplicable to the case at bar.³¹⁶

Justice Mercure's analysis is sound, but the result reached is not tolerable. There is a major public policy purpose in keeping alcoholic beverages out of the possession of those too young to be legally allowed to drink. Application of the Dram Shop Act is difficult enough because of the plaintiff's need to prove that the purchaser was intoxicated at the time he or she acquired alcohol from a defendant seller. With juveniles, the issue is much broader than the question of intoxication at point-of-sale. Without alcohol, young and inexperienced drivers are involved in a disproportionate number of both minor and major accidents. With alcohol, the odds of a serious or fatal accident increase dramatically. The *Powers* case illustrates a vacuum in the law which must be addressed either by the extension of common law duty or by legislative action.

VI. INTENTIONAL TORTS

A. *Privacy and Publicity*

As New York continues to be one of the minority of jurisdictions which lack either a common law right of privacy or a broad statutory protection of privacy interests, privacy invasion allegations in New York are generally confined to actions brought under sections 50³¹⁷ and 51³¹⁸ of the Civil Rights Law. Plaintiffs who have suffered what amounts to an invasion of privacy often also resort to pleading, sometimes inappropriately, libel or causes of action such as intentional infliction of emotional distress and prima facie tort.

In *Smith v. Long Island Jewish-Hillside*,³¹⁹ the Appellate Division, Second Department, reversed the trial court and dismissed a complaint that essentially raised privacy issues.³²⁰ The plaintiffs sought to recover for the emotional distress which they experienced because of the fatal illness of their nine-month-old infant.³²¹ In *Smith*, the parents apparently were unaware of either the diagnosis or the prognosis of their baby until a few weeks before the baby's death.³²² They apparently gained their knowledge of the

316. See *Powers*, 132 Misc. 2d at 127, 503 N.Y.S.2d at 519.

317. See N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976).

318. See N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976 & Supp. 1987).

319. 118 A.D.2d 553, 499 N.Y.S.2d 167 (2d Dep't 1986).

320. See *id.* at 554-55, 499 N.Y.S.2d at 168.

321. See *id.* at 554, 499 N.Y.S.2d at 168.

322. See *id.*

prognosis when they read an article in a local newspaper which, without naming their baby, referred to a critically ill baby in the defendant's pediatric intensive care unit as "doomed."³²³ The description of the mortally ill child was sufficient for the parents to recognize that the subject of the article was their baby.³²⁴ While the insensitivity of hospital personnel in releasing information sufficient to allow uninformed parents to learn the truth of their child's condition through a news article is revolting, no cause of action in New York can arise from this type of incident.³²⁵

Almost two years after the death of the baby, however, the plaintiffs "saw photographs of their child displayed in the defendant hospital and in a shopping center as part of a campaign advertising the opening of defendant's new children's hospital."³²⁶

The defendant, in moving to dismiss the plaintiff's complaint, admitted that had the infant been alive, a violation of his rights under the relevant New York Civil Rights statute³²⁷ would have been committed.³²⁸ The defendant argued that this type of cause of action is extinguished at death, that no such right can be raised where the photograph of a deceased person is used, and that the plaintiffs therefore could not raise a statutory cause of action.³²⁹ The trial court agreed and the appellate panel of the Second Department affirmed.³³⁰ The appellate court also found no merit in the plaintiff's causes of action for prima facie tort and intentional infliction of mental distress.³³¹

What are we to make of such a case? The existing case law does bar a cause of action under the civil rights statutes where the commercial use is of the the name or likeness of a dead person.³³² How can such behavior be not only unsanctionable, but implicitly recognized as lawful as the court in *Smith* has done? The competition among hospitals today, including teaching institutions such as

323. *See id.*

324. *See id.*

325. *See id.* at 555, 499 N.Y.S.2d at 168-69.

326. *See id.* at 554, 499 N.Y.S.2d at 168.

327. *See* N.Y. CIV. RIGHTS LAW § 50.

328. *See Smith*, 118 A.D.2d at 554, 499 N.Y.S.2d at 168.

329. *See id.* at 554, 499 N.Y.S.2d at 167.

330. *See id.* at 555, 499 N.Y.S.2d at 169.

