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Queens Bar Bulletin

Queens County Bar Association / 90-35 One Hundred Forty Eighth Street, Jamaica, NY 11435 / (718) 291-4500

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December 2012 - January 2013

Family Law Annual Review

BY MICHAEL AND DAVID DIKMAN

Michael and David Dikman

"DOMA"

One of this year's major decisions came from a divided Second Circuit Court of Appeals in *WINDSOR v. U.S.*, declaring "DOMA", the Defense of Marriage Act, unconstitutional. The definition of "marriage" as solely between one man and one woman was found to violate the equal protection clause of the U.S. Constitution. DOMA has long been assailed for denying the same federal protections to thousands of same sex American families as are available to traditional man/woman marriages. The Supreme Court is expected to take up this issue and of course, we will "stay tuned."

TEMPORARY MAINTENANCE

In 2010 we reviewed the provisions of the then new DRL § 236B, sections 5-a & 6-a, establishing temporary maintenance guidelines. The N.Y.S. Law Revision Commission was directed to:

1) Review and assess the economic consequences of divorce on parties;
2) Review the maintenance laws and their administration to determine their impact on post marital economic disparities and the laws' effectiveness in achieving the state's goals; and
3) Recommend legislation deemed necessary to achieve those goals.

A preliminary report to the Legislature & Governor was to be made no later than 9 months from the effective date with a final report to be rendered by December 31, 2011. There was a preliminary report. But that did nothing more than review the provisions and history, various problems and positions involved. There was no recommendation for any legislation. The final report date (December 31, 2011) came, went and was extended at least 3 times. At this writing we are still awaiting the recommendations. When this topic was discussed by us, last year, we said:

> "the myriad of different, relevant facts in each case, and the application of a "reality test" (actually computing what disposable income will be left for each spouse upon application of the guidelines) have convinced a number of judges that the temporary maintenance guidelines did, in fact, result in unjust or inappropriate awards, which they refused to make. More and more cases continue to be reported, where the judges are "deviating", and in different ways and upon different analyses. The result is that although it is taking the judges far more time to construct their decisions, they are as disparate and unpredictable as they were before the statute became effective. The statute has been criticized inasmuch as the application of the guidelines, based upon an automatic, mathematical calculation, basically creates a shift in resources, rather than the prior goal of tiding over the more needy party."

We commented that the cases regarding temporary maintenance, were very "fact intensive", and that it will be hard to find two cases presenting precisely the same facts, relative to the parties' incomes, assets, needs, ages, health, marriage duration, number and ages of children, type of residence, or whether the parties are still residing together, among others. Also, in view of the vastly varying fact patterns and the substantial number of matrimonial judges making decisions throughout the State, we opined that the value of any one Supreme Court decision, as a precedent, will be minimal, since not binding upon judges of coordinate jurisdiction. The conclusion was that "by next year we should have some guidance from the Appellate Division." But we really don't. The only decision of note came from the First Department, in ***KHAIRA v. KHAIRA***, 93 A.D. 3d 194, 938 N.Y.S. 2d 513 (February 7, 2012). In that case, the Supreme Court wound up making an award of unallocated temporary maintenance and child support plus requiring the husband to pay the mortgage on the marital residence. The Appellate Division acknowledged that the new law reflected a substantial change from the previous wide discretion given to the courts, with the goal being to "tide over the needy party." The new law created a "*substantial presumptive entitlement.*" The decision makes clear that the

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CPLR Update-2012

BY DAVID H. ROSEN, ESQ.

David H. Rosen

Uniform Notice of Claim Act

It has been my practice in these yearly Updates to work through various areas of procedural law, alphabetically. This new Act, which will take effect this June, is of sufficient importance to be taken out of order.

Tort actions against municipalities, and public agencies of every description, share certain procedural hurdles not encountered in other actions. They typically involve a condition precedent to suit in the form of a notice of claim requirement, which typically, but not always, must be served on the agency within 90 days of the accrual of the claim. The notice of claim must be served directly on the agency or municipality, in the manner specified by the specific governing notice of claim statute. The contents and manner of service of the notice of claim are usually, but not always, specified to be those set forth in General Municipal Law § 50-e. Consider, for example, a personal injury action against the Nassau County Bridge Authority, subject to Public Authorities Law § 666-b. What is required here is not a GML § 50-e notice of claim, but rather

> "a notice of intention to commence such action and of the time, when and place where the damages were incurred or sustained, together with a verified statement showing in detail the property alleged to have been damaged or destroyed and the value thereof, or the personal injuries alleged to have been sustained and by whom, shall have been filed in the principal office of the authority within ninety days after such cause of action shall have accrued."

If the governmental entity involved is the Triborough Bridge and Tunnel Authority, the notice of intention to sue must be filed within six months, not 90 days.[1]

Or consider, for another example, a personal injury action against the Central New York Regional Market Authority, subject to PAL § 841. The statute first requires a GML § 50-e notice of claim. It then goes on to require, *in addition*, a notice of intention to sue, in the same language as the Nassau County Bridge Authority.

The limitations period is also subject to apparently random variability. Most of the time, it is a year-and-ninety-days from the accrual of the claim, as set forth in, say, General Municipal Law § 50-i. On the other hand, actions against the

(Continued on page 15)

Honoring Judge Ciparick

Pictured here (left to right): Hon. Seymour Boyers, Former Associate Justice of the Appellate Division, Second Department; Hon. Peter J. Kelly, Surrogate, Queens County; Hon. Robert S. Smith, Associate Judge, New York Court of Appeals; Hon. Judith S. Kaye, Former Chief Judge, New York Court of Appeals; Joseph Risi, President, Queens County Bar Association; Hon. Carmen Beauchamp Ciparick, Associate Judge, New York Court of Appeals; Spiros A. Tsimbinos, Program Chair; Hon. A. Gail Prudenti, Chief Administrative Judge; Hon. Randall T. Eng, Presiding Justice of the Appellate Division, Second Department; Hon. Fernando Camacho, Administrative Judge, Criminal Term, Queens County; Hon. Jeremy S. Weinstein, Administrative Judge, Civil Term, Queens County; Hon. Sheri S. Roman, Associate Justice of the Appellate Division, Second Department.

INSIDE THIS ISSUE

THE DOCKET . . .

being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th St., Jamaica, New York. More information and any changes will be made available to members via written notice and brochures. Questions? Please call (718) 291-4500.

PLEASE NOTE:
The Queens Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Legal Education Provider in the State of New York.

CLE Seminar & Event Listing

December 2012

Tuesday, December 4	Till Death or Divorce Do Us Part
Wednesday, December 5	Advanced Criminal Law Series - Pt 2
Tuesday, December 11	Lexis/Nexis Seminar 4:00 - 5:00 pm
Thursday, December 13	Holiday Party at Douglaston Manor
Monday, December 24	Christmas Holiday - Office Closed
Tuesday, December 25	Christmas Day - Office Closed
Monday, December 31	New Year's Holiday - Office Closed

January 2013

Tuesday, January 1	New Year's Day - Office Closed
Monday, January 21	Martin Luther King, Jr. Day - Office Closed
Wednesday, January 30	Family Law Seminar

February 2013

Tuesday, February 12	Lincoln's Birthday - Office Closed
Monday, February 18	President's Day - Office Closed
Wednesday, February 20	Ethics Seminar

March 2013

Monday, March 11	Condominium/Cooperative Seminar
Wednesday, March 13	CPLR & Evidence Update
Thursday, March 14	Cancer Screening - in front of Civil Court
Wednesday, March 20	Military/Veteran's Law Seminar
Friday, March 29	Good Friday - Office Closed

April 2013

Monday, April 8	Judiciary, Past Presidents & Golden Jubilarian Night
Wednesday, April 10	Civil Court Seminar
Wednesday, April 17	Equitable Distribution Update

May 2013

Thursday, May 2	Annual Dinner & Installation of Officers
Monday, May 27	Memorial Day - Office Closed

CLE Dates to be Announced

Elder Law
Insurance
Juvenile Justice
Real Property
Supreme Court & Torts Section
Worker's Compensation

NEW MEMBERS

David Abraham	Micahel L. Cserhalmi	Tyne R. Modica
Kathleen J. Antenorcruz	Iyabo Fadairo	Constantina Papageorgiou
Brian Barnwell	Tiffany M. Femiano	Yogendra Patel
Aveet A. Basnyat	Robert L. Greenberg	Peter Withey
Shirley Boutin	Christopher C. Holtz	
Lillian J. Costa	Bright Dae-Jung Limm	

NECROLOGY

Hon. Lawrence V. Cullen
Bernard R. McConville

If you or someone you know is having a problem with alcohol, drugs or gambling, we can help.
To learn more, contact QCBA LAC for a confidential conversation.
Confidentiality is privileged and assured under Section 499 of the Judiciary Laws as amended by Chapter 327 of the laws of 1993.

Lawyers Assistance Committee
Confidential Helpline 718 307-7828

POETRY CORNER

WAIVERS

Bob Sparrow

A waiver's a tool,
to expedite and to ease,
and waivers are assorted -
among them, are these:

To avoid some disputes,
one can waive jurisdiction:
To return to your home state,
you can waive extradition.

Before a grand jury there's
a waiver of immunity,
without which you could testify
with relative impunity.

If evidence is bulky,
you can waive its production,
and a waiver of indictment,
accompanies a plea reduction.

And some flexible judges
give the rules less adherence
and allow, for some parties,
a waiver of appearance.

But the most interesting waiver -
by the neophyte lawyer,
who nervously arraigned
his client - his employer:

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President's Message

HAPPY NEW YEAR!

Before looking ahead to 2013, I wish to thank all our members and supporters for attending the Holiday Party which was held, once again, at the Douglaston Manor.

This year's party was co-hosted by the Brandeis Association, Hellenic Lawyers Association, Latino Lawyers Association of Queens County, Macon B. Allen Black Bar Association, Queens County Women's Bar Association and St. John's Law School Alumni Association of Queens County. I thank all your members for your friendship and support.

I wish to especially thank all the hard work of Committee Members, Jay M. Abrahams, Jeffrey Boyar, Hilary Gingold, Maureen Heitner, Mona Haas, George Nicholas and Sasha and Janice, our devoted staff.

Our thanks to our sponsors, Sterling National Bank and the Law Offices of Pyrros & Serres LLP for their support of all our Associations. The toys which were donated by our members and guests were presented to Forestdale, Inc., a non-for-profit foster care agency with much appreciation.

I am proud to be a member of the Queens County Bar Association. Our members have unselfishly donated their time and expertise to provide services to our communities affected by Hurricane Sandy. My heartfelt thanks goes to Mark Weliky and his entire staff at QVLP for their continued commitment to promote and provide pro bono services and representation for the less privileged.

Joseph Risi

Our Association has been diligently seeking to provide our membership with enhanced member benefits, in addition to our Continuing Legal Education and Programs which we offer. I hope all of our members take the opportunity to also benefit from special programs and discounts which we are continuously expanding upon.

Recently we have added special programs affiliated with LexisNexis, Unishippers, Brooks Brothers, Esqsites123.com and WB Mason.

Please continue to check your emails and visit our website @ www.CQBA.org to view upcoming events, register for CLE programs and take advantage of special discounts offered exclusively to our members by accessing the links provided on our website.

I urge all our members to please consider sharing your knowledge and experience to serve as a Mentor Volunteer. The Queens County Bar Association offers a Mentor Volunteer Program where members can call on other, more experienced members in an area of law they are not familiar with or need assistance with.

Our Association diligently seeks to further develop a larger networking Community of knowledgeable attorneys, who are willing to answer legal questions from time to time, for new attorneys, established practitioners or law students in need of direction and guidance. The simple willingness to answer a few questions or give your advice truly makes a difference.

Your participation in this wonderful program would be greatly appreciated.

It is not whether we can, it is whether we will.

Please use the New Year as an opportunity to become actively involved in the Queens County Bar Association and consider donating your skills and expertise, as attorneys, in providing pro bono services to the less privileged. Be a voice to help shape and improve our profession.

It remains Our Mission to cultivate professional competence, development, education, cooperation, collegiality and diversity amongst our members. Let us all strive to assist and guide each other for the betterment of all.

I thank all our members for your support. I urge each of you to continue supporting your own Specialty Bar Associations and become more involved in the Queens County Bar Association. We seek a diverse Bar Association for Queens County, as diversity is strength not a weakness. We encourage and desire as wide a participation as possible for all attorneys in Queens.

I look forward to working with you in the New Year.

Should you have any suggestions or comments, please do not hesitate to contact me by calling the Queens County Bar Association at (718) 291-4500 or by email at josephrisi.esq@gmail.com.

May we all enjoy and prosper in our wonderful Profession of Law.

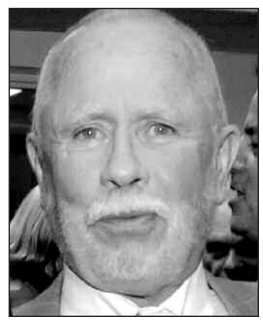
Sincerely,

Joseph Risi, President
Queens County Bar Association

SEMPER FI

In Memoriam: Hon. Lawrence V. Cullen, Judge NYS Court Claims (Retired), Justice Elect NYS Supreme Court

BY HON. RUDOLPH E. GRECO, JR



Hon. Laurence V. Cullen

My dear friend and colleague Hon. Lawrence V. Cullen, Larry to one and all, passed away on Sunday, November 25, 2012, after a long and valiant battle with myeloma. He was a belated casualty of the Vietnam War where he served multiple tours of duty as a wounded combat veteran of the First Marine Air Wing. At Danang he was twice exposed to Agent Orange.

Larry had no acquaintances. He either knew you or someone who knew you. If he met you and liked you then you were one of his legion of friends and he would do anything for you . He was a proud son of the Woodside Irish clan whose ranks include many brave Americans who served, sacrificed, suffered and died for their beloved USA.

Larry was defined by his quick razor wit; his big, kind and brave heart; his intelligence; his common sense; his loyalty; his sense of humor; his endless storytelling (all mostly true) and his impeccably custom tailored suits. His chambers were impressively decorated. In that room I would greet him as Cardinal Cullen. His silver hair and well trimmed beard enhanced his regal image even as he devoured a bagel with gobs of extra butter.

Larry was Irish and a Marine to the marrow of his bones. He majored in Irish Studies at Fordham and was graduated from CUNY Law. He was a devout Catholic every day in every way. He practiced his faith by doing countless good deeds. He was never pious. He was a living example of the very best Irish traits: a true leprechaun with a dash of fun loving mischief and "divilment". I'll never forget his sly grin and twinkling eyes as he passed a deadly remark or set up a funny prank.

Like all Marines, Larry would never leave anyone behind. As Secretary of the Queens County Bar Association's Committee on the Judiciary, Larry was the first to rise in defense of Queens judges and judicial candidates. As a guardianship judge, Larry protected the elderly and infirm with every ounce of his formidable resolve, humanity and legal skill. Woe to anyone who tried to exploit the unfortunate and helpless. They would soon find out the Marines had landed.

Larry married late in life and found the perfect match in his wonderful, loving Margaret. She was a medical doctor from Poland but a true Marine nevertheless. She stood by his side in every battle he waged against illness from beginning to end. He loved, respected and admired her with all his heart.

Together Margaret and Larry produced a daughter, Anya and a son, Patrick, high school students at Dominican Academy and Xavier respectively. Larry was deeply proud of them and literally beamed when he spoke of them. Happily they embody the best traits of their parents and are well on their way to becoming outstanding young adults. They are both scholar athletes and possessed of exceptional good character. Larry loved to watch them verbally spar and match wits. Larry was blessed to have Margaret, Anya and Patrick at his side at all times and Larry's spirit will never leave them. They were his family and his foxhole buddies.

I and all his many friends were lucky to call Larry our friend. He will be missed but never forgotten. I know he's in heaven now at the best bar enjoying a cool Tom Collins and a Havana cigar with Neil O'Brien, Tom Manton, Joe Dorsa, Al Lerner and Tim Flaherty. Larry's heaven looks a lot like Key West. And oh the stories.

In Memoriam - Hon. Lawrence V. Cullen

BY KEVIN SAMPSON

Margaret, Anya, Patrick, members of the Cullen family, distinguished guests, and friends of Larry Cullen - we have lost a good man and I have lost a dear friend.

My name is Kevin Sampson and I have been a friend of Lawrence V. Cullen for over thirty years. Larry was sixty-four when he passed on Sunday surrounded by family and friends. His four brothers, Jim, Kevin, Danny and Frankie were there by his side in the final days.

Larry's life was not an easy one but he possessed a spirit of resilience and good humor that allowed him to overcome pain and misfortune. He never complained. He suffered through personal trials that would have broken a lesser man.

By thirteen, he had lost both of his parents and at seventeen decided to enlist in the Marine Corps. He served three tours of duty in Vietnam receiving eight citations for valor including two Purple Hearts for being wounded in combat and the Bronze Star for heroism in the face of the enemy. Larry told me how, as a side gunner on a helicopter (which as an aside was the position receiving the highest casualty incidence in the war), his helicopter was shot down and for months he was listed as Missing-In-Action and presumed dead. But he defied the odds and survived.

Once, while in his *tent*, he asked his fellow Marines to lower the music so that he could rest. They rather impolitely declined and, in fact, turned the music louder. Never one to negotiate from weakness, Larry purchased his own stereo system, bought multiple albums of bag pipe music and after only a few hours his buddies were begging for quiet. *Soon*, everyone was resting comfortably.

He came home from the war and bounced between jobs. He worked on the floor of the Stock Exchange, an international moving company, and finally, at Skellig.s Delicatessen in Sunnyside. It was here where, I believe, he decided that the law was for him, for he believed

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In Memoriam - Hon. Lawrence V. Cullen

BY HON. PETER J. KELLY

When I confided in several people that I had been asked to speak about Larry's career as an attorney and judge, and that I felt it was a daunting task, the most common response I received was "Just speak from your Heart." That is very good advice.