331. *See id.*

332. *See, e.g., Schuman v. Loew's, Inc.*, 144 N.Y.S.2d 27 (Sup. Ct., N.Y. Co. 1955); *Robertson v. Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

Long Island Jewish, has reached unprecedented proportions. The hospitals take out weekly emotional advertisements³³³ or produce large and professionally impressive glossy supplements to Sunday newspapers such as the New York Times.³³⁴ Surely there are many people who will gladly, either gratuitously or for compensation, consent to photographs of themselves or their children appearing in these advertisements, the sole purpose of which are to attract new and more patients.

Smith demonstrates the type of harm that has been allowed to go unchecked because New York's courts have not expanded the tort of negligent infliction of mental distress to match the variety of conditions which regularly arise and merit common law treatment. Measuring the facts of the case by a negligence standard, it would not have been difficult for the Smiths to establish a prima facie demonstration that the defendant failed to adhere to a reasonable standard of care once the duty to exercise such care was acknowledged. No one will question the anguish of the parents. The result in *Smith* should encourage New York jurists, and especially the members of the Court of Appeals, to reconsider the issue of broadening the tort of negligent infliction of emotional distress. The common law tradition provides a rich heritage for recognizing the need for contemporary and continuing adaptation.

In another civil rights statutory action involving the use of the name of a deceased person, Justice Salman, Supreme Court, Bronx, dismissed an Article 78 petition.³³⁵ In contrast to *Smith*,³³⁶ in *Antonetty v. Cuomo*,³³⁷ the husband, daughter and son of a deceased woman objected to the renaming of a three acre Bronx site

333. St. Vincent's Hospital in the Greenwich Village section of Manhattan, for some months, has been running a human interest advertisement in the Wednesday edition of The New York Times. Each "story" tells of some aspect of the hospital's operations and while not every medical case ends with a happy and full recovery, each advertisement stresses the caring aspect of all of St. Vincent's staff members. While such advertisements are not in themselves objectionable, the economic factors underlying these campaigns indicate both the emergence of policy choice issues with regard to health care provisions and possible new tort liability based on commercial advertising. These advertising institutions may be offering, in some instances, more than they can deliver.

334. The defendant hospital in this case prepared a supplement to The New York Times Sunday edition to announce many of its services and special facilities.

335. See *Antonetty v. Cuomo*, 131 Misc. 2d 1041, 502 N.Y.S.2d 902 (Sup. Ct., Bronx Co. 1986).

336. See *Smith*, 118 A.D.2d at 553, 499 N.Y.S.2d at 167.

337. 131 Misc. 2d 1041, 502 N.Y.S.2d 902.

from "Fordham Plaza" to "Evelina Antonetty Mall and Park."³³⁸ It is not clear from Justice Salman's opinion—perhaps it was not clear to him—why these relatives objected to the naming of a site in honor of a woman who apparently was an outstanding community leader.³³⁹ What is clear is that the civil rights statutes do not, as covered in the prior discussion of the *Smith* case, afford a cause of action when the person whose privacy is allegedly invaded is dead.³⁴⁰ It is also clear that by no rational interpretation could the action of the State of New York, through the Urban Development Corporation, be viewed as the commercial appropriation of a name or likeness as statutorily required.³⁴¹

In another civil rights privacy case, the Appellate Division, First Department, dismissed an action brought by a transit police officer for invasion of privacy.³⁴² The plaintiff officer alleged improper production of records relating to an incident in which the officer had shot the owner of an antiques store.³⁴³ In *Simpson v. New York City Transit Authority*,³⁴⁴ the court found that the relevant statute, section 50-a of the New York Civil Rights Law³⁴⁵ does make "police personnel records confidential and requires either the written consent of the officer involved or a court order before any such records may be released to a third party."³⁴⁶ The court then found that the legislative history of this statute reflected a desire "to curb abusive use of a police officer's personnel record in connection with such officer's appearance as a witness."³⁴⁷ The court found that the Legislature did not intend to create, through this statute, a private right of action and none exists.³⁴⁸ In dismissing Simpson's action, the court also found no merit in his claim of a violation of his federally guaranteed civil rights.³⁴⁹

338. See *id.* at 1044, 502 N.Y.S.2d at 903.

339. See *id.* at 1043, 502 N.Y.S.2d at 903-04.

340. See *id.* at 1046, 502 N.Y.S.2d at 906.

341. See *id.* at 1045, 502 N.Y.S.2d at 905.

342. 112 A.D.2d 89, 491 N.Y.S.2d 645 (1st Dep't 1985).

343. See *id.* at 89-90, 491 N.Y.S.2d at 646.

344. See *id.* at 89, 491 N.Y.S.2d at 645.

345. N.Y. CIV. RIGHTS LAW § 50-a (McKinney 1976 & Supp. 1987).

346. See *Simpson*, 112 A.D.2d at 89, 491 N.Y.S.2d at 646.

347. See *id.* at 90, 491 N.Y.S.2d at 647.

348. See *id.*

349. The court correctly noted that an allegation of a single incident of alleged deprivation of rights guaranteed under title 42 of United States Code section 1983 was insufficient to properly state a claim based on that statute.

To finish this year's discussion of invasion of privacy on the lighter side, the Appellate Division, First Department's treatment of *Creel v. Crown Publishers, Inc.*³⁵⁰ is discussed. Plaintiffs appeared nude in a photograph in a 1983 book, *World Guide to Nude Beaches and Recreation*.³⁵¹ The plaintiffs alleged that their photographs appeared without their permission.³⁵²

In a memorandum decision, the appellate bench found that the cause of action was barred by the public interest classification of the subject material of the book.³⁵³ The court held that this classification included the photograph of the plaintiffs gambling in the buff in St. Maarten.³⁵⁴ "A guide to beaches where nude bathing is permitted is a matter of some public interest and the use of photographs with the text is protected by constitutional safeguards and is outside the protection of the Civil Rights Law."³⁵⁵

B. Libel and Slander

The discussion of libel and slander cases decided during the *Survey* year is begun with the most poorly reasoned decision of the year. In *Dally v. Orange County Publications*,³⁵⁶ the Appellate Division, Second Department, reversed the trial court's denial of summary judgment for the defendant newspaper, and dismissed the plaintiff's action.³⁵⁷ The plaintiff, a deputy sheriff, was the subject of an unauthorized advertisement in the personals section of the defendant's Classified Market Guide.³⁵⁸ The advertisement listed "plaintiff's first name and telephone number as the person to contact for further information regarding the meetings of a Monroe chapter of the 'Gay Community Center.'"³⁵⁹

In addition, a similar advertisement concerning the plaintiff

350. 115 A.D.2d 414, 496 N.Y.S.2d 219 (1st Dep't 1985).

351. *See id.* This book is a professionally-produced guide to nude beaches. Its production values are high and it is clearly intended for a serious readership either already committed to nude recreation or considering the possibility. The book in no way seeks to exploit sexuality. Even if permission were not obtained from a subject of a photograph, it is difficult to see what rights would be violated if the photographs were taken in a public place.

352. *See id.*

353. *See id.* at 415-16, 496 N.Y.S.2d at 220-21.

354. *See id.* at 416, 496 N.Y.S.2d at 220.

355. *Id.* at 415-16, 496 N.Y.S.2d at 220.

356. 117 A.D.2d 577, 497 N.Y.S.2d 947 (2d Dep't 1986).

357. *See id.*

358. *See id.*

359. *Id.* at 577, 497 N.Y.S.2d at 947-48.

had been published by the defendant one-and-a-half years earlier.³⁶⁰ As a result of the prior incident involving the plaintiff, the publisher had instituted a telephonic verification of advertisements "of a sensitive nature."³⁶¹ It is clear that this procedure was not used when the second advertisement, purportedly originating with the plaintiff, was placed.³⁶²

The court begins its analysis by stating:

If the plaintiff in a defamation action against a newspaper is a public official and the defamation relates to his official conduct, the plaintiff must establish actual malice, *i.e.*, that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard of the truth, before he may recover damages³⁶³

Applying the *New York Times v. Sullivan*³⁶⁴ standard, the court assumed that because a deputy sheriff *may be* a public official, a deputy sheriff appearing in a libel action as a plaintiff is also considered to be a public official and must prove actual malice in order to prevail.³⁶⁵

The *New York Times* standard was articulated in order to protect the press when its news, and even feature, stories contain defamatory falsehoods.³⁶⁶ Virtually all cases which correctly apply the *New York Times* standard concern material generated by the staff of a defendant media organization and published as either news or a news-related feature. The personals column of a newspaper cannot by any logical analysis be considered news or a news-related feature. There is absolutely nothing newsworthy about the modern personals column. All the advertisements in a personals column, whether published for consideration or as a free service, are authored by persons not under the control of the news and advertising staff. The assumption is that individuals write and place their own advertisements but the obvious scope of potential abuse has led most newspapers and magazines which accept such notices to adopt some verification procedure.