The problem remains, however, as to how you can do so when your heart is broken.

To describe Larry as an attorney and judge is - on the one hand - a seemingly impossible task. What words could I find that would adequately express Larry's unique qualities and characteristics? It seemed similar to the task of attempting to describe a color to a person who never had the ability to see. What words could possibly be adequate?

On the other hand, an equally valid thought came to mind: What, in fact, actually needs to be said?

The mere mention of the name Larry Cullen to another person invariably causes an immediate and identical response: a huge smile, a knowing look, and inevitably the response: "Larry, what a great guy!"

Larry became an attorney later in life and his practice was largely devoted to Guardianship, Trusts and Estates, and Real Estate.

While his practice was financially successful and Larry had a keen business mind, his primary goal as an attorney was to help others.

His proudest achievements, and most numerous stories, were not of his affluent clients or the lucrative business deals he closed, but of victims of injustice that he obtained relief for.

My personal favorite was of a client he defended in a criminal action who was accused of a misdemeanor. The sole complaining witness was a police officer. Now, everyone knows Larry was an ex-marine and a "law and order" guy. But he absolutely despised liars and hypocrites and he knew the officer was not being 100% truthful regarding what he had seen. His client was offered a fine

(Continued on page 14)

Editor's Note

Googling Jurors?

BY PAUL E. KERSON

The case did not settle, despite your best efforts. There have been several conferences with the Court's Law Secretary and numerous telephone calls with the attorneys on the other side.

The case has been marked "ready" several times, and adjourned. This time, it looks like jury selection is actually going to happen, much to everyone's surprise.

The cards are drawn from the wheel, and clipped to the board. You are given the carbonized copy of the form each juror filled out with the most limited background information.

Ah ha! You have your I-phone. You can Google each prospective juror to see what turns up. You can also look on Linked In, Twitter, Facebook, Bebo and Tagged. Why, in a few seconds, you can have more information about each prospective juror than any carbonized form will ever tell you.

But should you do it?

New York City Bar Association (NYCBA) Formal Opinion 2012-2 suggests that you have an obligation to your client to do so. But the same opinion suggests that electronic research about prospective jurors is also unethical IF the prospective juror knows electronically or otherwise that you have "contacted" any website where his or her name appears.

Paul E. Kerson

In the November-December 2012 most recent issue of the *New York State Bar Association Journal*, Robert B. Gibson and Jesse D. Capell address this question in their leading article, "Researching Jurors on the Internet – Ethical Implications".

Gibson and Capell's Conclusion is this:

> "Pre-trial Internet research of prospective jurors is becoming an integral component of the trial preparation process. Trial attorneys would be well advised to apply this practice whenever possible because it may increase the likelihood of a favorable outcome. But before undertaking this research, attorneys must be familiar with the local rules governing this practice. They must also determine whether jurors will receive a notification from the website if another user views their profiles."

It is respectfully submitted that this "Conclusion" needs a Reality Check, as follows:

1. The trial attorney does not know who is on the jury panel until the cards come out of the wheel and are clipped to the board. It you whip out your I-phone and start googling, or e-mailing an off-site associate, *the jurors will see you doing it, and thus know all about it*, putting the trial attorney in violation of NYCBA Formal Opinion 2012-2. This is not a good way to win, or to survive the complaint which is sure to follow.

2. Gibson and Capell's Conclusion completely ignores the *First Rule of Law that Governs All Others: He or she is the Judge and you are not.* You absolutely do not get to make the decision as to exactly how jury selection is conducted. Each judge does it slightly differently from every other. You MUST approach the Bench with your adversary in tow, and ask the Judge presiding at the trial whether he or she will permit electronic research on jurors, and to what extent, and for how long, and whether in their presence or not.

3. Our tradition of Due Process and Equal Protection must survive the Electronic Age. A wise judicial ruling will insure that both sides have an equal opportunity and equal time to electronically research each juror. Alternatively, a wise Judge might rule that neither side is permitted to do so.

4. Under no circumstances will our traditions be satisfied if one side is all wired up and the other side is not.

Gadgetry must never obscure who we are – the custodians of the fairest justice system devised. People stand on line at Kennedy Airport to live under our Justice System. Let's not be the generation that messes it up.

History Corner

Charles O'Conor

A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.
— Sir Walter Scott

BY STEPHEN DAVID FINK, ESQ.

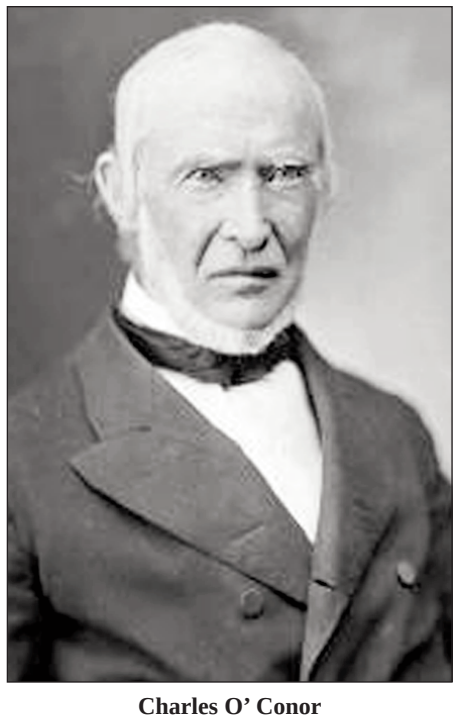
It was Ralph Waldo Emerson who said that history is best learned through biography. The study of individuals in our past tells us more about human emotions than the staid use of dates and events.

So it is with the facts and circumstances surrounding great but forgotten lawyers of our past. These are people like Max Steuer who defended the business owners in the Triangle Shirtwaist factory trial. In more recent times we remember William M. Kunstler, a true gadfly of the criminal law and well known radical attorney.

However, few (if any) remember Charles O'Conor of New York City - best known for the Forrest divorce trial and the defense of Jefferson Davis.

Charles O'Conor was born in (what was then) the City of New York in 1804. His father had been an active Irish rebel who came to the United States in 1798. Charles was admitted to the bar in 1824, and quickly became a successful attorney and prominent proponent of Catholic causes - not always popular in those days.

While he rose to notoriety on a number of cases, his most sensational matter was the divorce trial of Catherine Forrest from the then famous actor Edwin Forrest in 1850. In antebellum America



Charles O' Conor

divorce trials were based upon the conflict between the autonomy of woman and the authority of men. O'Conor sued on behalf of the wife Catherine arguing her modesty, her desire for privacy, and a life away from the public eye. At the trial, lasting more than a month, Edwin tried to characterize Catherine as a profligate woman who drank heavily and had frequent male visitors. Yet, Catherine became a crowd pleaser by refusing to be characterized as a victim. Her victory, upheld on appeal, gave Catherine the opportunity to capitalize on her public visibility. She pursued an acting career on her own and her performances drew crowds who had followed her trial.

O'Conor won a national reputation by winning the case and securing a liberal amount of alimony for his client. He became a prominent Democrat and United States Attorney for the Southern District of New York from 1853 to 1854. He was opposed the Federal government's response by force to the formation of the Confederacy. This position was not unusual in New York City which was generally pro-Southern.

Even as the Civil War ended, pro-Southern Northerners opposed retaliation against the defeated Confederacy. However, when Jefferson Davis fled Richmond in April of 1865, there were calls for his hanging for treason, marked by his eventual capture and such charges being brought against him. Once he was captured, Charles O'Conor was asked to be lead counsel to defend the case while Jefferson Davis languished in prison at Fort Monroe. Through his efforts and those of other prominent persons (such as former President Franklin Pierce) Davis was freed and never tried.

In 1871, O'Conor also became counsel to the State of New York for purposes of prosecuting William M. "Boss" Tweed. He accepted no compensation for this role - even as he suffered a severe illness as the case continued.

O'Conor actually was a reluctant Presidential candidate in 1872 when Horace Greeley, the original Democratic candidate, suddenly passed away. He received 21,599 votes and even some electoral votes.

He also participated in the heavily disputed Presidential election of 1876 between Samuel Tilden and Rutherford Hayes. In fact, Tilden (who lost the election to Hayes) wrote that O'Conor "was the greatest jurist among all the English speaking race".

O'Conor died in Nantucket in 1884. Today he is largely forgotten even by the members of the New York City bar.

Learn More...

For further reading see:

- http://en.wikipedia.org/wiki/Charles_O'Conor
- http://www.newadvent.org/cathen/112029a.htm
- "Infidelity,Law,and Divorce" at http://www.librarycompany.org/women/virtue/infidelity.htm
- Also see, EdwinForrest at http://en.wikipedia.org/wiki/Edwin_Forrest

Trials and Tribulations -

Fifty Years of Family Court

BY MERYL KOVIT


Meryl Kovit

Charles Dickens raised the social conscious in the 19th century to the radical idea that children should have attorneys represent them in Court. One hundred years later, Kathryn McDonald, the Administrative Judge of the New York City Family Court from 1986 until 1995, observed, that "the rich kids all had lawyers, and the poor kids had nobody. I decided that I wanted to become a lawyer and represent children."[1]

Counsel to represent children in Family Court was one of the "landmark provisions"[2] of the Family Court Act of 1962. Dickens didn't live to see it, but children were finally given attorneys. After 50 years of Family Court, it can still be argued that the treatment of children in court has not yet been fully resolved to the satisfaction of Charles Dickens. Nonetheless, the journey to a more perfect court for children continues daily and sometimes the journey is as important as achieving the goal — whether the goal be getting counsel for children, figuring a fair fee for paying a judge, or creating a building dedicated to being a Family Court.

The historical journey to find a place to properly house the Queens Family Court continued in the 1960's. The plan to move to the Parsons Boulevard library building, after the library vacated, was almost "junked by the City Bureau of the Budget"[3] in 1967 in favor of building a brand new building built to be a Family Court. There was a recommendation to "look into the feasibility of a new building rather than remodeling the present building." It was suggested that at a lower cost the old library could be demolished and an adequate Family Court could be constructed on the city owned property. The remodeling was estimated to cost 3.9 million.[4]

Leo Dikman, Esq. the chairman of the family law committee of the Queens County Bar Association, and Judge Peter M. Horn, Queens Family Court, both disagreed with the proposal of the City Bureau of the Budget. Judge Horn thought "new plans will mean a new delay." The chairman of the family law committee, Leo Dikman, said the "remodeled building would suffice for the next 15 years ... a new building will mean a delay of at least seven years ... the family law committee feels the library can and must be remodeled at a cost of less than 4 million dollars. That is the best solution in the face of the urgency of the problem .... we cannot wait for a new building."[5]

As our story continues, however, we find that Leo Dikman, Esq., as well as the entire community to be serviced by the Family Court, does continue to wait — except for Judge Horn, and only because he retired from the bench in 1968.[6]

As the wait continued, one of those quirks of history happened. On June 1, 1969, New York State put into effect a new law requiring a separate child abuse part in each Family Court. In New York City, only Manhattan was reorganized so as to comply with the new statute. It came to be that all child abuse cases in the City Of New York were handled by one Judge sitting in Manhattan.

Judge Florence Kelley, "the head Judge of the New York City Family Court," speaking of the new law requiring a child abuse part in each Family Court, acknowledged that the law was such that there ought to be a child abuse part in Queens, however, she said, "I can't put one there" — referring to Queens.

Conditions at the Union Hall building were too desperate to allow for child abuse matters to be heard. The four judges sitting in the building shared one office which was 20 x 30 feet. There was one room, used as a combination nursery and chambers, for a woman judge sitting in Queens — women judges did not share the main chambers because of the proximity of the men's washroom. The lunch meal for the girls in detention was prepared about five feet from their bathroom facilities. The litigants waited for their cases to be called in corridors without air conditioning nor room for chairs. There were confidential files being kept in the public hallways because there was no room in any of the offices. Last but not least, security was a problem in that all adults and juveniles in custody had to be escorted through these same public corridors.[7]

The historical lesson gleaned from Judge Kelley's tribulations of that day is that sometimes, try that they might, it just isn't possible for a Judge to obey the law. Mr. Dickens could not have made this up — however, given such brilliant raw material there is no telling what he could have created with such gems. Just try to imagine the fiction Mr. Dickens could have tooled about Judges arduously laboring to obey laws --day after day— without the proper resources provided to effect those very laws. The premise sounds like a Dickens tale. We can only ponder how Mr. Dickens' fictional Judge would have reacted to such stresses in the daily grind.

Judge Kelley acknowledged that the lack of a special child abuse part in Queens has "drawbacks for a Queens attorney who must make the trip to Manhattan to handle his cases." As well, she pointed out that it was roughest on the generic male attorney from Queens as while there was no separate abuse part in the Bronx, Kings or Richmond counties, "The trip from Queens to Lafayette street is the hardest." Close your eyes and try to visualize Dickens barrister entering the subway at Jamaica center for the long journey to Lafayette Street. Think about what he might be wearing. Imagine the effect of the subway on the white wig; contemplate the dangers the black robe might present on the subway trip.

Judge Kelley stressed that the new child abuse part law "wasn't drawn up for lawyers — but for the children," however, she had concerns that setting up a part in Queens would subject youngsters to "inhuman physical surroundings." Judge Kelley insisted, nonetheless, that "despite

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The Evolution of Elevation

A quarter-century of New York's 'Scaffold Law'

HON. GEORGE M. HEYMANN[1]

One of the most prominent statutes that comes into play with respect to worker-related injures is section 240(1) of the Labor Law ("LL") commonly referred to as the "Scaffold Law."

Enacted in 1921, it "descended from the 1885 'Act for the protection of life scaffolding...'."[2]

Expanded in 1947 to include coverage for workers who fell from elevated devices other than scaffolds, the title of the statute was changed from "Safe scaffolding required for use of employees" to its current title "Scaffolding and other devices for use of employees."[3]

Two additional amendments brought the statute to its present form. A 1969 amendment placed responsibility for safety practices at construction/building sites squarely on "all contractors and owners and their agents",[4] while owners of one and two family homes "who contract for, but do not direct or control the work" were exempted in the final amendment in 1981.[5]

In the three decades since, there has been a myriad of cases seeking to interpret and clarify the succinctly worded first paragraph of this statute. The trial and appellate courts have created a body of law that is constantly evolving in order to reconcile the often inconsistent decisions in an attempt to clarify the legislative intent by their differing definitions and the application thereof.

The first paragraph of section 240(1) of the Labor Law contains two distinct criteria, each of which comes into play when an injured worker seeks recovery under this statute. In relevant part, LL §240(1) reads as follows:

> All contractors and owners and their agents, ...[1] in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure [2] shall furnish or erect, or cause to be furnished or erected for the purpose of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed. (Numbers in [ ] added)

The first part of this provision sets forth and limits the specific type of job that a worker must be doing at the time of his or her injury. The second part pertains to the various devices necessary to protect the worker from injury while in the performance of his or her duties. The list is not exhaustive as the language includes "other devices" to provide "proper protection."[6]

Hon. George Heymann and Hon. Carmen Beauchamp Ciparick

It should be noted that the statute itself makes no mention of height or elevation differentials. Such language and its application evolved from the courts as the use of devices such as "scaffolds," "hoists" and "pulleys" refer to working above and/or the lifting or lowering of objects from one level to another. Similarly, there is no mention of "strict" or "absolute" liability which was also a term applied by the Court of Appeals, as will be discussed below.

Much has also been written with respect to the nature of the job undertaken such as "cleaning" and "altering," as well as whether "proper protection" was provided by the employer, if, in fact, it was required and its absence was the proximate cause of the resultant accident and injury.

This article will highlight the major decisions rendered by the Court of Appeals regarding LL §240(1) from 1991 to the present plus several recent Appellate Division and Supreme Court cases.[7]

In Rocovich v. Consolidated Edison, Co.,[8] the Court of Appeals stated that LL §240(1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed," and reaffirmed its earlier interpretations that the statute "impos[es] absolute liability for a breach which has proximately caused an injury."[9] Contributory negligence by the injured worker is of no consequence and the duty of an owner's liability under this provision is nondelegable.[10]

The Court proceeded to address "the nature of those occupational hazards"[11] that were intended by the Legislature to warrant absolute protection and an injury occasioned by a different type of hazard would not be protected. Here the Court stated that because the statute prescribes the use of "scaffolding" and "ladders" it is "evident" that they are "for the use or protection of persons in gaining access to or working at sites where elevation poses a risk."[12] (Emphasis added) The Court further stated that in considering all the devices listed, the Legislature "contemplated hazards" involving the force of gravity "because of a difference between the elevation level of the required work and a lower level of the materials or load being hoisted or secured."[13] Determining that the hazards incurred were "special hazards" the Court "believe[d] that the Legislature has seen fit to give the worker the exceptional protection that section 240(1) provides."[14]

In this case, Rocovich, a construction worker, was removing and repairing the insulated covering on recessed pipes on the roof of defendant's building. In the center of the recess was a trough, 18 to 36 inches wide and 12 inches deep, filled with about 5 inches of hot oil. As he was about to step across it, plaintiff slipped and his right foot and ankle became immersed in the hot oil.