360. *See id.* at 577, 497 N.Y.S.2d at 948.

361. *See id.*

362. *See id.* at 578, 497 N.Y.S.2d at 948.

363. *Id.*

364. 376 U.S. 254 (1964).

365. *See Dally*, 117 A.D.2d at 578, 497 N.Y.S.2d at 948.

366. *See New York Times*, 376 U.S. at 254.

It should also seem obvious that Dally's status as a deputy sheriff is irrelevant here. The item was placed in the defendant's column undoubtedly with the intent to cause embarrassment to Dally. There is no newsworthy component whatsoever in this spurious advertisement. A deputy sheriff is not so high an official that he or she carries the status of public official into every facet of personal life and no case law has so held.

The plaintiff in *Dally* was unable to prove actual malice against the defendant.³⁶⁷ Actual malice is one of the most difficult burdens of proof for a plaintiff to meet and the *New York Times* formulation undoubtedly deters and derails many actions. The *New York Times* standard was never intended to cloak slothful, ordinary negligence in the publishing of reader-generated advertisements.

A number of cases involving the media were decided during the *Survey* year. The Appellate Division, Fourth Department, reversed the trial court's granting of summary judgment in *Fitzgerald v. Herald Co.*³⁶⁸ The court found that a factual issue existed as to the degree of negligence of a reporter who erroneously described the plaintiff as having been arrested at a DWI checkpoint.³⁶⁹

In *Ocean State Seafood v. Capital Newspaper*,³⁷⁰ the Appellate Division, Third Department, sustained the trial court's denial of a motion for summary judgment by the defendant newspaper.³⁷¹ An article in the defendant's newspaper had reported on illness caused by fresh seafood and suggested that avarice and greed underlay the decision to sell possibly contaminated seafood.³⁷² The Third Department found that there was sufficient evidence offered by the plaintiff to raise a material issue of fact for trial.³⁷³

Another media case concerned a diversity action which alleged both common law libel and a violation of New York Civil Rights Law.³⁷⁴ Specifically, the case concerned the issue of commercial appropriation of a name or likeness without permission.³⁷⁵ In *Nelson*

367. See *Dally*, 117 A.D.2d at 579, 497 N.Y.S.2d at 949.

368. 119 A.D.2d 974, 500 N.Y.S.2d 871 (4th Dep't 1986).

369. See *id.*

370. 112 A.D.2d 662, 492 N.Y.S.2d 175 (3d Dep't 1985).

371. See *id.* at 666, 492 N.Y.S.2d at 179.

372. See *id.* at 663-64, 492 N.Y.S.2d at 177.

373. See *id.* at 665, 492 N.Y.S.2d at 178.

374. See *Nelson v. Globe Int'l, Inc.*, 626 F. Supp. 969 (S.D.N.Y. 1986).

375. See *id.*

v. Globe International, Inc.,³⁷⁶ the plaintiff Nelson, an employee of the New York Bureau of Nutrition, was described in defendant's publication as being "instrumental in preparing this marshmallow-based diet to help GLOBE readers lose up to a pound a day."³⁷⁷ The plaintiff was not pleased.³⁷⁸

While the Bureau of Nutrition which employed Nelson is a public agency, the United States District Court for the Southern District of New York found that Nelson was not a public official within the meaning of *New York Times v. Sullivan*.³⁷⁹ The court also found that Nelson was not a "limited purpose" public figure.³⁸⁰

The real problem with the plaintiff's case is that the author of the article to which she objected was a free-lance journalist.³⁸¹ Under New York law, the journalist had the status of an independent contractor and the facts show that the defendant in no way controlled or directed the journalist's activities.³⁸² Thus, Nelson's action against the defendant failed.³⁸³

Another action also alleged a combination of libel and a violation of section 51 of New York Civil Rights Law.³⁸⁴ *Quezada By DeLamota v. Daily News*,³⁸⁵ was discussed in last year's *Survey*,³⁸⁶ and was reviewed by the Appellate Division, First Department, during the current *Survey* year.³⁸⁷ This action was based upon an article in the defendant's newspaper about juvenile drug trafficking.³⁸⁸ To accompany the article, a free-lance artist was told to draw a picture of children engaged in drug sales.³⁸⁹ The plaintiffs alleged that they were recognizable in the published drawing.³⁹⁰

376. *See id.*

377. *See id.* at 971.

378. *See id.*

379. 376 U.S. 254.

380. *See Nelson*, 626 F. Supp. at 975-76.

381. *See id.* at 977-78.

382. *See id.* at 978-79.

383. *See id.* at 978.

384. *See* N.Y. CIV. RIGHTS LAW § 51.

385. 130 Misc. 2d 842, 501 N.Y.S.2d 971 (1st Dep't 1986).

386. *See Torts*, 1984 *Survey*, *supra* note 3, at 673-76.

387. *See Quezada*, 130 Misc. 2d at 842, 501 N.Y.S.2d at 971.

388. *See id.*

389. *See id.* at 844, 501 N.Y.S.2d at 973.

390. *See id.* at 843, 501 N.Y.S.2d at 973.

The plaintiffs were not involved in drug deals in any manner.³⁹¹

The trial court granted the defendant's motion for summary judgment on the libel causes of action but permitted the privacy causes of action to stand.³⁹² In a *per curiam* opinion, the First Department held that the matters covered in the article were of public concern and thus the plaintiffs were obliged to demonstrate gross irresponsibility.³⁹³ It is obvious that this standard of proof was difficult, if not impossible, for the plaintiffs to meet because the artist was a free-lance contractor.³⁹⁴

The court refused to apply a different standard for analyzing the statutory invasion of privacy cause of action.³⁹⁵ The court noted:

Given the close connection between privacy and defamation claims, particularly in the area of first amendment concerns, it is clear that a heightened degree of fault must be shown before section 51 sanctions can be imposed against a media defendant for a publication about a newsworthy event or a matter of public interest³⁹⁶

In another libel action, the Second Department found that to say that a lawyer "went crazy" when certain aspects of a real estate transaction were not completed did not constitute words sufficient to support a libel action.³⁹⁷ In *O'Brien v. Lerman*,³⁹⁸ the appellate division reversed the trial court and held that the words complained of "cannot reasonably be understood by the mind of the ordinary intelligent reader as imputing to plaintiff insanity or mental instability" ³⁹⁹

The importance of privilege as a bar to defamation actions was reflected in the three following cases decided during the *Survey* year. In *Kaplan v. MacNamara*,⁴⁰⁰ the Appellate Division, Second

391. *See id.*

392. *See id.*

393. *See id.* at 845, 501 N.Y.S.2d at 973-74.

394. The record demonstrates, as summarized by the court, that the illustrator was specifically told not to draw recognizable people. *See id.* at 844, 501 N.Y.S.2d at 973-74. This fact alone probably defeats any theory of gross irresponsibility.

395. *See id.* at 846, 501 N.Y.S.2d at 975.

396. *Id.* at 847, 501 N.Y.S.2d at 975.

397. *See O'Brien v. Lerman*, 117 A.D.2d 658, 498 N.Y.S.2d 395 (2d Dep't 1986).

398. *Id.*

399. *See id.* at 659, 498 N.Y.S.2d at 396.

400. 116 A.D.2d 626, 497 N.Y.S.2d 710 (2d Dep't 1986).

Department, affirmed summary judgment for the defendants.⁴⁰¹ The plaintiff, a former university faculty member, alleged defamation in the course of a tenure evaluation.⁴⁰² The plaintiff failed to meet his burden to show the degree of personal malice that would strip away the qualified privilege normally protecting communications generated in the course of a tenure review.⁴⁰³ Tenure denials breed much bitterness and not an insignificant amount of litigation. If the tenure process is to be based on forthright and open evaluations, the qualified privilege must be sustained as the Second Department recognized.