Based on its interpretation of the type of hazard that warrants protection under LL §240(1), as outlined above, the Court declined to apply it in plaintiff's favor. While acknowledging that an elevation related risk is not always determined by the extent of the elevation differential, the Court found it "difficult to imagine how plaintiff's proximity to the 12-inch trough could have entailed an elevation-related risk which called for any of the protective devices of the types listed in section 240(1)."[15]

Thus, because the nature of the plaintiff's job did not require any of the protective devices listed in the statute it was not deemed to comport with the "thrust" of its intent to protect against the risks involved in "relative differences in elevation."[16]

In Ross v. Curtis-Palmer Hydro-Electric Co.,[17] Ross was a welder working at the top of a 40-50 foot shaft. In order to weld a seam at the top, a temporary platform was installed and Ross had to sit at the edge of the platform and "extend one leg forward against the top edge of the shaft and stretch forward and down with his upper torso and head to reach the seam that needed welding."[18] Ross had complained about working in this contorted position and had requested a ladder but was told that he had to use the platform. After approximately 2½ hours working from the platform he experienced difficulty and pain when he tried, but failed, to straighten up. Despite subsequent surgery he remained disabled.

As in Rocovich, supra, the Court of Appeals had to determine whether this was a hazard contemplated by LL §240(1). Here, the Court decided that the plaintiff's disabling back pain was not "the kind of harm that is typically associated with elevation related hazards."[19] The Court held that plaintiff's argument that his injury was "related to the effects of gravity."..."misconstrues the import of our analysis in Rocovich."[20]

Again, referring to "special hazards" the Court emphasized that they "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity."[21] (Emphasis in original) They are limited to gravity-related accidents such as "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured."[22] The Court distinguished this case because the plaintiff's injuries did not flow directly from the application of the force of gravity to an object or person. Here, the "makeshift 'scaffold' served the objective of the statute by preventing the plaintiff from falling down the shaft - a "device that did not malfunction and was not defective in its design."[23] The harm suffered by Ross was not one contemplated by the statute and it would not be even if the device used was inadequate, defectively designed or malfunctioned.

In Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.,[24] the Court of Appeals, in a brief memorandum decision, dismissed plaintiff's cause of action based on LL 240(1) as follows:

> Plaintiff in this case was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law §240(1). In placing a 120-pound beam onto the ground from seven inches above his head with the assistance of three other co-workers, Rodriguez was not faced with the special elevation risks contemplated by the statute (Citing Ross v. Curtis-Palmer Hydro-Electric Co., supra, and Rocovich v. Consolidated Edison, Co., supra)."[25]

In 1995, the Court of Appeals rendered

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MARITAL QUIZ

BY GEORGE J. NASHAK JR.*

George J. Nashak Jr.

Question #1 - May the court award child support in accordance with the CSSA Guidelines and order the payer spouse to pay the mortgage on the marital home where the child resides?

Your answer -

Question #2 - Can the refusal to file a joint income tax return be found to be marital waste?

Your answer -

Question #3 - Are siblings permitted to commence a proceeding to seek visitation with a whole or half brother or sister?

Your answer -

Question # 4 - In question #3, if the petitioner is a minor, is his or her attorney authorized to file the petition for his or her client?

Your answer -

Question #5 - Is a substantial reduction in father's visitation with the parties' child a substantial change of circumstances warranting an increase in child support?

Your answer -

Question #6 - May the court award temporary maintenance in accordance with the formula set forth in DRL §236(B)(5-a) and direct the payment of carrying charges on the marital home?

Your answer -

Question #7 - Can the trial court award appellate counsel fees?

Your answer -

Questions #8 - Is the trial court permitted to order a lump sum distributive award, if all of the marital assets are non-liquid?

Your answer -

Question #9 - When the court orders a distributive award in installments, what rate of interest should it order?

Your answer -

Question #10 - The wife obtains an annulment based upon husband's bigamy. During their purported marriage, the husband satisfies a criminal judgment for failure to pay child support to his first wife, whom he remarried. Is the wife who obtains the annulment entitled to be reimbursed by husband for 50% of the criminal judgment he paid to the first wife?

Your answer -

**Editor's Note: Mr. Nashak is a Past President of our Association and Vice-Chair of our Family Law Committee. He is a member of the firm of Ramo Nashak Brown & Garibaldi LLP*

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NYC's Scaffold Law

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a decision that reaffirmed the limitations of seeking relief under the "scaffold law" by injured workers. Misserritti v. Mark IV Construction Co., Inc.,[26] written by Judge Ciparick, continued the theme stated in Rodriguez, supra, that an injury resulting from hazards that are not elevation related constitute "other types of hazards [that] are not compensable under the statute even if proximately caused by the absence of *** [a] required safety device."[27] The Court concluded that the wife of the decedent worker could not recover under LL §240(1) because the collapse of the fire wall he was working on was the type of "ordinary and usual peril a worker is commonly exposed to at a construction site and not an elevation-related risk subject to the safeguards prescribed" by the statute.[28]

Plaintiff-wife sued on the theory that her husband had been hired to perform masonry work and that his injuries occurred when a completed concrete-block fire wall collapsed. She alleged that the defendant had a nondelegable duty to furnish the appropriate safety devices (i.e.: braces) to give the decedent the proper protection during his employment.

Once again, reciting the holdings and reasoning in Rocovich and Ross, supra, the Court concluded:

> In this context, we construe the "braces" referred to in section 240(1) to mean those used to support elevated work sites not braces designed to shore up or lend support to a completed structure. *** There is no showing that the decedent was working at an elevated level at the time of this tragic accident. Nor can it be said that the collapse of a completed fire wall is the type of elevation-related accident that section 240(1) is intended to guard against."[29]

Relying on its holding in Misserritti, supra, the Court of Appeals also denied recovery pursuant to LL §240(1) in Melo v. Cosolidated Edison Co. of NY.[30] In this case a steel plate was being hoisted to a vertical position at street level to be lowered over an unfilled trench. The steel plate was attached to the shovel part of a backhoe connected by a chain and hook at each end. Plaintiff and a co-worker were directing the covering of the trench as the plate was being raised to a vertical position perpendicular to the ground with the edge touching the ground. As they were maneuvering the steel plate it became unhinged and fell on plaintiff's foot and shoulder. Here, the Court based its determination on the fact that the steel plate was resting on the ground.

While the force of gravity may have caused the steel plate to fall as it was being moved by an allegedly defective hoist, one of the safety devices enumerated in the statute, the steel plate was resting on the ground or hovering slightly above the ground. The steel plate was not elevated above the work site. Thus, it could not be said that the statute was implicated "'either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured'."[31] (Emphasis added)

Building upon its foundation of Rocovich, Ross, Rodriguez and Misserritti, supra, the Court of Appeals next addressed the issue of falling objects that injured workers in Narducci v. Manhasset Bay Associates.[32] Narducci actually comprised two cases consolidated in one decision. In the first case, Narducci was required to remove steel window frames from the third floor of a fire-damaged warehouse. As he stood on a ladder working on a window frame he saw "a large piece of glass from an adjacent window frame falling toward him."[33] Although he turned away, the glass hit him in the face and severely cut his right arm. He did not fall from the ladder, nor did the ladder malfunction in any way.

In the second case, Caparrelli, an electrician was assigned the job installing fluorescent light fixtures into a dropped ceiling. He was standing halfway up an eight foot ladder to reach the ten foot ceiling when he lifted the light fixture into the grid. As he was descending the ladder to relocate its position in order to secure the fixture the fixture began to fall. In an attempt to stop it from hitting him Caparrelli reached out to hold it but it slipped cutting his right hand and wrist. Like Narducci, he did not fall from his ladder.

Both plaintiffs alleged that they should have been provided a scaffold to perform their jobs and, therefore, were entitled to compensated under LL §240(1). Holding that absolute liability is imposed only after a violation of the statute has been established, contingent upon the contemplated hazards, not every worker who falls at a construction site and not every object that falls on a worker triggers the extraordinary protections of the statute.[34]

The Court distinguished between falling workers and falling objects, as each is a different type of hazard. While the former creates a hazard by working in an elevated situation where the worker might fall and be injured "in the absence of adequate safety devices," [35] the latter is "associated with the failure to use a different type of safety device (i.e.: ropes, pulleys, irons) also enumerated in the statute"[36] and because the risks are dissimilar the hazards of one type of accident cannot be 'transferred' to create liability for a different type of accident."[37]

In denying Narducci's LL §240(1) claim, the Court found that the falling glass was the result of a pre-existing building condition due to the fire and not the result of the absence of any securing or hoisting devices listed in the statute. It described the incident as "clearly a general hazard of the workplace"[38] and not one contemplated in the statute. Moreover, this was not deemed an elevation-related accident since Narducci did not fall from his ladder, nor was it alleged that the ladder did not function properly. Thus, there was no causal connection between the ladder and the injury.

As to plaintiff Capparelli, while his injury could be classified as "gravity related" it was not the type envisioned by the statute.[39] Although working on a ladder approximately 4 - 5 feet off the ground to a 10 foot high ceiling there was no "hoisting" of the light fixture and no height differential between him and the falling fixture. In what appears to be a first for the Court, Judge Ciparick held that the exclusion of gravity-related accidents that can be distinguished from those intended by the Legislature "made [ ]the *de minimus* elevation differential in this case appropriate."[40]

Sixteen years later, as discussed below, Judge Ciparick would revisit the issue of falling objects and *de minimus* elevation differentials in Wilinski v. 334 East 92nd HDFC.[41]

In the joint cases of Toefer v. LIRR and Marvin v. Korean Air, Inc.,[42] the Court of Appeals denied recovery under LL §240(1) where the injuries were the result of falling of flatbed trucks in the process of removing the cargo in the first instance and alighting therefrom in the second. The Court concluded that the flatbed trucks "did not present the kind of elevation-related risk that the statute contemplates."[43]

In both instances, the injured workers were only 4 - 5 feet from the ground. The Court rejected their arguments that the safety devices listed in the statute would have prevented the respective accidents and, therefore, LL §240(1) was not applicable.

As previously noted, LL §240(1) not only pertains to tasks that are elevation-related, it also limits the nature of the work to be performed in order for it to be implicated in seeking recovery thereunder.

In Joblon v. Solow[44] an electrician was directed to install a clock on the wall of an office building. Because there was no outlet in that particular room, the plaintiff had to chop a hole through the concrete wall to the adjoining room and run electrical wiring from the electrical source to the hole. To accomplish this, the plaintiff was on a partially opened ladder leaning against the wall. Due to the dimensions of the room, the ladder could not be completely opened. Joblon's co-worker held the ladder securely while Joblon was performing his duties. At one point, however, the co-worker left the room and Joblon proceeded to ascend the now unsecured ladder to complete his task. While doing so, the ladder shifted and Joblon fell backward sustaining injuries.

The Court of Appeals was now confronted with the "highly elusive goal of defining with precision statutory terms within" LL §240(1) having found "that no precedent of this Court four-square controls the definition of the term 'altering' as used in "that statute."[45]

In the course of explaining its holding that Joblon's work was more than merely standing on a ladder to hang a clock that which he performed "was a significant physical change to the configuration or composition of the building."[46] The Court refused to limit relief only to construction sites because it "would eliminate possible recovery for work performed on many structures falling within the definition of that term but found off construction sites."[47] Here, the plaintiff's job was more than a simple routine activity - he made a "significant physical change to the configuration or composition of the building or structure. *** It is not important how the parties generally characterize the injured worker's role but rather what type of work the plaintiff was performing at the time of the injury."[48]

Joblon is a prime example of how the definition and interpretation of each element of LL §240(1) by the courts can yield differing results for the respective parties of a lawsuit involving this statute.

Almost a decade after Joblon, a worker who sustained injury while cleaning the interior window in an office building could not recover under the scaffold law because he failed to establish the need for any safety device and, therefore, no liability could attach to the defendant.

In Broggy v. Rockefeller Group, Inc.,[49] the plaintiff window washer was not a steady building employee of the defendant but worked in various buildings bringing his own bucket and tools to perform his duties. At the time of his accident, the plaintiff was not using a ladder but was standing on top of a desk to reach the top of the window approximately 10 feet from the floor. As he was washing the interior side of the window a co-worker washing the outside of the same window signaled that he wanted to come inside. While lifting the bottom sash of the window plaintiff was standing with his left leg on the window sill and his right foot on the desktop. Between the desk and the window was an open spaced "gallery." Expecting the bottom sash to remain open the plaintiff removed his hands and it suddenly "slammed down." To avoid injury to his foot, Broggy quickly moved his left leg and his instep got caught in the gallery causing him to fall backward onto the desktop and then the floor.

In his lawsuit Broggy sought recovery on the theory that he was using the desk as an elevated platform or scaffold while doing commercial cleaning. He further alleged that the "defendant[s] fail[ed] to provide plaintiff with the safety devices necessary 'to overcome the elevation differential of approximately four feet between the floor and the window so as to perform his task safely'."[50]

The Court of Appeals pointed out that 'altering' and 'cleaning' are discrete categories of activity protected under section 240(1). Notably, in Joblon, we rejected the defendants' argument that only altering performed as part of a building construction job was covered by section 240(1). *** The crucial consideration is not whether the cleaning is taking place as part of a construction, demolition or repair project, or is incidental to another activity protected under section 240(1); or whether a window's exterior or interior is being cleaned. Rather, liability turns on whether a particular window washing task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against."[51] In this case, the plaintiff could not establish that a ladder was required to perform his duties and that he could not have successfully cleaned the windows from the floor level using extension poles with his wand and/or squeegee. Failure to show that "he stood on the desk because he was obliged to work at an elevation to wash the interior of the windows"[52] was fatal to his claim. The plaintiff did not, as a matter of law in this case, need protection from the effects of gravity.

Query: Can a worker recover for his injuries that were neither caused by him falling nor from a falling object hitting him, where the injuries were a "direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential?"[53]

In Runner v. New York Stock Exchange, Inc.,[54] the Court of Appeals answered this issue of first impression in the affirmative. Unlike the previous cases discussed, Runner was in the process of lowering an 800 pound reel of wire down a set of four stairs. Using a makeshift pulley Runner was at the top of the stairs holding on to a 10-foot rope acting as a counterweight while the reel of wire was descending the steps. As the reel began to pick up speed it pulled the plaintiff toward it and he jammed his hands against a metal bar to which the rope was tied causing his injuries.

The relevant inquiry here was whether the harm to the plaintiff-worker flowed directly from the application of the force of gravity to the object even if that object did not fall on the worker. The Court reasoned that had Runner been at the bottom of the stairs and the reel descended onto him causing injury he would be protected by the statute. Therefore, since "the injury to the plaintiff was every bit as direct a consequence of the descent of the reel" he should be entitled to the same legal recourse as if he were injured while in its path as it rapidly descended.[55]

Finally, the Court held that the elevation differential was not *de minimus* "given the weight of the object over the course of a relatively short descent."[56]

In October 2011, the Court of Appeals broke new ground in its departure from

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Misserritti, supra, by holding that a worker is not categorically barred from recovery under LL §240(1) where he or she "sustains an injury caused by a falling object whose base stands at the same level as the worker."[57] In Wilinski v. 334 East 92nd HDFC, supra, Judge Ciparick, expressed how the "jurisprudence defining the category of injuries that warrant the special protection of Labor Law §240(1) has evolved over the last two decades centering around a core premise: that a defendant's failure to provide workers with adequate protection from reasonably preventable gravity-related accidents will result in liablitiy."[58] (Emphasis added)

Explaining the Court's progression of the cases discussed above, it was pointed out that while rejecting Misserritti's "categorical exclusion" of injuries resulting from falling objects on the same level of the injured worker, it "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240(1) analysis."[59] Relying on Runner, supra, the Court held that it is not "the precise characterization of the device employed" or whether it was the fall of the worker or an object falling on the worker, but whether injury was a direct consequence of the employer's failure to provide adequate safety devices to prevent accidents caused by a "physically significant elevation differential."[60]

Wilinski was injured during the demolition of the brick walls of a vacant warehouse. After previous demolition of the floor and ceiling two 10-foot vertical pipes, 4 inches in diameter, remained standing on the ground unsecured. They were not scheduled to be removed at that time. Although the plaintiff expressed his concerns about leaving them unsecured to his supervisor, no measures were taken to secure them. Wilinski, 5 feet, 6 inches tall, was standing on the ground when debris from a nearby wall being torn down hit the pipes causing them to topple approximately 4 feet striking and injuring him.

Applying the reasoning in Runner, supra, Wilinski was not precluded from recovery simply because he and the pipes were on the same level when he was struck. The harm flowed directly from the force of gravity generated by the pipes in their descent and the four foot height differential was not *de minimus* as a result of that force. Notwithstanding that there was a "potential causal connection between the object[s'] inadequately regulated descent and plaintiff's injury",[61] there still remained an issue of fact as to whether the plaintiff's injury was a direct consequence of defendant's failure to provide adequate protection to prevent the pipes from falling. Thus, neither party was entitled to summary judgment.

The Court distinguished this case from others where summary judgment dismissal was warranted. Where objects that fall and injure workers are themselves the "target of demolition" it would be "illogical" to secure them as it would be "contrary to the objectives of the work plan."[62] Such was not the case here where the removal of the pipes were not part of that phase of the demolition project and should have been secured.

Only a month after Wilinski, the Court of Appeals applied the same rational in Salazar v. Novalex Contracting Corp.[63] in denying recovery to a worker injured when he stepped backward into a trench as he was filling it with cement. Salazar was directed to pour and spread concrete over an entire basement floor which contained 3 to 4-foot deep trenches for pipes. He claims that defendant should have provided a protective device to cover the trenches. The Court held that to do so would be "illogical", "impracticable" and "contrary to the work plans in the basement" since it was the goal to fill these trenches with cement.[64] Defendant was entitled to summary judgment "given that Labor Law §240(1) should be construed with a commonsense approach to the realities of the workplace at issue."[65]

In Ortiz v. Varsity Holdings[66] the Court of Appeals stated that "courts must take into account the practical differences between 'the usual and ordinary dangers of a construction site, and ... the extraordinary elevation tasks envisioned by Labor Law §240(1)'."[67]

At issue here was whether Ortiz, injured when he fell to the ground off a six-foot dumpster, was performing a job that created an elevation-related risk encompassed in the scaffold law. Defendants moved for summary judgment claiming this was not such a case. The plaintiff asserted that his task of filling the dumpster and rearranging the content therein as it filled up required him to stand on the 8-inch ledge at the top of the dumpster.