The Appellate Division, Second Department, also affirmed summary judgment for the defendant in *Mock v. LaGuardia Hospital-HIP Hospital, Inc.*⁴⁰⁴ This libel action arose from an attempt by plaintiffs to organize a union at the defendant hospital.⁴⁰⁵ The plaintiffs were supervisory personnel and the defendant discharged them for impermissible labor activity.⁴⁰⁶ The alleged libel consisted of statements made by the defendant to the National Labor Relations Board in connection with the dispute.⁴⁰⁷ The court found that a qualified privilege was clearly controlling in this case.⁴⁰⁸

In *Jafar v. Blue Cross & Blue Shield*,⁴⁰⁹ a complaint was dismissed upon a finding of law that an absolute privilege applied.⁴¹⁰ The plaintiff-physician, who was under investigation for allegedly overcharging medicare patients, brought an action against a fellow doctor who testified to the plaintiff's detriment at an investigation hearing.⁴¹¹ While the court found that the statements made by Dr. Segal, a defendant, were biased and "inexcusable," the court concluded that the nature of the hearing mandated the application of the absolute immunity rule.⁴¹²

Jafar demonstrates again that the price of encouraging open and useful disclosures at quasi-judicial hearings may well be the

401. See *id.* at 628, 497 N.Y.S.2d at 712.

402. See *id.* at 626-27, 497 N.Y.S.2d at 711.

403. See *id.* at 628, 497 N.Y.S.2d at 712.

404. 117 A.D.2d 721, 498 N.Y.S.2d 446 (2d Dep't 1986).

405. See *id.* at 722, 498 N.Y.S.2d at 447.

406. See *id.*

407. See *id.*

408. See *id.*

409. 129 Misc. 2d 584, 493 N.Y.S.2d 941 (Sup. Ct., N.Y. Co. 1985).

410. See *id.* at 585, 493 N.Y.S.2d at 942.

411. See *id.*

412. See *id.* at 588-89, 493 N.Y.S.2d at 945.

tolerance of occasional unhelpful and malevolent abuse of the immunity which attends testifying at such hearings.⁴¹³

Extravagant claims by car salespersons occasionally produce consumer litigation. *McMilliam v. Atlantic Oldsmobile, Ltd.*⁴¹⁴ may be the first reported case in which plaintiffs successfully alleged slander *per se* against a salesperson employed by the defendant.⁴¹⁵ The plaintiffs, apparently married, wanted to buy a car and the credit transaction that they sought to conclude was only available to married couples.⁴¹⁶ The salesperson, defendant Levine, apparently put the requirement of marriage, a credit requirement, before his desire to sell the plaintiffs a car.⁴¹⁷ He stated, in the hearing of a third person, "I don't believe you are really married to each other You are trying to pull a fast one."⁴¹⁸ The Appellate Division, Second Department, found that Levine's words impute the commission of a crime to the plaintiffs and are thus actionable.⁴¹⁹

In *Loughry v. Lincoln First Bank, N.A.*,⁴²⁰ the Court of Appeals sustained a jury award based on a finding that the plaintiff had been slandered and the trial court's striking of an award by the jury of punitive damages.⁴²¹ The plaintiff-employee was fired after being informed in a meeting that he was dealing in illicit drugs and that he had misappropriated bank property.⁴²² The Court held that the jury award of punitive damages was unwarranted because the plaintiff was unable to establish the involvement of the employer in the slanderous statements made by its employee.⁴²³

C. Miscellaneous Intentional Torts

Virtually every case in which a plaintiff attempts to sustain a cause of action for *prima facie* tort reflects the courts' extreme re-

413. *See id.*

414. 115 A.D.2d 645, 496 N.Y.S.2d 481 (2d Dep't 1985).

415. *See id.* at 645-46, 496 N.Y.S.2d at 482.

416. *See id.* at 645, 496 N.Y.S.2d at 482.

417. *See id.*

418. *Id.*

419. *See id.* at 645-46, 496 N.Y.S.2d at 482.

420. 67 N.Y.2d 369, 494 N.E.2d 70, 502 N.Y.S.2d 965 (1986).

421. *See id.* at 381, 494 N.E.2d at 77, 502 N.Y.S.2d at 972.

422. *See id.* at 373-74, 494 N.E.2d at 72, 502 N.Y.S.2d at 967.