The Court held that neither side was entitled to summary judgment. Based on the record before it, the Court "[could not] say as a matter of law that equipment of the kind enumerated in section 240(1) was not necessary to guard plaintiff from the risk of falling from the top of the dumpster."[68] Since liability is contingent upon the failure to use, or the adequacy of, one of the enumerated devices, a question of fact remained as to whether the task the plaintiff performed created an elevation-related risk of the kind these devices are intended to prevent.

At the time of this writing, the last case decided on this subject by the Court of Appeals was Dahar v. Holland Ladder & Mfg. Co.[69] As in Broggy, supra, the plaintiff's duties involved "cleaning." In this case, the plaintiff was required to clean a 7-foot high manufactured steel wall module prior to it being shipped to its final destination. It was necessary for plaintiff to stand on a ladder to perform his task. While engaged in this job that ladder broke and plaintiff fell to the ground. He sought recovery under LL §240(1) asserting that he was 1) "cleaning" - one of the tasks enumerated in the statute; and 2) the wall module was a "structure." (See definition of "structure", supra, FN 47) The Court rejected this argument stating that it would expand the statute's coverage to "encompass virtually every 'cleaning' of any 'structure' in the broadest sense of the term" (i.e.: an employee standing on a ladder to clean a bookshelf or to clean a light fixture).[70]

In the nine weeks between July 19, 2012 and September 18, 2012, five Appellate Division decisions and two Supreme Court decisions were rendered with respect to issues pertaining to the application of LL §240(1).

In Oakes v. Wal-Mart Real Estate Business Trust,[71] "apparently the first extended analysis" of Wilinsky,[72] the Appellate Division, Third Dept., denied recovery to a worker injured in a force-of-gravity accident.

While working on a construction site, Oakes had his legs crushed as he walked between two steel trusses each measuring 30-feet long by 5½-feet in height and 1-foot wide. Every piece of the steel components in his project contained a numbered tag that Oakes, as supervisor of the project, was required to read in order to determine its placement in the building structure based on the blueprints. As he was performing this task, one of the vertically positioned trusses, standing on its 1-foot side, was struck by an unsecured bar joist being carried by a forklift causing it to fall on top of him.

The appellate court distinguished this case from Wilinski noting that "[i]n light of the Court[ ] [of Appeals] continued reliance upon Rodriguez in [Ortiz, supra] a case decided after both Runner and Wilinski it cannot be said that an elevation differential posed 'the special elevation risks contemplated by the statute' simply because the force of gravity acting on a heavy object caused severe injuries when the object fell."[73]

Here, the plaintiff was not only on the same ground level as the truss, he was approximately the same height or slightly taller. Thus, it was held that "[n]otwithstanding the substantial weight of the [10,000 pound] truss and the significant force generated as it fell due to the force of gravity, however, there was no elevation differential present here, let alone a 'physically significant elevation differential'. *** Under these circumstances, plaintiff was exposed to 'the usual and ordinary dangers of a construction site, and [not] the extraordinary elevation risks envisioned by LL §240(1)'."[74] (Emphasis in original)

In Toney v. Raichoudhury,[75] Toney's estate brought an action for wrongful death, negligence and violations of the Labor Law. Toney was killed when a falling crate that had been unloaded from a flatbed trailer truck fell and crushed him. The crates, each weighing approximately 2000 pounds, were filled with glass plates and when lifted off the truck by a crane were placed on the ground with two crates upright and parallel to each other. The workers would then tilt them toward one another so that they would touch at the top where they were connected with braces to form an "A." As Toney and a co-worker were tilting the two of the six crates that were delivered, one of them shifted causing both of them to fall. Neither crate was attached to the crane at that time.

Defendants moved for summary judgment dismissal on the ground that the falling crates were located at the same level as the work site where Toney was standing and this did not constitute an elevation-related risk under LL §240(1). Defendants further contended that unlike the falling pipes in Wilinski relied on by the plaintiff, the cranes did not fall from a substantial height. The plaintiff averred that, pursuant to Wilinski, the fact that the falling crates and the deceased were at the same level was irrelevant because the crates were inadequately secured.

In rejecting the defendants' argument, the Supreme Court found that the failure to secure the crates before removing the crane was a violation of the statute. With respect to the fact that the crates stood only about 9 inches above the decedent's head, the court held that the elevation differential was not *de minimus* considering their weight and amount of force they were capable of generating even over a short distance. "Moreover, '[t]he sufficiency of an elevation differential and a fall from a height for purposes of [liability under the scaffolding law] cannot be reduced to a numerical bright-line test or an automatic minimum/maximum quantification'."[76]

Cappabianca v. Skanska USA Building, Inc.,[77] was the next case decided by an appellate court which also denied recovery to an injured worker suing under LL §240(1).

At a school construction site the plaintiff was cutting bricks with a stationary wet saw. The saw and its stand sat on a wooden pallet that lay on the concrete floor. Standing on an adjacent pallet of the same height, 4 to 12 inches from the floor, plaintiff operated the saw with its foot petal, arm lever and cutoff switch. The pallets' surfaces were positioned 3 to 6 inches apart. In order to keep the blade and bricks cool and to provide lubrication while cutting, the saw was supposed to spray water on them which would then be directed to an attached tray. However, due to a malfunction, the water sprayed all over and onto the floor which became slippery. As a result, the pallet on which plaintiff was standing shifted and he lost his footing injuring his knee as it became caught between the two pallets.

In affirming dismissal of the plaintiff's LL §240(1) claim, the Appellate Division, First Department, disposed of this issue in one paragraph which held that his "accident could not give rise to liability under the statute because he was at most 12 inches above the floor and was not exposed to an elevation-related risk requiring protective safety equipment."[78]

The specified tasks enumerated in LL §240(1), supra, must take place in [or on] a "building" or "structure." Although the definition of "structure" was set forth in Joblon v. Solow, supra [see, FN 47], what constitutes a "structure" requires determination on a cases by case, fact-specific basis.

On September 13, 2012, the Appellate Division, Second Department, determined in McCoy v. Abigail Kirsch at Tappan Hill[79] that, under the facts of that case, the canopy under which a Jewish wedding ceremony was performed, known as a "chupah", qualified as a "structure" for the purposes of seeking recovery under LL §240(1).

Citing numerous instances where some "structures" fall within the purview of the statute's protection and those that do not, including differently constructed wedding canopies, the Court noted that "a structure, by implication, may include constructs that are less substantial and perhaps more transitory than buildings." *** "In this action, the chupah consisted of various interconnected pipes 10-feet long and 3 inches wide, secured to steel metal bases supporting an attached fabric canopy. A ladder plus various hand tools were required to assemble and disassemble the chupah's constituent parts in a process that would take an experienced worker more than a few minutes to complete. The chupah here is more akin to the things and devices which the courts of this state have recognized as structures than to the things and devices that have not been recognized as structures."[80]

On the same day that McCoy was published, the Supreme Court, NY County, also rendered a decision with respect to LL §240(1). In Britez v. Madison Park Owner[81] the plaintiff was injured when he fell off a scaffold approximately 6-feet high. He stated that he needed the scaffold because he had to do taping work at the top of a 12-foot high wall and that the only scaffold available was a pre-assembled one made of wood. It had no safety railings or mesh, which, plaintiff alleges, would have prevented him from falling backwards had they been there.

The Supreme Court held that the plaintiff established *prima facie* entitlement to partial summary judgment on his liability claim under LL §240(1). Here, the plaintiff demonstrated that the scaffold did not provide proper protection and he was not given any other devices to prevent him from falling. The defendants asserted that the plaintiff was the sole proximate cause of the accident as he attempted to move forward on the scaffold, lost his balance and stepped off the scaffold. However, defendants failed to establish that the "plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use

(Continued on page 12)

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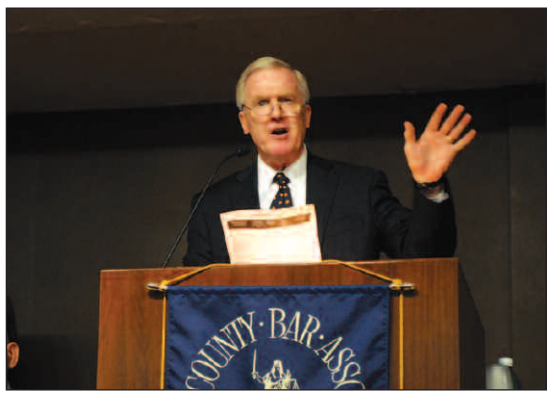
Recent Decisions From Our Highest Appellate Courts 2012
October 23, 2013

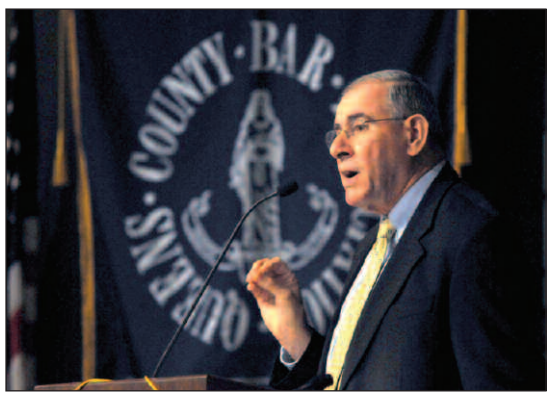
Joseph Risi making the introductions.

President Joseph Risi presenting Judge Ciparick with a plaque from QCBA recognizing her years of service on the bench



J. Gardiner Pieper discussing civil cases from the NY Court of Appeals

Paul Shechtman speaking about criminal cases in the NY Court of Appeals



Spiros Tsimbinos reviewing recent developments in the US Supreme Court

Hon. A. Gail Prudenti reminiscing about her friendship with Hon. Ciparick

Hon. Judith S. Kaye paying tribute to Judge Ciparick and time on the bench

Spiros Tsimbinos, Hon. Judith Kaye, Hon. Carmen Ciparick and Arthur Terranova

Hon. Robert S. Smith talking about times on the bench with Judge Ciparick

Peter Lane, President-Catholic Lawyers Guild, Donna Furey, President-Queens Women's Bar Assn, Michael Hartofilis, 1st Vice-President-Hellenic Lawyers Assn, Hon. Bernice Siegel, Chairperson-Brandeis Assn, Joseph Risi, President-QCBA, Hon. Carmen Beauchamp Ciparick, Associate Judge, New York Court of Appeals, Hon. Randall Eng, Presiding Justice of the Appellate Division, Second Department, Spiros Tsimbinos, Program Chair and Gary Miret, Treasurer-Latino Lawyers Assn of Queens County

Photos by Walter Karling

PHOTO CORNER

Recent Decisions From Our Highest Appellate Courts 2012
October 23, 2013

Hon. Allen Beldock, Chanwoo Lee, Emilio Gonzalez and Tom Graham in background

Hon. Carmen Beauchamp Ciparick, Spiros Tsimbinos, Joseph Risi and Hon. Judith Kaye

Hon. Randall Eng discussing his memories of Judge Ciparick

Hon. Carmen Beauchamp Ciparick thanking QCBA and everyone who are celebrating her retirement

Bernie Vishnick, Tom Principe, Hon. Randy Eng, Chanwoo Lee and Hon. Morton Povman

Hon. Carol Stokinger, Spiros Tsimbinos, Hon. Judith Kaye and Hon. Carmen Ciparick

Hon. Jeremy Weinstein, Hon. Bernice Siegal, Neda Melamed, Hon. Carmen Beauchamp Ciparick, Hon. Sheri Roman, Hon. Peter Kelly and Hon. Seymour Boyers

Hon. Sy Boyers, Hon. Robert Smith, Hon. Jeremy Weinstein, Larry Litwack, Jim Pieret, Ed Rosenthal, Hon. Peter Kelly and Jay Abrahams

Photos by Walter Karling

NYC's Scaffold Law

(Continued from page 9)

them; [and] that he chose for no good reason not to do so."[82]

On September 14, 2012, the Appellate Division, Second Department, affirmed the dismissal of the plaintiff's LL §240(1) claim in Rodriguez v. D&S Builders, LLC [83] as plaintiff failed to raise a triable issue of fact. Defendants "established their *prima facie* entitlement to [summary] judgment [of dismissal] as a matter of law by demonstrating that the plaintiff's decedent was not exposed to an elevation related hazard inasmuch as, at the time the decedent was struck by a bundle of forms, the forms were not being hoisted or secured, and the decedent was working on a flatbed truck at the same level as the bundle of forms (citing, *inter alia*, Toefler v. LIRR, supra, and Narducci v. Manhasset Bay Assoc., supra)."[84]

In Rivera v. Fairway Equities LLC,[85] plaintiff was injured at a construction site when a metal hamper filled with sand fell on him after being lifted by a forklift off a flatbed truck. Plaintiff and two co-workers were instructed by their supervisor to hold a bag while sand was poured into it. When the sand would not pour out of the hamper, the operator of the forklift tried to shake the hamper by using a lever of the forklift which, allegedly, caused the hamper to tilt forward and fall on the plaintiff. Although the weight of the hamper was not established, it was 3 to 4 feet tall and its bottom was approximately 3 to 4 feet off the ground while held in the air by the forklift. Plaintiff was employed by non-party Bolinet Construction, a sub-contractor hired to erect the building's cinder block walls. The operator of the forklift was employed by Miron Building Suppy LLC who supplied and delivered construction materials to the jobsite.

Plaintiff moved for partial summary judgment against Miron under LL §240(1). Miron contends that "the fall of the hamper from the forklift simply did not involve a fall from a height sufficient to warrant the special protections provided under Labor Law §240(1)."[86]

The court held that "in light of the heavy weight of the sand-filled hamper, the obvious force it generated in the three to four foot fall from the forks of the forklift, and the absence of any brace or other Labor Law §240 device securing the hamper to the forklift, plaintiff has demonstrated, as a matter of law, that Labor Law §240(1) was violated (citations omitted). In opposition, Miron has failed to demonstrate the existence of a factual issue with respect to whether section 240(1) was violated. This finding, however, does not end the inquiry, as Miron also asserts that it may not be held liable because it was not an owner, contractor or agent under section 240(1)."[87]

As to this final point, the Court found that "[t]he absence of proof of a direct contractual connection with the owner or general contractor weighs against finding that Miron was delegated any authority by the owner or general contractor." Thus, plaintiff's motion for partial summary judgment was denied.

Finally, on September 18, 2012, the Appellate Division, First Department, in Fabrizi v. 1095 Ave. of the Ams., LLC,[88] addressed, in a concurring opinion, the element of forseeability in all LL §240(1) cases as "an issue whose discussion ... is long overdue."[89]

Plaintiff, an electrician, was hired to overhaul a building's electrical system which required him to run a galvanized steel conduit up through the building's floors. The conduit on each floor met and abutted the conduit from the floors below and above and held together by compression couplings. On each floor, the conduit rose several feet and was connected and attached to a "pencil box" by a compression connector. As plaintiff was relocating a "pencil box", the conduit above where the "pencil box" had been was still attached to a compression coupling from the floor above. While drilling new holes for the "pencil box's" new location the conduit fell from its coupling above falling on top of plaintiff's hand causing injury. Prior to the accident, plaintiff had requested screw couplings to hold the conduits in place during this task which were never provided.

While agreeing with the majority in denying plaintiff's motion for summary judgment because there was an issue of fact as to whether a protective device was required for plaintiff to safely perform his duties and whether the defendant failed to provide such device, the concurring opinion focused on the aspect of foreseeability in all actions under the scaffold law.

> Absent a foreseeability requirement, then, we leave owners and contractors with no reasonable way to determine when the statute applies and therefore when they are required to provide the safety devices enumerated therein. After all, an accident cannot trigger the extraordinary protections of Labor Law §240(1) merely because it is gravity related (citation omitted). Otherwise, virtually every accident would fall within the purview of Labor Law §240(1), and defendants would never be able to forecast when safety devices are required.*** [I]t is beyond cavil that in cases pursuant to Labor Law §240(1) and, more particularly, as is the case here, cases involving injury by virtue of a falling object, the dispositive issue for purposes of the statute's applicability, is not as argued by defendants, whether an object falls from a permanent structure or whether it was at the time of injury the object was being hoisted or secured. Instead the pertinent and indeed dispositive inquiry is whether it was reasonably foreseeable at the outset that the task assigned to a worker exposed him/her to a gravity-related hazard, so that he/she should have been provided with one or more of the safety devices required by the statute.[90]

Whether future decisions by the trial and appellate courts will incorporate the element of foreseeability remains to be seen, for, as the court noted it "remains a point of contention in our very own department."[91]

CONCLUSION

Thus, we end where we began: Labor Law §240(1) has been and continues to be a statute that will yield differences of opinions between the courts at all levels regarding the nature of a worker's tasks that fall within the statute; the devices, if any, to be provided and used to protect the worker; the nature and degree of the elevation and height differentials, vis a vis the worker and the distance he or she falls or that which an object falls causing injury to the worker; and, now, whether foreseeability must be an element to be considered.

In all actions predicated on LL §240(1), it is incumbent upon the courts to make every effort to ensure that the "ultimate responsibility" to safely protect the workforce remains where it belongs, with the owners and contractors of the construction sites, as the Legislature intended.[92]

Barring further clarity of the statute by legislative amendment, the courts will continue to confront the "highly elusive goal of defining with precision the statutory terms"[93] of the ever-evolving "Scaffold Law."

[1] Hon. George M.Heymann is a former Judge of the N.Y.C. Housing Court and is Of Counsel to Finz & Finz, P.C.

This article is dedicated to retiring Court of Appeals Judge Carmen Beauchamp Ciparick for her major contributions to this body of law.

2 Temkin, New York's Labor Law Section 240: Has It Been Narrowed Or Expanded By The Courts Beyond The Legislative Intent?, 44 NYL Sch Rev 45 (2000), n.31
3 Id. n.38; 42; LL§240(1)
4 See, Rocovich v. Consolidated Edison Co, 78 NY2d 509, 513 (1991) [the legislative purpose behind this enactment is to protect "workers by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor' ( ), instead of on workers, who 'are scarcely in a position to protect themselves from accident'"]
5 Temkin, supra, n.47. Although not relevant to this article, the amendment further exempted architects and professional engineers "who do not direct or control the work for activities other than planning and design." LL§240(1)
6 LL §240(1), supra [FN3]
7 For additional comments on this subject, see NY PJI - Civil, Vol. 1B, §2:217 [Injured Employee - Action Under Statute Imposing Absolute Liability], pp 425 - 489
8 Rocovich v. Consolidated Edison, Co., supra [FN 4]
9 Id. at 513; In Blake v. Neighborhood Housing Services of NYC, 1 NY3d 280 (2003) the Court of Appeals noted that the words strict or absolute liability did not appear in the current statute or its predecessors. It was the Court that began to use that terminology in 1923 and its context here is different from its use elsewhere. Under these circumstances there must be a violation of the statute (i.e.: failure to provide protective devices) and that said violation was a contributing or proximate cause for the worker's injury.
10 Id.
11 Id.
12 Id. at 514
13 Id.
14 Id.
15 Id. at 514-515
16 Id. at 515
17 Ross v. Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 (1993)
18 Id. at 498
19 Id. at 500
20 Id.
21 Id. at 501
22 Id.
23 Id.
24 Rodriguez v. Margaret Tietz Center for Nursing Care, Inc., 84 NY2d 841 (1994)
25 Id. at 843-844
26 Misserritti v. Mark IV Construction Co., 86 NY2d 487 (1995)
27 Id. at 490
28 Id at 488
29 Id. at 491
30 Melo v. Consolidated Edison Co. of NY, 92 NY2d 909 (1998)
31 Id. at 911-912
32 Narducci v. Manhasset Bay Associates, 96 NY2d 259 (2001)
33 Id. at 266
34 Id. at 267
35 Id.
36 Id.
37 Id.
38 Id.
39 Id. at 270
40 Id. However, in Quattrocci v. F.J. Sciame Construction Corp., 11 NY3d 757, 758-759, the plaintiff was struck and injured by falling planks that were part of a makeshift platform used to facilitate the installation of an air conditioner over a doorway. There, the Court of Appeals held that the falling object liability under LL §240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured.
41 Wilinski v. 334 East 92nd HDFC, 18 NY3d 1 (2011)
42 Toefer v. LIRR, 4 NY3d 399 (2005)
43 Id. at 408
44 Joblon v. Solow, 91 NY2d 457 (1998)
45 Id. at 460 - 461
46 Id. at 464
47 Id. The Court defined "structure" for the purposes of LL §240(1) as "any production or piece of work artificially built up or composed of parts joined together in definite manner."
48 Id. at 465
49 Broggy v. Rockefeller Group, Inc., 8 NY3d 675 (2007)
50 Id. at 679
51 Id. at 681
52 Id.
53 Runner v. NY Stock Exchange, Inc., 13 NY3d 599, 603 (2009)
54 Id.
55 Id. at 604
56 Id. at 605
57 Wilinski v. 334 East 92nd HDFC, supra at 5
58 Id. at 7
59 Id. at 9
60 Id. at 10
61 Id.
62 Id. at 11
63 Salazar v. Novalex Contracting Corp., 18 NY3d 134 (2011)
64 Id. at 140
65 Id.
66 Ortiz v. Varsity Holdings, 18 NY3d 335 (2011)
67 Id. at 339
68 Id.
69 Dahar v. Holland Ladder & Mfg. Co., 18 NY3d 521 (2012)
70 Id. at 526
71 Oakes v. Wal-Mart Real Estate Business Trust, 948 NYS2d 748, 2012 NY SlipOp 05694 (A.D., 3rd Dept.)
72 Caher, Parsing Recent Precedent, Panel Declines to Apply Gravity Liability, NYLJ, 7/20/12
73 Oakes, supra at 755
74 Id.
75 Toney v. Raichoudhury, NYLJ, 7/31/12 (Sup. Ct., Kings County)
76 Id.
77 Cappabianca v. Skanska USA Building, Inc., 950 NYS2d 35 (A.D., 1st Dept.)
78 Id. at 41
79 McCoy v. Abigail Kirsch at Tappan Hill, 2012 NY SlipOp 06128
80 Id.
81 Britez v. Madison Park Owner, NYLJ, 9/13/12
82 Id.
83 Rodriguez v.D&S Builders, LLC, NYLJ, 9/14/12, 26:1
84 Id.
85 Rivera v. Fairway Equities LLC, NYLJ, 9/18/12. Fairway and several other defendants did not appear in this action and default was taken against them in an order dated June 1, 2009.
86 Id.
87 Id.
88 Fabrizi v. 1095 Ave. of the Ams., LLC, 2012 NY Slip Op 06182 (A.D., 1st Dept.)
89 Id.
90 Id.
91 Id. See, Letters to the Editor, Foreseeability and Labor Law §240(1) by David H. Perecman, Chair of the Labor Law Committee of the NYS Trial Lawyers Association, (NYLJ, 9/27/12, p.6, col.4), in which he states his opposition to the inclusion of the element of foreseeability in Labor Law §240(1) cases ["...the imposition of a foreseeability requirement runs counter to and will serve to defeat the guiding principles behind §240(1). *** [T]o actually graft on to the statute a concept like what is reasonably foreseeable would eviscerate the statute and create havoc."]
92 Rocovich v. Consolidated Edison Co., supra at 513
93 Joblon v. Solow, supra at 460 - 461

Fifty Years of Family Court

(Continued from page 5)

the surroundings, the Queens courthouse is "one of my best operations."[8] She did not provide an explanation as to why Queens was best nor how the children involved in other proceedings could be subject to the "inhuman physical surroundings."[9]

As a result of the new law and the publicity surrounding the law, Judge Kelley reported that there had been an "outpouring" of child abuse cases. She estimated there were about five times more cases reported in 1969 than in 1968 the year prior to the act.[10]

There were 111 child abuse petitions filed in July of 1969 — one month after the law went into effect— she could not compare to July, 1968, because prior to the new law no separate records were kept for abuse cases. What was known, however, was that the Bureau of Child Welfare Registry, the division of the Social Services Department which handled child abuse complaints, reported that 78 complaints were reported in July 1968 — compared with 184 complaints in July 1969. Judge Kelley said of these numbers "it scares us because it means we're still only hitting a few of them ... It means there are an awful lot of people abusing children ... the 111 doesn't represent the number of children abused, just those who get to a responsible person."[11]

In order to give some perspective to the numbers of child abuse filings in 1968-69, consider that in 2007, The New York Times reported that Child Protective Services (CPS) investigated more than three million cases of suspected child abuse.[12]

Records are now kept better, due to the 1974 child abuse prevention and treatment act, a federal law designed to encourage more thorough and accurate reporting and record keeping in child abuse cases. CPS offices now exist in every county in New York State, paid for in part with federal funds.[13]

Researchers in 2007 investigated the records of 595 children nationwide, ages 4-8. There were 164 children in the study that had families that had been investigated. The study considered factors such as social support, family functioning, poverty, caregiver education and depressive symptoms, and child anxiety, depression and aggressive behavior. The researchers were not able to find any differences in the investigated families versus the non-investigated in any of these factors. The one exception was that maternal depressive symptoms were worse in households that were visited.[14]

The lead author of the study, Dr. Kristine A. Campbell, a professor of pediatrics at the University of Utah said "as a pediatrician... I need them. But we have to look at other systems that can really create a safety net for these children." Dr. Campbell said "I don't believe CPS has outlived its usefulness, ... The problem is that someone needs to continue working with these families ... CPS deals with acute issues. We don't know how to deal with what remains." Dr. Campbell's study appeared in the October, 2007, issue of the Archives of Pediatrics and Adolescent Medicine.[15]

The new law in 1969 which mandated the special abuse part, also expanded the people who might originate child abuse proceedings to include doctors, nurses and other hospital personnel as well as welfare workers and teachers. It also added to the old definition of an abused child. Prior to 1969, an abused child was a child under 16 who had serious physical or mental injury inflicted upon him by other than accidental means. The 1969 law heralded a new era in the child abuse field as the abused child was now also a youngster under 16 "who is in the care or custody of a parent or other persons who has been adjudicated a narcotic addict." [16]

Judge Kelley called the expansion of persons who report child abuse cases "one of the best parts of the law." She also said that "since the new act, judges have the tendency to remove a child from the home where abuse is suspected quickly ... you do the preventive thing first."[17]

Judge Florence Kelley was reported as being obviously pleased with the new method for handling child abuse cases. She was quoted as stating "Wouldn't it be wonderful if all cases were handled like these?"[18] After 50 years of trials and tribulations in the many child abuse parts that came to be in the Family Court, there are still a lot of people pondering the answer to this question.

As our story moves on, the seventies continued and with it the modern women's rights movement. Title IX of the education amendments of 1972 was signed into law by President Richard M. Nixon on June 23, 1972.[19] The new law provided that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."

A few days later, on June 28, 1972, The New York Times reported in the metropolitan briefs column that Mayor John Lindsay had officially opened the "new" Queens Family Court, housed at 89th Avenue and Parsons Boulevard — in a building formerly occupied by the Queens Borough Public Library, which had vacated the building back in 1966 — and the Mayor told the Judges attending the ceremonies that he was awaiting a report from a study commission on how much their $31,750.00 salaries should be raised.[20]

The girls' ascent onto school playing fields, including school tennis courts commenced changes that would be seen thereafter in all the other courts — including the Family Court. As women arrived as regular players in the operation of the Family Court, they found institutionalized laws such as the 1969 child abuse law. It was a law that called for more and more state intervention into the life of the family. Women became accepted as lawyers and judges and as such became the state interveners into the private life of the family.

The changes which would result, from the changes Mr. Dickens proposed, were unforeseen. Family Court is now writing the sequel to Charles Dickens, case by case, as to how we should be responding to these further changes in the way in which government may pierce the veil of the family.

The Family Court also continues to wrestle, on a daily basis, with the question of what is a family. Many child support and child custody laws have had to be written, rewritten and reinterpreted to accommodate the very modern game of musical chairs of consecutive and even concurrent sexual partners we now accept as a manner by which a new generation is being born. Now if a man becomes a father to two children in the same month and year by way of sexual relationships with two different women, contemporaneously, we address protecting the children by determining child support orders and seating at the Thanksgiving table by ways of custody orders. This may or may not be the kind of protection of children that Dickens was seeking. It is too late to ask him. We can, however, ask ourselves, Is it "wonderful" that we have child support laws to help us sort out how to finance the children of the first, second or even third relationship? Is it "wonderful" to have Custody laws to help us determine where the kids should eat Thanksgiving dinner? And, of course, the final jeopardy question, first posed by Judge Kelley, "Wouldn't it be wonderful if all cases were handled like these?"[21]

The study of family history has shown that family systems are flexible, culturally diverse and adaptive to ecological and economical conditions — as well it can be argued that the 50 year history of the family court also shows us that the Family Court has also shown itself, time and time again, to be flexible, culturally diverse and adaptive to ecological and economical conditions — after some trials and tribulations.[22] The laws that came to be in the Family Court have changed the family more than Dickens could foresee, and definitely much more than the any possible effect of the cancellation of Father Knows Best.

Next: A Family Court Super Star!

Meryl Kovit regularly practices before the Family Court. She wants to thank Briana Hart and Julia Gonikman, Stony Brook University students, for their help in researching this article.

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21 Supra, Ferguson. Quoting Judge Florence Kelley, 1968.
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Eulogy by Kevin Sampson

(Continued from page 3)

that if he could convince people that his rice pudding was any good then he could convince people of anything!

Larry attended Fordham University, then law school at City University of New York and was admitted to the bar in 1991. Soon afterward, as his Uncle John was not feeling well and needed assistance at his home, Larry called me and asked me to go with him and meet the female doctor interviewing for the position. In February, 1994, Larry married that lovely woman. It did not escape me that Larry never called again to go with him to visit his Uncle John.

Margaret Cullen was the love of his life and fulfilled all his dreams. As his nephew Frank so eloquently said last night, "It was her devotion to him that allowed Larry to be so devoted to us." Larry and Margaret were together for eighteen years and were blessed with two children. First, Anya appeared on the scene and a couple of years later, Patrick came along. Often, and as recently as last Tuesday, he told me how proud he was of you both - your intelligence and independence, your ability to deal with adversity, your desire to remain altar servers, and the kindness and love you show your mother. You were always in his heart. As you would think, he had high expectations for the both of you and he was so very proud of how frequently you exceeded those high expectations.

Larry was a man of immense faith .and a leader here at St. Andrew's parish. He was generous with his time and talent, attended weekly Mass and assisted the parish school. He was instrumental in bringing the Knights of the Holy Sepulchre to the parish and attained the rank of Knight Grand Cross, the highest rank attainable by a lay person. The Knights are responsible for the building of schools and hospitals and supporting the Church in the Holy Land. Being a member was part of who he was, a lover of history with practical benefits to those in need.

Larry's life was the fulfillment of the American dream. He knew what it was like to live at the Flushing YMCA and, conversely, to design and own a lovely Tudor home on the other side of Flushing. He had a marvelous mind and a great vocabulary and, on his worst day, could finish the NY Times crossword puzzle. Larry was a man with opinions who would speak his mind. He was a loving man who had a passion for life. He loved his Roman Catholic religion, his Irish heritage, his Marine Corps. He loved being a man of the law. And above all, he loved his beautiful wife and caring children. As Anya reminded me, Larry would never say "good bye" but would always say "so long." He was loved and cherished and will be sorely missed.

To my friend Lawrence:
May the road rise to meet you,
May the wind be always at your back,
May the sun shine warm upon your face,
And the rain fall softly upon your fields
And until we meet again,
May God hold you in the palm of his hand.

Answers To Marital Quiz on Page 7

Question #1 - May the court award child support in accordance with the CSSA Guidelines and order the payer spouse to pay the mortgage on the marital home where the child resides?

Answer: No, this is an award of a double shelter allowance for the child. *Harris v. Harris* 2012 NY Slip Op 5389 (2nd Dept.).

Question #2 - Can the refusal to file a joint income tax return be found to be marital waste?

Answer: Yes, *Levitt v. Levitt* 2012 NY Slip Op 5393 (2nd Dept.).

Question #3 - Are siblings permitted to commence a proceeding to seek visitation with a whole or half brother or sister?

Answer: Yes, *Matter of Alexandra D. v. Santos* 2012 NY Slip Op 5634 (2nd Dept.).

Question # 4 - In question #3, if the petitioner is a minor, is his or her attorney authorized to file the petition for his or her client?

Answer: Yes, *Matter of Alexandra D. v. Julianna Santos* 2012 NY Slip Op 5634 (2nd Dept.).

Question #5 - Is a substantial reduction in father's visitation with the parties' child a substantial change of circumstances warranting an increase in child support?

Answer: Yes, since the amount of money the father was required to spend on the child was significantly reduced. *McCormick v. McCormick* 2012 NY Slip Op 5530 (2nd Dept.)

Question #6 - May the court award temporary maintenance in accordance with the formula set forth in DRL §236(B)(5-a) and direct the payment of carrying charges on the marital home?

Answer: No, *Woodford v. Woodford* 2012 NY Slip Op 7993 (2nd Dept.)

Questions #7 - Can the trial court award appellate counsel fees?

Answer: Yes, *Franco v. Franco* 2012 NY Slip Op 5721 (2nd Dept.)

Question #8 - Is the trial court permitted to order a lump sum distributive award, if all of the marital assets are non-liquid?

Answer: No, the trial court must order the distributive award in installments *Iarocci v. Iarocci* 2012 NY Slip Op 6191 (2nd Dept.)

Question #9 - When the court orders a distributive award in installments, what rate of interest should it order?
Answer: The legal rate, 9%. *Iarocci v. Iarocci* 2012 NY Slip Op 6191 (2nd Dept.)

Question #10 - The wife obtains an annulment based upon husband's bigamy. During their purported marriage, the husband satisfies a criminal judgment for failure to pay child support to his first wife, whom he remarried. Is the wife who obtains the annulment entitled to be reimbursed by husband for 50% of the criminal judgment he paid to the first wife?

Answer: Yes, *Levenstein v. Levenstein* 2012 NY Slip Op 7090 (2nd Dept.)

Eulogy by PJ Kelly

(Continued from page 3)

of about $150.00 which the client was inclined to accept. Larry counseled the client to reject the offer and insist on a trial. When the client protested that, if they were unsuccessful, the fine would be greater and that he could not afford it, Larry responded "Don't worry, if somehow we lose, I'll pay it." When I asked Larry what he would have done if jail time had resulted he broke into a laugh and said "Yeah ....that would've been a problem." But he immediately turned serious and said "But I knew the guy was lying."

Ultimately his client was acquitted, Larry got his records expunged and all was fine. But to me, that incident was indicative of how Larry practiced law and lived his life. Trust and Honesty were the hallmarks of his career.

It was not by accident that Larry was continuously appointed as a Guardian-ad-Litem, Guardian, Special Military Attorney and Court Examiner. These are roles that require vigilant representation of persons incapable of protecting their own interests, or as oversight of counsel or others who were - supposedly- fulfilling this role.