423. *See id.* at 377, 494 N.E.2d at 74-75, 502 N.Y.S.2d at 969-70.

luctance to recognize that tort. The Appellate Division, First Department, in *Halperin v. Salvan*,⁴²⁴ found that an amended complaint sufficiently alleged a prima facie tort cause of action.⁴²⁵ This action was brought by an attorney against several defendants for libel and intentional infliction of emotional distress, and against an attorney defendant on the theory of prima facie tort as well.⁴²⁶ The plaintiff alleged that the defendant had initiated, with malice and with no lawful purpose, a lawsuit for the sole purpose of injuring the plaintiff professionally.⁴²⁷ Thus, the elements of the prima facie tort cause of action were found to be adequately pleaded.⁴²⁸

In view of the fact that the plaintiff may have problems demonstrating the requisite degree of mental distress necessary for his intentional infliction of emotional distress cause of action—a problem common to most litigants who raise this tort action—the court's recognition of the facial merits of his pleading was a real advantage to him.

While reported tort assault and battery actions are somewhat uncommon today, two such decisions were handed down during the *Survey* year. The Appellate Division, Third Department, in *O'Reilly v. Executone of Albany, Inc.*,⁴²⁹ sustained the sufficiency of a complaint which alleged battery as well as intentional infliction of emotional distress in the context of sexual harassment.⁴³⁰ It is clear from the brief opinion of the court that the type of conduct which plaintiff alleged is of the variety not physically harmful, but that is nonetheless offensive and unwelcome.⁴³¹ Because battery is completed when there is an unwanted, intentional offensive physical contact not justified by law, attorneys should consider including a cause of action for this tort in all sexual harassment actions where there has been any touching. The very term, "battery," has a certain emotional import, and proving a cause of action in battery may help to convey to a jury the totality of wrongfulness inherent in the sexual harassment incident.

424. 117 A.D.2d 544, 499 N.Y.S.2d 55 (1st Dep't 1986).

425. *See id.* at 546, 499 N.Y.S.2d at 57-58.

426. *See id.* at 545, 499 N.Y.S.2d at 57.

427. *See id.* at 546-47, 499 N.Y.S.2d at 58.

428. *See id.*

429. 121 A.D.2d 772, 503 N.Y.S.2d 185 (3d Dep't 1986).

430. *See id.* at 774, 503 N.Y.S.2d at 186.

431. *See id.* at 773, 503 N.Y.S.2d at 185-86.

In *Rodriguez v. Johnson*,⁴³² the plaintiff charged that the defendant Janet Johnson, a bus matron, was liable for slapping her child.⁴³³ Both plaintiff and defendant appeared *pro se* in the Small Claims Part of the Civil Court of the City of New York.⁴³⁴ Judge Taylor found that no condition existed to justify the application of force by the defendant to the plaintiff's child.⁴³⁵ She found for the plaintiff in the sum of \$250.00.⁴³⁶ Her well-reasoned opinion ends with her observation:

It is time for the civil law to recognize that children are entitled to equal protection. The tort of battery, which once protected only the bodily integrity of men, must now protect all persons, be they adults or children, from unauthorized physical contact. Physical abuse in even the slightest degree seriously harms children. It is not only immoral and unethical, but also unfair and unjust and therefore intrinsically illegal. It is most appropriate to consider such abuse as the tort of battery.⁴³⁷

VII. CONCLUSION

The impact of the new legislative enactments designed to alleviate the malpractice situation should become assessable during the next year. Whether these new laws provide some relief for the medical community, the fact remains that medical malpractice is a reality which begins, more often than not, in a medical not a legal setting. Tort law must continue to find remedies for the victims of medical malpractice as it must continue to be the source of justice and recovery for all who sustain harm because of civil wrongs. Perhaps the single greatest impression received from reviewing the case law advance sheets each year in preparing this Article is the continued vitality and relevance of our common law system and, aberrant, poorly reasoned and silly decisions aside, the degree of wisdom expressed by our very busy jurists each year.

432. 132 Misc. 2d 555, 504 N.Y.S.2d 379 (N.Y.C. Civ. Ct., N.Y. Co. 1986).

433. *See id.* at 556, 504 N.Y.S.2d at 379.

434. *See id.* at 555, 504 N.Y.S.2d at 379.

435. *See id.* at 556, 504 N.Y.S.2d at 379.

436. *See id.* at 561, 504 N.Y.S.2d at 382.

437. *Id.* at 560-61, 504 N.Y.S.2d at 382.