Larry's background and life experiences uniquely suited him for these roles. Working from the time he was 13, in different jobs with widely various ranges of responsibilities, enabled Larry to gain the trust of clients and wards who were victims of various societal ills and, as a result, were naturally hesitant of others. Yet, he was also able to easily navigate the halls and offices of the city's most prestigious law firms and turn those attorneys, even if first adversaries, into friends.

That was just the way the world worked for Larry: His common sense approach to problems, his ability to treat everyone equally, and his practical knowledge of many fields enabled him to achieve solutions that served his clients and other counsel well. His decency, forthrighteousness and good natured persona struck a chord in everyone.

He also viewed his time as a member of the Queens County Bar's Judiciary Committee as a stellar part of his career. Larry saw his role as a defender of candidates from unwarranted attacks; especially those coming from people from "outside of Queens." Many judges sitting here today owe Larry a huge debt of gratitude for his efforts in spearheading the defense of their judicial qualifications which were, in fact, as Larry saw it, simply smokescreens for personal biases or grievances of particular individuals.

Yet, regardless of all of his successes as an attorney, Larry was BORN to be a judge. Apart from time spent with Margaret, Anya and Patrick, Larry was happiest when he was at the courthouse utilizing his talents in the Guardianship Part.

A more perfect match of a person's talents and temperament with a job's requirements would be impossible to find. He could disarm the most vexatious litigant or attorney with his charm; he could relate any strange factual circumstance of a case to a similar incident from his experience ....and then personalize the matter for the litigants; he was obvious in his concern for the welfare of the parties in the matters before him; and he was extraordinary in his ability to perceive malfeasance or neglect and was unceasingly vigilant in protecting the interests of incapacitated individuals.

He was also an exceptionally hard worker, someone who never failed to put every ounce of effort he could muster into resolving the matters that appeared before him. And, as is so often the case, when you lead by example you are - as he often acknowledged to me - blessed in having a chambers and court room staff that shared his work ethic.

One of Larry's permanent, but little known, contributions as a judge was as an advocate for the creation of the Veteran's Court. Larry worked tirelessly with Judge Lippman and other administrator to ensure this vision became a reality. True to form, when the announcement of the creation of the court was to be made and Larry, along with others who were instrumental in seeing this dream come to fruition, were given invitations to speak at a ceremony, he declined to be a headliner.

Instead, he opted to send a heartfelt letter to Judge Lippman, thanking him for helping ensure that veterans who had served our country and subsequently became involved in the legal system due to the stresses they encountered, received help and treatment for their emotional and physical disabilities with the dignity they deserve.

And, whether you are a clerk, court attorney, court reporter, court officer, judge or janitor, I can safely say you will NEVER, EVER, have a colleague as kind, as caring, or as genuine as Larry Cullen. There is not a person present who has not been touched by his concern, his wit, or his wisdom.

No matter what the day entailed Larry always had time for a cup of tea, a snack and a story. Inevitably, though it would be during the busiest time of your day.

Those of you who own dogs know how they have a knack of finding the busiest part of the house and lying down on the floor right in the middle of everything. Well, Larry humanized this trait.

The conversation would go like this - I'd be told Judge Cullen was calling, and I'd pick up.

"Hey it's me. Come on down I have a story to tell you."

"Um...ok. Just in a bit; I'm in the middle of something ...."

"Ok. I'll come up."

However, just as inevitably, these moments proved to be the absolute best part of the day. And if it wound up that you had to stay late or take some work home - so be it. It was a small price to pay for such a wonderful benefit.

So Larry, my dear friend, it is safe to say that we will all miss you very much and that the Queens County Courthouse will never be the same.

But, we owe you a debt of gratitude for permanently enriching our lives with valuable memories of a great friendship, spirit, and for a life well lived that we can all seek to emulate.

God Bless you Lawrence.

Family Law Update

(Continued from page 1)

income to be considered initially, up to the then $500,000 cap, was gross income. This is no surprise, since that is precisely what the statute says. But the husband had argued that cash flow or net income should be the basis of the calculations. He earned about $800,000 and the wife was charged with $60,000. The result was that the motion was remanded for reconsideration, inasmuch as the court did not discuss any of the statutory factors, including those in play relative to the husband's income above the then $500,000 cap (now $524,000). In the discussion, the court did rule that the statute was intended by the legislature to make the temporary maintenance award inclusive of all of the wife's needs, including housing. Accordingly, just tacking the mortgage payments onto the husband's obligation was a deviation from the statutory scheme. Although the court said that may well have been appropriate, such a conclusion had to be supported and explained within a discussion of the requisite statutory factors.

While there have been several carefully considered and well written decisions on this topic, during the year, one seems particularly worthy of comment:

E.J.L., II v. K.L.L., 950 N.Y.S. 2d 626 (Supreme Court, Monroe County, March 16, 2012)

This lengthy decision is one of many, which establish the inappropriateness of applying the much criticized "presumptive" temporary maintenance guidelines. Here that was held to be unjust and inappropriate, since the award required by those guidelines would have transformed the husband from the monied to the lessmonied spouse. This was not a "big money" case - (rounding the numbers) with the wife earning $23,000 and the husband $83,000 annually in 2011. Their residence had a negative equity. The husband presented computations to establish that if he pays the child support established in a custody agreement ($11,700), his payroll taxes and the presumptive amount of temporary maintenance, the wife would have more income than the expenses she set forth in her Net Worth Statement, even though those expenses were subject to question. The parties' computations of the "presumptive amount" varied, but were both within the $17,000 to $19,000 range.

The court noted that the statute shifts the award from a needs based or *status quo* based analysis to one based on income alone. After a lengthy discussion of the legislative history and a few lower court decisions, this court concluded that the two decisions it reviewed held that it was inappropriate to disturb the presumptive award solely because "it was simply too much money." But this court's expressed view was, first, that in order to perform its mandate, to determine whether or not the calculated award was unjust or inappropriate, it was not required to analyze the 17 factors enumerated in the statute and second, that "the court still has the discretion to determine that the award is 'unjust or inappropriate' based upon any factor it deems apropos and that the 'sheer size' of the award or the fact that the award constitutes 'a resource shift' among the parties is a sufficient justification." Stated another way, this court said that notwithstanding the attempt to streamline awards and generate greater consistency, the legislature "did not intend to handcuff judges in deciding a 'just and appropriate' amount of temporary maintenance."

The court calculated that under the presumptive award, the husband would wind up with "net available resources of $41,388" and the wife with $48,886, although as a matter of law she is the less-monied spouse for calculation purposes. The numbers were interpreted to leave the husband with insufficient funds to cover his own expenses. The court believed that it was never the intent of the legislature that the "presumptive award" would so alter the economic status of the two parties, as to transform who was the monied and who was the less-monied spouse. So, while acknowledging that some other courts have not considered such a status shift to be an independent basis upon which to modify the presumed award, this court held that the catch-all factor, (q) "any other factor which the court shall expressly find to be just and proper," allows the court to make a blanket rejection of the calculation because it is simply too much money. Yet, the very next sentence is: "The financial resource shift, in and of itself, is not a basis for the court to re-write the intent of the statute." In considering the enumerated factors, the court properly observed that "Most of the statutory factors are irrelevant at this stage because the court has few undisputed facts on which to advance a judgment. There is little evidence of the standard of living of the parties established during the marriage." The lack of evidence of numerous other factors was recounted, and it was noted that other courts have criticized the legislature's use of these criteria at such an early stage of the case.

After a detailed discussion of the facts that were available, the court concluded that the legislative intent clearly dictated there should be some amount of temporary maintenance paid. The wife emphasized that the child support agreement was a substantial deviation from the CSSA guidelines ($11,700 rather than $19,718). But that same agreement set forth a mutual agreement that the CSSA guidelines would be unjust and unfair, and committed the husband to pay 100% of extra-curricular activities and to have the children with him 50% of the time, leading the court not to consider that point in assessing appropriate temporary maintenance. The court was not about to revert to an amount that would merely "tide over the needy party," since the guidelines were enacted to obviate such an underlying objective. That was also made clear in the *KHAIRA*, Appellate Division decision, *supra*. After making unusually painstaking reviews of the computations in other decisions and of the numbers involved in the case at bar, the court determined an amount it believed would enhance the wife's lifestyle while preserving the husband's status as the more monied spouse. Whereas the parties' calculations resulted in an annual presumptive guideline amount of between $17,000 and $19,000, the court awarded $10,000.

The court also commented that it was "forced to analyze, in perhaps greater detail than it had ever previously" the factors and effects upon the family finances, even on a temporary basis. The discussion of the temporary maintenance issue took almost 10 of the 12 pages of the printed decision, and obviously took a very substantial time to put together. The decision is a testament to a judge, who recognized the significance of his decision upon real life people, and took the time to do the "reality test" and do what appeared to be "right." While we doubt that the legislation will be scrapped in its entirety, most courts were able to do the same thing, pre-legislation, in far less time, by the use of sound discretion and with no need to deal with an inordinate amount of criteria, computations and extensive decision-writing. We can only hope that after some clarifications from the appellate courts, a report from the Law Revision Commission and eventually, some corrective legislation, the law will be vastly improved, as it needs to be. However, most of those close to the process have concluded that the political reality is that we are going to wind up with some permanent maintenance and maintenance duration guidelines. We wait with bated breath and considerable trepidation!

DRAFTING ALERT!

SCHNEIDER v. SCHNEIDER, 98 A.D. 3d 732, 951 N.Y.S. 2d 30 (App. Div. 2nd Dept. Aug. 29, 2012)

There are important lessons to be learned from this cited Appellate Division decision. If this case does not suggest an inequitable result to you, then at least it should serve as a warning, in terms of drafting both agreements and motions.

Here the parties (referred to as H for husband and W for wife) entered into an agreement in 2005, pursuant to which the W became the primary residential parent of the parties' two children. 4 years after the parties' divorce, the younger child moved from his mother's residence into his father's. The H then made a motion in Supreme Court, to modify the child support provisions, so as to require the W to pay child support for the child who was then residing with him full time, pursuant to the CSSA. A Cross-Motion was made for various child support arrears.

At first blush, this appeared to us to be a "no-brainer", a clear case for the requested modification. But the H's motion was denied both in the Supreme Court and in our Appellate Division. We get only two relevant statements from the court: first, the conclusory pronouncement that the H "failed to demonstrate that the stipulation should be modified to adjust the parties' respective child support obligations so as to require the W to pay the H child support" for the child living with him. That was followed by this language: The H "did not claim that the younger son's change of residence was an 'unanticipated and unreasonable change in circumstances' or that the boy's needs were not being met," citing *BODEN v BODEN*, 42 N.Y. 2d 210 and *BRESCIA v. FITTS*, 56 N.Y. 2d 132, *inter alia*.

Assuming that the original agreement contained a "survival clause," although not specified in the decision, then it is true that the Court of Appeals decision in *BODEN*, *supra*, requires a showing of an "unanticipated and unreasonable change in circumstances" before the agreement can be modified. We have also known for a long time that an alternative justification for the modification of child support in a surviving agreement was to establish that without a modification the child's needs would not be met, as established in *BRESCIA*, *supra*. The change of a child's residence from one parent to the other, in our opinion, should almost automatically qualify as an unanticipated and unreasonable change of circumstances. If the H is now providing food, housing, clothing and other necessaries for the boy, why should he be paying child support for that child to his ex-wife? The result certainly appears to be inequitable. But there are two lessons to be learned. First, the agreement could have provided for this eventuality. At the very least, in the definition of "emancipation" most drafters include the permanent removal of a child from the payee's residence as an emancipation event. In this case, that may not have automatically entitled the H to receive child support, but it would certainly have enabled him to avoid having to pay out support after the child moved from his mother's residence. Of course, a specific provision as to what would happen when and if a child moves from one parent to the other, would have saved the day and a whole lot of litigation.

The second lesson relates to the motion itself. Clearly, when seeking to modify a surviving agreement, one must allege and prove one of the prerequisites set up by the *BODEN* and *BRESCIA* decisions, *supra* - either that there has been an *unreasonable and unanticipated change of circumstances* or *that the child's needs cannot be met without a modification*. If the H's attorney did not make that claim, then the papers were clearly deficient. The "magic words" should have been used. However, courts have very often declined to exalt form over substance, and here the court could easily have afforded the H relief, interpreting the facts of the case to establish the necessary "unreasonable and unanticipated change of circumstances." Here, the only relief given was to reduce the child support arrears by $1,680 based upon a failure of proof of some items ... not much of a result after the husband's paying for the motion and a full appeal!

UNANSWERED QUESTION

PELCHER v. CZEBATOL, 951 N.Y.S. 2d 288 (App. Div. 4th Dept., Sept. 28, 2012) In this decision, a wife, whose mother had given her a $150,000 gift, put the money into her own checking account and used it to buy the parties' marital residence. Despite the fact that the house was bought in both parties' names, as tenants by the entirety, the Court found no intent to make a gift of any of that separate property to the husband, and accordingly, gave the wife credit for the full amount of separate property, contributed to the acquisition of this marital asset. There are many decisions going the same way. The unanswered question (based upon the decision only) in this case is procedural. The decision reflects that the question of this credit was raised in a pre-trial motion that was decided in the wife's favor. But the decision reports that the W died, and her executor-mother was "substituted as the plaintiff." If there had not been a final divorce by the time the wife died (and there is no suggestion that the action had gone that far), then why were this motion and the pre-trial decision not moot? It is well established that upon death a divorce action abates. Moreover, the husband would then be entitled to the entire residence, as a result of his survivorship right, assuming a tenancy by the entirety or joint tenancy. Until the divorce is finalized there can be no equitable distribution. Accordingly, upon reading the decision, it remained a mystery as to why this appeal was allowed to go to a decision, after the wife's death. We called the attorney for the wife and her estate, and were told that although there is no mention of it in the decision, the parties were in fact divorced, based upon a settlement agreement which left the division of house proceeds open, to be made pursuant to the Appellate Division decision, all before the wife's death. Mystery solved!

CHANGES IN QUEENS MATRIMONIAL PRACTICE

Last month a representation from the Family Law Committee met with Judge Weinstein and discussed changes that were going to be made starting in January, 2013. As a result a notice was sent to the Family Law Committee members by E-Mail, advising of the new developments. In order to inform other members of the Bar Association, who may have either missed the E-Mail or who are not members of the committee, it was decided that the entire notice should be re-printed here, and it follows:

Our Administrative Judge, Jeremy S. Weinstein, recently invited a small group of representatives from our committee, to discuss upcoming changes. We were told that due to continuing budgetary constraints, vacant judgeships not being filled and shortages of other supporting staff, the County was continuing to be asked to do more with less. Notwithstanding that, the Court is sincerely concerned with improving the operation of the Matrimonial Parts.

Starting in January, there will be some changes in the Parts. Judges Pam Jackman

(Continued on Page 16)

Family Law Update

(Continued from page 15)

Brown and Joseph J. Esposito will continue to operate their Parts. The majority of the inventory of Hon. Thomas D. Raffaele will be taken over by Hon. Leslie J. Purificacion. Judge Raffaele will preside over what is being called an 11 hybrid 11 part, where some of his current cases will be continued and some other matters, such as hearings, may be assigned in the future, in addition to his new Part's handling other types of civil cases. Hon. Rudolph E. Greco, Jr. will finish up the cases already before him, after which he will no longer be handling matrimonial matters. The IDV Part will continue to operate as before.

Referee Elizabeth Anderson and J.H .O. Stanley Gartenstein will also be available to conduct trials. The major procedural change will relate to the conduct of the Preliminary Conferences.

Referee Lisa J. Friederwitzer is being assigned the task of presiding over a new, centralized Matrimonial P.C. Part, which will conduct all P.C.'s which have not previously been scheduled before the matrimonial judges, thus freeing their time and hopefully, streamlining and making the P.C. process more meaningful and productive. It is going to be expected that we lawyers refrain from coming to the P.C.'s to more or less play a waiting game, not having yet completed Net Worth Statements or produced basic financial records, and expecting to have a schedule imposed at the P.C., which will only require later action. The intent and expectation is that the P .C.'s, which will be able to be scheduled sooner, and with staggered appearance times, will result in early agreements or orders for various issues, including support, parental access, etc. The court is not limited by the absence of any underlying motion, although it will be expected that pleadings are served, seeking various forms of relief. Temporary orders will be made to afford parties relief or partial relief in various areas, without long waiting times. But this means we have to be ready to cooperate with and prepare for the process.

Initially, the P.C.'s will be conducted (upon the filing of an R.J.I. requesting that relief or the filing of any pendente lite motion) on Tuesday, Wednesday and Thursday mornings, with attendance by attorneys and clients being mandatory. It is expected that complaints and answers will have been served and filed, with copies being made available at the P.C. Moreover, various other documents are expected to be filed and copies made available, as more specifically set forth in the Part Rules. The Preliminary Conference Order form will have to be filled out, as usual, and should be done insofar as possible before the conference begins. To facilitate this process, a copy of the P.C. Conference Order will be mailed along with the Order directing the Preliminary Conference. One adjournment may be granted as a result of the first appearance. But the plan is to have all preliminary orders, by agreement or court direction, made by the end of the second session, whereafter the case will be assigned a Compliance Conference date before one of the matrimonial judges.

Requests for adjournments must be made only by **E-Mail** to **QSMATPC@courts.state.ny.us**. A copy of the new Part Rules, while subject to change, is attached.

MATRIMONIAL PRELIMINARY CONFERENCE PART- Part Rules

Preliminary conferences shall be held on Tuesday, Wednesday and Thursday each week.

Preliminary conferences will be conducted within forty-five (45) days after assignment of the action.

CALENDAR

Calendar call is at 9:30 a.m., unless the matter is scheduled at a time certain. Please be prompt for all appearances. Defaults will be taken at 12:30 p.m.

APPEARANCES

Unless otherwise directed by the Matrimonial Preliminary Conference Part (MPCP) the appearances of Counsel, Plaintiff and Defendant are **MANDATORY** at all Preliminary Conference court appearances. Counsel are to submit two business cards to the MPCP.

PLEADINGS

Prior to the Preliminary Conference, all pleadings (Verified Complaint, Answer, Notice of Appearance, and Affidavit of Service) must be properly filed with the Office of the County Clerk. Courtesy copies of all pleadings are to be provided to the MPCP at the Preliminary Conference.

DOCUMENTS

Fully completed and acknowledged Net Worth Statements with required documents, including parties' recent pay stubs and W-2s, Attorney's Retainer Statements and Temporary Maintenance Guidelines Worksheets, are to be properly filed with the Office of the County Clerk ten (I 0) days prior to the Preliminary Conference date. Courtesy copies of all documents, including any pending motions or orders to show cause and prior and current Court orders from any and all courts, are to be provided to the MPCP at the Preliminary Conference.

PRELIMINARY CONFERENCE ORDER

Prior to the call of the Preliminary Conference calendar, counsel and/or self represented parties **MUST** complete the proposed Preliminary Conference Order to submit to the MPCP at the first appearance.

ADJOURNMENTS

Adjournments may be granted on a limited basis upon request to the MPCP. The MPCP will not grant adjournments of Preliminary Conferences beyond the forty-five (45) day period unless good cause is shown.

Communication with the MPCP will be accepted through ema il only at QSMATPC@courts.state.ny.us.

INTERPRETERS

Notification for Court Interpreter Services shall be made to the MPCP not less than five (5) business days prior to the first court appearance by **email** at **QSMATPC@courts.state.ny.us**. At the time of calendar call or check in, Counsel and/or Parties shall remind the MPCP that Court Interpreter Services are needed.

CPLR Annual Update

(Continued from page 1)

Metropolitan Transportation Authority are governed by Public Authorities Law § 1276, which states that the limitations period is one year. That seems clear enough, except that the limitations period is really a year-and-30-days. You see, the complaint in an action against the MTA must state that the claim has been presented to the MTA, which has neglected or declined to pay it for thirty days. That is read as a statutory stay of the action for thirty days, and by virtue of CPLR 204 (a) is not a part of the time within which the action must be commenced.[2]

Now, there is a similar waiting period provision in GML § 50-i (1), so you might conclude that the limitations period under that statute would be similarly extended, to a year-and-120-days. But you would be mistaken, since GML § 50-i (2) states that its provisions are applicable notwithstanding any inconsistent provision of law. Therefore, CPLR 204 does not apply, and the waiting period triggers no stay and no extension.[3] For good measure, GML § 50-i (3) states explicitly that nothing contained in the section shall extend the limitations period beyond the year-and-90-days of subdivision (1). Now what about the aforementioned Nassau County Bridge Authority? Its statute has the 30-day waiting period, carries a year-and-90-day limitations period, but says nothing about inconsistent provisions of law. Is that limitations period really a year-and-120-days?[4]

The Legislature has now acted to bring some consistency to this area. The "Uniform Notice of Claim Act"[5] provides for a consistent time for service of notices of claim (90 days after the claim arises), the form of notices of claim (as in General Municipal Law § 50-e), a central place for the service of the notice of claim (the secretary of state), and a consistent limitations period (a year-and-90-days, with no stay for presentment of claim). The Act first establishes the uniform practices, and then amends no less than 71 separate statutory provisions governing entities entitled to notices of claim, specifying the uniform notice of claim procedures and the uniform statute of limitations. It is a measure of the disarray of the notice of claim procedures that the Sponsor's Memo on the bill described the number of entities entitled to notices of claim as "large though uncertain," and that the general provisions of the Uniform Act are applicable to all of them, whether or not the specific statute applicable to a specific entity was amended in the Uniform Act. Apparently, even the Legislature couldn't find them all.

A significant number of governing statutes were not specifically amended, and some of the remaining ones may still retain quirks presenting traps for the unwary. One of the provisions of the Uniform Act is that the secretary of state's website will have a list of public corporations, authorities or other entities subject to notice of claim requirements, with any statutory provisions unique to each entity and suits against it. Remember, however, the general principle that errors in such postings or informational services do not serve to estop governmental entities from claiming the benefits of statutes as they actually exist. The specific statute must still be found and consulted. Care must also be taken to ascertain whether a notice of intention to sue is still required in addition to, or even in place of, the notice of claim. The Uniform Act replaces many of the notice-of-intention requirements with notices of claim, but it does not have a universal provision replacing *all* notices of intention to sue with notices of claim. PAL § 841, governing the Central New York Regional Market Authority, with its idiosyncratic requirement of both a notice of claim and notice of intention to sue, survived specific amendment by the Uniform Act. It would not be amiss to assume that the double notices are still required. Whether the notice of intention to sue can be served on the secretary of state, as can all notices of claim, is not addressed by the Uniform Act.

Herewith, a brief description of the general provisions of the Uniform Notice of Claim Act:

A new CPLR provision has been enacted, 217-a, which makes the provisions of GML § 50-e applicable to all entities entitled to a notice of claim, whether or not the specific statute governing the entity has been amended to say so. The notice of claim must be "served on such governmental entity within the time limit established by, and in compliance with all the requirements of section fifty-e of the general municipal law." Later provisions of the Uniform Act amend the GML so as to make the secretary of state the central delivery point for notices of claim throughout the state, as will be described shortly.

The new section also provides that the limitations period in all such cases shall be the longer of a year-and-90-days, or a different period prescribed in "any special provision of law." The section begins with the recitation "Notwithstanding any other provision of law to the contrary, and irrespective of whether the relevant statute is expressly amended by sections three through seventy-nine of the uniform notice of claim act. . . ," thus removing any extension of the limitations period due to waiting periods after presentation of the claim. The term "special provision of law" is not defined. Presumably it refers to the specific periods existing in specific governing statutes, and not the general provisions of the CPLR, which for both negligence and contract actions are always longer than a year-and-90-days.[6]

Excepted from the year-and-90-day limitations period are actions for wrongful death. The Uniform Act does not set a specific limitations period for these, which generally carry a limitations period of two years from the date of death. For entities governed by the General Municipal Law this is set forth at GML § 50-i (1). Public authorities and public benefit corporations are subject to Article 9, Title 11 of the Public Authorities Law, in which the two-year limitations period is set forth at § 2981.

The new CPLR 217-a concludes by stating that it is not intended to amend the court of claims act or any of its provisions.

CPLR 8301 is amended by renumbering the existing paragraph (12) as paragraph (13), and inserting a new (12), which makes taxable disbursements of any fees for service of notices of claim on the secretary of state under the newly-enacted GML § 53.[7]

GML § 50-e (3) is amended by adding a new paragraph (f), which sets forth that notices of claim may be served on governmental entity by delivery to the secretary of state, or his deputy or any person authorized by him, at the secretary of state's offices, in Albany or any other office, duplicate copies of the notice, with the fee. Service on the entity is complete upon delivery to the secretary of state. The secretary of state is thereupon required to send one of the copies to the entity by certified mail, return receipt requested. Note that this procedure for service is an alternative to any other statutory means of service which may be in the entity's specific governing statute, whether or not that

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statute is specifically amended by the Uniform Act.

GML § 50-e (5), governing applications for leave to serve a late notice of claim, is amended by adding a reference to service of the notice on the secretary of state.

A new section of the GML, § 53, is enacted, which sets forth that service of the notice of claim on the secretary of state may be made in lieu of service directly on a public corporation. The notice served on the secretary of state must contain the same information as a notice served on the public corporation, and

> "All the requirements relating to the form, content, time limitations, exceptions, extensions and any other procedural requirements imposed in such section with respect to a notice of claim served upon a public corporation shall correspondingly apply to a notice of claim served upon the secretary of state".

The secretary of state is to be deemed the agent for service of notices of claim on all public corporations subject to the notice of claim requirement. The secretary of state is required to designate an office for the service of notices of claim. All public corporations subject to the notice of claim requirement are required to file a certificate with the secretary of state designating the secretary as such an agent, and providing the name and address of the person or officer to whom the secretary of state is to send the notices received. The filing with the secretary of state must state the applicable time limit for service of the notice of claim, and if that time is later amended, there must be a new filing stating the new time limit. It is not clear why this is necessary, in view of the provision of the new CPLR 217-a harmonizing all such time periods with the 90-day requirement in GML § 50-e. Any failure of a public corporation to file with the secretary of state does not invalidate service of the notice of claim on the secretary. As noted above, the secretary of state is required to publish on the departmental website a listing of the entities entitled to notices of claim, with the address of the entity and any statutory provisions unique to the entity. To repeat, however, the listing might well contain errors, estoppel on the grounds of such errors is not generally available, and the careful practitioner would do well to check the actual statutory provisions in each instance.

The secretary of state is required to notify the public of the time, place and manner of service on him, by way of the secretary's website. The secretary is required to issue a receipt, with the date and time of receipt, an identifying number or name, and the embossed seal of the department of state. The rights of the public corporation to any defense based on the nature, sufficiency or appropriateness of the notice of claim, or objection to its timeliness, is not affected by the new provisions.

And oh yes, the fee. The secretary of state may impose a fee for service by delivery to the department of not more than $250, to be divided half-and-half between the secretary and the public corporation involved.

The balance of the Uniform Act amends many, but by no means all, of the statutory provisions concerning notices of claim against public entities. Of the provisions and entities mentioned above, for example, the Nassau County Bridge Authority has been brought into conformity, with the amendment of Public Authorities Law § 666-b to replace the notice of intention to sue requirement with a notice of claim, to be filed within the time limit of GML § 50-e, i.e., 90 days of the accrual of the action. So has the Triborough Bridge and Tunnel Authority, with the amendment of PAL § 569-a.

And now, back to the usual traversal of case law.

Appellate Practice

Siegmund Strauss, Inc. v East 149th Realty Corp., ___ NY3d ___, ___ NYS2d ___, 2012 NY Slip Op 07048 [October 23, 2012]

Paul v Cooper, 100 A.D.3d 1550, ___ NYS2d ___, 2012 N.Y. Slip Op. 07831 [4th Dept., 2012]

Smith v Town of Colonie, 100 A.D.3d 1132, 952 N.Y.S.2d 923 [3rd Dept., 2012]

The Court of Appeals here clarified the reviewability of intermediate orders on appeals from final judgment, allowing some orders to be reviewed where the Appellate Division had not. Recall that CPLR 5501, governing the scope of appellate review, provides that a non-final order which "necessarily affects" the final judgment is reviewable on an appeal from that judgment, providing that the non-final order has not already been reviewed by the court hearing the appeal. What it takes to "necessarily affect" a final judgment has been subject to differing interpretations in the commentaries, and the Court here adopted a broader interpretation than that accepted by the Appellate Division.

Last year's discussion of the Appellate Division opinion in this case[8] centered on a corollary of this rule, set forth in *Matter of Aho*,[9] that the right of direct appeal from an intermediate order terminates on the entry of final judgment. If the intermediate order "necessarily affects" the final judgment, it will still be reviewable on appeal from that final judgment. If not, the entry of judgment terminates the right to appeal, whether or not the aggrieved parties have substantial rights at stake and even if they have diligently pursued the appeal. Since the Appellate Division found that the intermediate order did not "necessarily affect" the final judgment, it not only dismissed the appeals from those orders pursuant to *Matter of Aho*, but refused to review them on the appeal from the judgment.

The dispute arose out of a failed business merger between the parties, for simplicity referred to here simply as "Strauss" (plaintiffs) and "the Rodriguezes" (defendants). The original agreement contemplated that the Rodriguezes would continue working at the premises involved in the business, and the dispute reached a head when Strauss changed the locks and excluded the Rodriguezes from the premises.

Strauss sued for a declaratory judgment that the Rodriguezes had no interest in the premises, and moved for a preliminary injunction excluding them. The motion was granted. The Rodriguezes then served pleadings asserting claims for fraud, conversion and tortious interference with contracts with various other entities, improper accounting and wrongful termination. Their pleadings denied the existence of a contract and asserted no claim for breach of contract. Strauss successfully moved to dismiss these claims, on the grounds that the Rodriguezes' claims really sounded in breach of contract, since the essence of the purported fraud claims was that Strauss entered into the merger agreement with no intent of performing it.

Strauss filed a note of issue. The Rodriguezes moved to amend their pleadings to assert claims for breach of contract, but the motion was denied, apparently as untimely. They filed a notice of appeal from this order, but neither perfected nor formally withdrew it, choosing instead to pursue an appeal from any adverse final judgment.

After a bench trial, the trial court held in favor of Strauss, declaring that Strauss was entitled to possession of the premises and that the Rodriguezes had no interest in it. The Rodriguezes now appealed from this judgment, asserting that the appeal brought up for review the prior orders dismissing their original pleadings and denying leave to amend.

The question was this: Did the intermediate orders "necessarily affect" the judgment, or not? If so, they would be still be reviewable on the appeal from the final judgment, if not, not. The Appellate Division adopted the approach suggested by Professor Siegel, that the question should be whether or not reversal of the non-final order would require reversal of the judgment.[10] If it would, then it "necessarily affects" the judgment, if not, not. Since the non-final orders here affected only the Rodriguezes' contract claims, and not the possession of the premises which was the subject of the final judgment, the court found that reversal of the intermediate orders would not require reversal of the judgment, and hence did not "necessarily affect" it. The intermediate orders were held not reviewable.

The Court of Appeals, however, found this approach too narrow. Where an intermediate order dismisses a cause of action or counterclaim, the question of whether it "necessarily affects" the final judgment should not turn on whether the reversal of the intermediate order would completely overturn the final judgment. The Court preferred the formulation in Karger's *Powers of the New York Court of Appeals*,[11] that the term includes the cases where the reversal of the intermediate order would require a modification of the final judgment, as well as its reversal. By eliminating the issues presented by the Rodriguezes' claims from the case, and hence from the judgment, the intermediate orders "necessarily affected" the judgment. The Court sent the matter back to the Appellate Division for further consideration.

Two Appellate Division cases decided in the immediate wake of *Siegmund Strauss* nicely illustrate the application of the newly clarified rule. In *Paul v Cooper*, a motor vehicle accident case, two pretrial orders were involved. The first granted plaintiff's counsel's motion to be relieved, and the second dismissed plaintiff's claim for lost wages. When the trial day came, plaintiff was unready to proceed, and the court found her in default and dismissed her complaint. On appeal from the resulting judgment, the plaintiff sought review of the intermediate orders relieving counsel and dismissing the lost wages claim. The Appellate Division found that the order relieving counsel did not necessarily affect the judgment, and that it was therefore not reviewable on the appeal from the judgment. The order dismissing the lost wages claim, on the other hand, eliminated the issue from the case, and hence did necessarily affect the judgment. It was therefore reviewable. In the event, the court found the dismissal of the claim not to be an abuse of discretion.

Necessary to the operation of the rule, however, is that there be an appeal from the final judgment. In *Smith v Town of Colonie*, a products liability case, the trial court had granted partial summary judgment, limiting the plaintiff's failure to warn claim based on the bill of particulars, and later denied leave to amend the bill. After a defendant's verdict, and subsequent judgment, plaintiff appealed from the order granting partial summary judgment. The Appellate Division recognized that the intermediate order necessarily affected the final judgment by eliminating issues from the case, and would have been reviewable on an appeal from the judgment. Since the plaintiff had neglected to appeal from the final judgment, however, the rule in *Siegmund Strauss* could not be applied. *Matter of Aho* remains good law, and therefore the right to direct appeal of the intermediate non-final order had ended with the entry of final judgment. The court declined to deem his appeal from the intermediate order an appeal from the judgment, and dismissed the appeal.

In re Weeks Woodlands Ass'n, Inc., v Dormitory Authority of the State of NY, ___ NY3d ___, ___ NYS2d ___, 2012 N.Y. Slip Op. 08175 [2012]; *affirming* 95 A.D.3d 747, 945 N.Y.S.2d 263 [1st Dept., 2012]

The Court of Appeals here affirmed, on review of submissions, an Appellate Division order dismissing an appeal as moot, even though all of the Justices on the First Department panel agreed that the construction was done in violation of the NYC Zoning Resolution.

When circumstances have overtaken a case, such that there is no longer an actual controversy before the court, the usual rule is to dismiss the case as moot. Otherwise, after all, the court would have to issue an impermissible advisory opinion.[12] There is a well-recognized exception to that rule, which allows consideration of an otherwise moot case where there are

> "three common factors: (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i. e., substantial and novel issues." [13]

In cases concerning whether ongoing construction projects should be allowed to continue (as against zoning or environmental challenges), there is an additional issue. If the court at *nisi prius* ruled in favor of continuation of the project, which was in fact completed before appellate review could show that the ruling was erroneous, is the appeal now moot or not?

In *Citineighbors Coalition v NYC Landmarks Preservation Com'n* and *Dreikausen v Zoning Bd. Of Appeals*, the Court of Appeals has recognized that, on the one hand, the extent to which the construction had approached completion is a relevant factor, and on the other hand, a "race to completion" should not be allowed to determine the mootness question.[14] In addition to the mere fact of completion (or near-completion), therefore the Court listed three additional factors in such cases. The most important is whether or not the construction's opponent sought provisional relief against the construction, such as by a preliminary injunction. The others are whether or not the construction work was done without authority or in bad faith, and whether or not the construction can in fact be readily dismantled without undue hardship. As the Court noted in *Citineighbors Coalition*, a rule that always allowed appellate consideration of the challenge even after completion of the project would place all the financial risks on the property owners and developers.[15]

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This case involved a zoning challenge to a hospital modernization project, which Supreme Court rejected in August of 2011. The court also denied the petitioners' application for a preliminary injunction. On appeal to the First Department, the petitioners did not renew their application for injunctive relief. By the time the matter reached a decision before the First Department, in May of 2012, a substantial amount of the work was complete, and the court found that it had not been done in bad faith and could not readily be undone. Hence, the exception to the mootness doctrine did not apply, and the appeal was dismissed as moot.

This was done in the face of a strong dissent, both on the mootness issue and the merits.[16] The majority stated that while it "would adopt the dissent's cogent analysis of the zoning issue" on the merits, the petitioners' failure to pursue injunctive relief from the Appellate Division allowed the construction to proceed and the matter to become moot. The majority noted at least six occasions when the petitioners would have been procedurally allowed to seek such relief, and failed to do so.[17] Petitioners' initial applications before the Supreme Court, first for a temporary restraining order and then for a preliminary injunction, were not sufficient to avoid their responsibility to press the applications before the Appellate Division. By failing to do so, the court viewed them as "complicit" in the continuation of the work to the point where it could not readily be undone. The court viewed it as incumbent on the petitioners to have acted to preserve the status quo at every stage of the proceeding. An excuse that a successful application for a preliminary injunction would entail an onerous bonding requirement was rejected in the Court of Appeals cases cited above, and was rejected by the Appellate Division. It was not the respondents' responsibility to essentially enjoin themselves if the petitioners did not seek to do so.

One word of caution concerning the precedential effect of the affirmance. The Court of Appeals went no further than agreeing with the dismissal for mootness. There is still no explicit approval by the Court of Appeals of the rule that opponents of construction projects must press their entitlement to provisional relief in the Appellate Division as well as in the courts of original instance. In *Citineighbors* the petitioners never sought injunctive relief, and so the issue of where they should have done so did not arise. In *Dreikausen* the petitioners in fact did seek a preliminary injunction from the Appellate Division, which was denied. The issue of mootness did not come up until the matter was in the Court of Appeals.

Arbitration

N.J.R. Assoc. v Tausend, 19 N.Y.3d 597, 950 N.Y.S.2d 320 [2012]

This is one of those cases where a nominal concurrence is in fact a dissent.

The ultimate question was whether Plaintiff's limitations challenge to the Respondent's counterclaims should be determined by the court as a threshold matter, or by the arbitrators. Determination of that issue posed an initial choice: was the arbitration subject to the Federal Arbitration Act or to New York law? The Federal Act presumptively leaves the issue to the arbitrators, while New York law normally allows an arbitration respondent to present the issue to a court. The party raising the limitations issue here, however, was not the arbitration respondent, but the initiator of the arbitration, seeking to bar the respondent's counterclaims as untimely. New York law in that context was unclear.

The case, then, presented a choice between choices: should the Court first choose which law governed? If federal law governed, the New York issue could be left to another day. Or, should it decide the New York question first? If the result was the same as under federal law, the choice of governing law could be left to another day.

The dispute was over the disposition of two buildings in New York City owned by a Tausend family trust, which were in turn acquired by the petitioner NJR. The partners in NJR were Ronald Tausend (80%), and his children Nicole and Jeffrey (20% each). The partnership agreement provided for both arbitration and the applicability of New York law. The buildings were acquired by NJR in 1985, and the purchase price of $1.9 million was based on an appraisal which excluded air rights as worthless. The same day, NJR sold one building's air rights alone for $1.75 million. Some twenty years later, NJR sold the land rights to that building for $10.25 million, and converted the other building into a condominium. The dispute arose when Nicole sought information concerning the sale of the property. Rebuffed by NJR and her father, she brought an Article 78 proceeding to obtain documents and an accounting. NJR demanded arbitration, Nicole unsuccessfully sought to stay it. Compelled to arbitrate, Nicole appeared and asserted counterclaims (which the opinion does not describe), and it is these which bring us to the issue. NJR commenced its own proceeding to stay arbitration of the counterclaims, on limitations grounds, which Nicole moved to dismiss, as properly asserted only in front of the arbitrator. Supreme Court agreed with Nicole and stayed arbitration of the counterclaims. The Appellate Division agreed with NJR and dismissed the petition to stay arbitration of the counterclaims, on the grounds that NJR had initiated the arbitration and had participated in it. The Court of Appeals affirmed the Appellate Division.

The FAA applies where the contract affects interstate commerce. Such contracts may contain a choice-of-law provision, but the wording is crucial. If the choice-of-law provision adopts New York law as to both "the agreement and its enforcement", then New York law applies to the threshold limitations question, but less explicit formulations will not be sufficient.[18] The parties here merely stated that their agreement was to be "governed by, and construed in accordance with, the laws and decisions of the State of New York," and thus did not unequivocally choose New York law on this issue. Assuming that the contract affects interstate commerce, the FAA would apply and the limitations issue would be for the arbitrators.

The Court chose not to determine the validity of that assumption, choosing instead to address New York law first. CPLR 7503(b) specifies that a petition to stay arbitration, specifically including one made on limitations grounds, may be presented by "a party who has not participated in the arbitration." NJR had of course initiated the arbitration, defeated Nicole's petition to stay arbitration, received Nicole's own petition to compel arbitration of the counterclaims and obtained its own order to stay arbitration of the counterclaims until the timeliness issue could be decided by the court. The Court of Appeals found this more than sufficient to invoke the rule in CPLR 7503(b) that court resolution of the limitations issue is not available to a party who has already participated in the arbitration.

The concurrence, by Judge Smith, disagreed with both choices in the majority's analysis. He would have addressed the threshold issue of the applicability of the FAA. He found that the partnership agreement at issue clearly involved interstate commerce, indeed international commerce. The partners of NJR reside in New York, Italy and California, and the purpose of creating the entity was to acquire Manhattan real property. That being so, the FAA clearly governed, making the discussion of New York law unnecessary. He also disagreed as to the majority's determination of New York law, finding that the mere fact that NJR initiated the arbitration of its own claims should not preclude it from seeking judicial resolution of the timeliness of Nicole's claims.

Article 78

Kahn v New York City Dept. of Educ., 18 N.Y.3d 457, 940 N.Y.S.2d 540 [2012]

McCarry v. Purchase College, State University of New York, 98 A.D.3d 671, 949 N.Y.S.2d 764 [2d Dept.,2012]

When a probationary employee of the NYC Department of Education is terminated, the availability of an internal review procedure established by a collective bargaining agreement and the Department's by-laws does not serve to delay the finality of the decision to terminate. The four-month limitations period therefore begins to run on the date of termination, not when the internal review is completed. The internal review is not an administrative remedy which must be exhausted prior to the employee commencing an Article 78 proceeding challenging the termination. Rather, it is simply an optional and alternative means of seeking redress.

The Court of Appeals had before it here two matters with similar facts. In each, a probationary employee had been terminated on the grounds of unsatisfactory performance. In each, the employee received a written statement stating unequivocally that her employment would terminate on a specified date. Each notice advised the employee that she had the right to seek review. In each, the employee pursued the internal review without success. In each, the employee commenced an Article 78 proceeding challenging the adverse determination within four months of the completion of the internal review, but more than four months after the termination date in the termination letter.

One of the employees (Kahn) had initiated the internal review a few weeks prior to the termination date, and the adverse determination of the review came down about 3 ½ months after the termination date. In the second case (Nash), the internal review process was considerably more protracted. It took 11 months for the reviewing committee to hold a hearing, and another two years for the superintendent to reaffirm the termination as of the original date.

In each case, the respondent Department of Education moved to dismiss the proceeding as time-barred, relying on the opinion of the Court of Appeals in *Matter of Frasier*.[19] *Frasier* did not involve a limitations issue. The probationary employee in *Frasier* had in fact been successful in pursuing the internal review, and the issue was whether or not he was entitled to back pay and benefits for the time between the termination date and his reinstatement. In holding that he was not, the Court held that the original determination was in all respects final and binding as of the termination date, and did not await the internal review to become effective.

Applying this rule to the cases before it, the Court concluded that the starting point for the four-month limitations period to challenge the termination must be the effective date, not the eventual end of the review. It follows, of course, that the employee need not await the determination of the review to commence an Article 78 proceeding challenging the termination. As the Court noted, the internal review can be quite lengthy (as happened to Nash here), and the employee should not have to wait it out before making his challenge. After all, during the review the employee is not in fact employed, is not being paid, and has no right to back pay in the event the review is successful.

The decision here was heavily dependent upon the fact that the employees were probationers, and the termination date was discretionary with the employer. Compare the result, therefore, with the *McCarry* case, where an assistant professor was notified that his contract would not be renewed. The limitations period for his Article 78 proceeding commenced on the date he was notified of the decision, and not on the date his existing contract ended by its terms.

Attorney and Client

Judiciary Law §§ 475 and 475-a have been amended to allow an attorney's charging lien to attach to awards and settlement proceeds received by clients through alternative dispute resolution mechanisms and settlement negotiations, whether or not a judicial proceeding has been commenced.

Disclosure

Matter of New York City Health & Hosps. Corp. v New York State Commn. of Correction, 19 N.Y.3d 239, 946 N.Y.S.2d 547 [2012]

The Court held here that there is an implied exception to the physician-patient privilege (CPLR 4504) where the New York State Commission of Correction seeks medical records in connection with its investigation into the death of an inmate at a health care facility not within the correctional system. The Commission is required through its statutorily created Medical Review Board, to make such an investigation pursuant to Correction Law § 47 (1)(a).

The inmate here had been incarcerated at a New York City facility, and was transferred to first to Elmhurst Hospital and then to Bellevue Hospital, where he died. The Commission issued a subpoena to Elmhurst Hospital to obtain the inmate's records. This motion was brought to quash the subpoena pursuant to CPLR 2304 by the Health & Hospitals Corporation, Elmhurst Hospital's parent agency. HHC asserted the physician-patient privilege on the inmate's behalf, as well as an objection under the Health Insurance Portability and Accountability Act (HIPAA). Supreme Court rejected the HIPAA argument, but accepted the privilege objection. The Appellate Division affirmed, on the grounds that there is no public interest exception to the privilege. In the absence of an express exception in the Commission's favor, its duty to investigate could not override the privilege.

The Court of Appeals disagreed and reversed. While there is no general public-interest exception to the physician-

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patient privilege, such an exception can be implied from the investigatory duties imposed on the Medical Review Board. Where an inmate dies in a correctional hospital, the Board is statutorily entitled to the relevant medical records. The Legislature could not have intended that the death of an inmate who happened to die in a non-correctional facility would be investigated less thoroughly than that of an inmate who died in a correctional hospital, merely because the non-correctional facility, or someone acting as the inmate's personal representative, would not waive the privilege. Moreover, the Board is expressly granted other powers which affect the interests guarded by the physician-patient privilege. Specifically, the Board is entitled to the report of any autopsy, and may even order its own, additional, autopsy. The effect of these powers shows that the protection of the records kept by a non-correctional facility, where those kept by a correctional facility would not be protected, would not serve the interests protected by the privilege as a whole.

Finally, the Court held that HIPAA did not prevent disclosure of the records. The HIPAA Privacy Rule allows disclosure of records required by law, including administrative subpoenas such as the one here.

Judgments

J. D'Addario & Co., Inc. v Embassy Indus., Inc., ___ NY3d ___, ___ NYS2d ___, 2012 NY Slip Op 07850 [2012]

Not for the first time, the Court of Appeals reminds contract draftsmen to be wary of liquidated-damages clauses. If the parties intend the sum of liquidated damages to accrue interest, the contract should say so, explicitly. Otherwise, the liquidated sum will be the entire damages, without the statutory accrual-to-verdict interest at 9%.

The contract dispute here can be simply stated. This was a real-estate deal, with the $650K down payment held in escrow in an interest-bearing bank account. The contract recognized that in the event of a Purchaser's default, the exact sum of damages would be difficult to compute, and so the down payment and accrued interest would be retained by Seller as liquidated damages, with that amount being Seller's sole remedy and Purchaser's sole obligation. Purchaser did default, and after a bench trial Seller was awarded the down payment, accrued bank interest, and another $200K in statutory interest. The Appellate Division viewed the question as one of discretion, holding that the award of interest was "improvident," and deleted the award of interest.[20]

The Court of Appeals affirmed, but not as a matter of discretion. In contract cases, CPLR 5001 (a) requires the payment of interest from accrual of the cause of action to the date of the verdict. Court of Appeals case law makes clear that the purpose is to compensate the wronged party for the loss of use of its money, whether or not the breaching party has obtained a benefit from it.[21]

By the terms of their contract, the Seller and Purchaser here had in effect opted out of the statutory interest scheme. The contract provided for the retention of the down payment and interest as the parties' "sole remedy" and "sole obligation." It specified that after the escrow agent paid over the retained sum, the parties were to have "no further rights" against each other. Parties are allowed to specify their own methods of computing damages, so long as public policy is not involved, and so the remedy the parties here established as exclusive must be enforced.

The Court adverted to *Manufacturer's & Traders Trust Co. v. Reliance Ins. Co.*, an interpleader action where was the successful claimant sought interest from the unsuccessful ones.[22] The Court held there that the unsuccessful claimants had no obligation to pay statutory interest, since they never possessed the winner's money and no money judgment was entered against them. The Court there expressed dismay that the parties had not provided for "meaningful" interest on the escrowed money, with the result that the successful claimant lost the use of its funds for four years with little or no compensation in the form of interest.[23]

The Court here repeated its concern, noting that if the parties really intended for the bank interest on the escrow to be sufficient, they could have said so and avoided this litigation (or, at least, the appellate portion of it). The language they did use, of course, eventually reached the same result.

There was a dissent, by Judge Graffeo joined by Judge Pigott, which would not have read the contract language as ruling out statutory interest. The dissent also pointed out that when Purchaser refused to consent to Seller's demand that the escrow agent be allowed to release the down payment and accrued interest, it "effectively restrained" Seller's access to its money. The dissent viewed this as a separate wrong, subject to statutory interest regardless of the contract language.

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1. PAL § 569-a
2. *Cruz v. City of New York*, 302 A.D.2d 553, 755 N.Y.S.2d 416 [2d Dept.,2003]; *Burgess v. Long Island R.R. Authority*, 79 N.Y.2d 777, 587 N.E.2d 269 [1991]
3. See, *Rutigliano v. Board of Educ. of City of New York* 176 A.D.2d 866, 866, 575 N.Y.S.2d 339, 340 [2d Dept., 1991], construing a similar provision in Education Law § 3813(2-b).
4. Public Authorities Law § 666-b. The same could be said for the Cayuga County Water and Sewer Authority, subject to PAL § 1199-oooo.
5. L. 2012, ch. 500, effective June 25, 2013
6. Note, however, that while an intentional tort such as assault normally carries a one year limitations period (CPLR 215), when the claim is against an entity subject to the year-and-90-day period, it is the longer period which controls. *See, Lewis v. Town of Richland*, 77 A.D.3d 1415, 910 N.Y.S.2d 332 [4th Dept., 2010] [assault]; *Ruggiero v. Phillips*, 292 A.D.2d 41, 739 N.Y.S.2d 797 [4th Dept., 2002] [libel]
7. Why do they insist on doing it this way? Any existing caselaw, treatises or other authority pointing to the existing paragraph 12 will now be pointing to something different. Why not simply add the new section as paragraph 13?
8. *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 81 A.D.3d 260, 919 N.Y.S.2d 1 [1st Dept., 2010]
9. *Matter of Aho*, 39 N.Y.2d 241, 383 N.Y.S.2d 285 [1976]
10. Siegel, NY Practice § 530, at 940 [5th ed]. To be fair, Professor Siegel suggested his rule only as as "not perfect, but helpful."
11. Karger, Powers of the New York Court of Appeals § 9:5, at 304-305, 311 [3d ed rev]
12. *Funderburke v New York State Dept. of Civ. Serv.*, 49 A.D.3d 809, 854 N.Y.S.2d 466 [2008]
13. *Matter of Hearst Corp. v Clyne*, 50 N.Y.2d 707, 431 N.Y.S.2d 400 [1980]
14. *Matter of Citineighbors Coalition of Historic Carnegie Hill ex rel. Kazickas v New York City Landmarks Preservation Com'n*, 2 N.Y.3d 727, 778 N.Y.S.2d 740 [2004]; *Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165, 746 N.Y.S.2d 429 2002]
15. *Citineighbors Coalition, supra*, 2 NY3d 727, 730
16. For those who find such things entertaining, there is a great deal of back-and-forth between the majority and dissent concerning just who is stooping to emotional appeals, just who is being disingenuous, whose arguments are mystifying, and whose blithely disregard the law.
17. 95 A.D.3d 747, 748 at fn. 1
18. *Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 253, 793 N.Y.S.2d 831 [2005], quoting *Matter of Smith Barney, Harris Upham & Co. v Luckie*, 85 NY2d 193, 202, 623 N.Y.S.2d 800 [1995], *cert denied sub nom. Manhard v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 516 US 811 [1995])
19. *Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 N.Y.2d 763, 530 N.Y.S.2d 79 [1988]
20. *J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 83 A.D.3d 1001, 921 N.Y.S.2d 550 [2d Dept., 2011]
21. *Spodek v. Park Property Development Associates*, 96 N.Y.2d 577, 581, 733 N.Y.S.2d 674 [2001]
22. *Manufacturer's & Traders Trust Co. v. Reliance Ins. Co.*, 8 N.Y.3d 583, 838 N.Y.S.2d 806 [2007]
23. *Manufacturer's & Traders Trust Co. v. Reliance Ins. Co.*, 8 N.Y.3d 583, 590

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