DEFENDANT

The Journal of the Defense Association of New York, Inc.

THE DEFENSE ASSOCIATION OF NEW YORK — April, 1993

PRESIDENT'S MESSAGE

By: James G. Barron

Today, I would like to extend to each of you an invitation to participate actively in the work of our organization. And the best way to do so is to become a member of one or more of our committees.

For the most part these committees are manned and chaired by members of the Board of Directors of our organization. However, it was never intended that membership in the committees should be limited solely to these persons.

Any member of our organization may serve on any committee by appointment of the President.

Article VI of the Constitution sets forth the guidelines for the committees.

Subdivision 1 of the article sets forth a complete listing of our Standing Committees. These are the committees we are required to have on an ongoing basis.

They are a diverse group and deal with such matters as legislation, the judiciary, education, and medical malpractice. These are all matters that are of concern to us as attorneys.

Subdivision 2 of Article VI provides for Special Committees. These are committees that are created to respond to particular needs that may arise at given points in time. At the present time we have committees dealing with the court crisis, trial advocacy and insurance coverages.

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PREINDEMNIFICATION REDUX

By: John J. McDonough*

(EDITOR'S NOTE: The regular review of recent cases of interest which appears in this column, Notitia, will not appear in this issue, but will run in the next issue, in order to provide an expanded analysis of the topic covered.)

The theory of preindemnification has been dealt with twice before in this journal. See "Preindemnification," by John J. McDonough, THE DEFENDANT, January 1991, and "Preindemnification and Insurance Coverage in Construction Site Accident Cases," by Richard Bakalor, THE DEFENDANT, September 1991.

The essence of this theory is that a policy of insurance procured for a promisee by a promisor is to be primary to all other forms of coverage and the acquisition of said policy acts to void any and all subrogation rights the promisee may have against the actual culpable party.

Since the above articles have appeared the Appellate Division First Department has further honed some of the issues presented by insurance procurement clauses in ancillary contracts. Many more issues, such as priority of coverages among existing and procured insurance have either been ignored or not presented for consideration. Clearly, this whole area should be one of intense interest to insurers who are now being put in a position, if they maintain the insurance that was procured for a promisee by a promisor, as to be

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*Mr. McDonough, editor in chief of THE DEFENDANT, is a partner in the Manhattan firm of Alio, Caiati & McDonough.

THE WAGES OF WIN

UNREBUTTED YEARNINGS YIELD LARGE AWARD FOR LOST FUTURE EARNINGS

By: Michael Majewski

In cases of serious permanent personal injury suffered by a low-wage earner, it is easy to underestimate the possibility of a very significant award for lost future earnings capacity—based on the hopes and aspirations of the plaintiff as opposed to actual employment history. Although lost future earnings are not calculated solely by reference to the actual earnings before injury, it has also been held that loss of earnings must be shown with reasonable certainty and not based on speculation. The issue of what a plaintiff needs to prove to establish lost future probabilities relating to career aspirations was the subject of two recent appeals which directly raised the issue of speculative earnings.

In **Cranston v. Oxford Resources,** 173 AD2d 757, 571 NYS2d 733, App. Den. 78 NY2d 860, 576 NYS2d 219, the Appellate Division of the Second Department affirmed the following verdict on damages: $500,000.00 for past pain and suffering; $350,000.00 for future pain and suffering; $51,000.00 for past lost earnings; and $625,000.00 for future lost earnings. Plaintiff was injured on July 17, 1985. She had graduated from secretarial school in June 1983. Plaintiff has been employed as a secretary, but on the date of accident, she was unemployed. Crucially important to plaintiff's case and to the Appellate Division's affirmance, was the fact that plaintiff had passed the medical, written and psychological examinations required to enter the 1986 class at the Police Academy.

It was uncontested that plaintiff never attended a single day of class, and never served on the police force. To the Appellate Division, it was extremely significant that plaintiff failed the final step prior to admission in the Police Academy, which admission would have entitled plaintiff to a salary. Plaintiff failed the "mini-medical" examination due to her injuries.

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COMMON LAW INDEMNIFICATION RELIEF FOR STRICT OR VICARIOUS LIABILITY

By: Glenn H. Shore, Esq.
Lester, Schwab, Katz & Dwyer

Legislation and significant decisions by the Court of Appeals in recent decades have created absolute or strict liability in many instances against parties who have committed no active wrong. Owners are held strictly liable for unsafe conditions during construction. Retailers are responsible for defects in products they sell. Vehicle owners, including rental companies, are liable for the negligence of permissive users.

In many instances, the parties strictly liable do not have the ability to secure a contractual provision indemnifying them for their strict or vicarious liability. They are not, however, without recourse. Common law indemnity, a much overlooked, ancient principle of American jurisprudence, provides such entities with a right of recovery for any vicarious or passive liability, as well as expenses and attorneys' fees.

Indemnity is defined as a right arising out of a contract, which may be express or may be implied in law, "to prevent a result which is regarded as unjust or unsatisfactory". **Prosser and Keaton Torts** § 51, **op. cit.** at 346 (5th ed.). New York's

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The Defendant, April 1993

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FEDERAL COURT IS DIFFERENT

By: Mark G. Barrett, Esq.*

Since law books are the tools of the trade for an attorney, a State practitioner who finds him or herself in U.S. District Court, must make sure the right "tools" are readily available. The six tools which are necessary for the completion of the task at hand in every U.S. District Court proceeding are as follows:

1) The Judiciary Act—Title 28 of the United States Code;
2) Federal Rules of Civil Procedure;
3) Federal Rules of Evidence;
4) The General Rules of the particular U.S. District Court;
5) The Civil Rules of the particular U.S. District Court;
6) The individual Judges' Rules.

DIFFERENT SCHEDULE

Similar to the "tools" which are different when an attorney enters the Federal arena, another glaring difference from State practice is the expedited schedule that the attorney finds him or herself on.

First of all, action is commenced by a filing of the Summons and Complaint with the Clerk of the Court, a practice currently in the process of being adopted by the State Courts of New York. Secondly, the Summons and Complaint must be served on the defendant within 120 days after the filing with the Clerk. Thirdly, upon the **filing** of the Summons and Complaint with the Clerk, there is a random automatic assignment of the case to a District Judge. Fourthly, the District Judge will schedule an early preliminary conference at which an expedited discovery schedule (usually 60 to 120 days) will be established. Next, after the discovery

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*Mark G. Barrett is a partner in the firm of Boeggeman, George, Jannace & Hodges, P.C., White Plains, New York. This article is based on a seminar given by D.A.N.Y., Inc. on October 20, 1992 in White Plains. A video cassette of the seminar is available from D.A.N.Y., Inc.

INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

21ST ANNUAL DEFENSE COUNSEL TRIAL ACADEMY OFFERS YOUNG LAWYERS A CHANCE TO SHARPEN SKILLS

Defense attorneys with two to six years of trial experience will have the opportunity to hone their trial advocacy skills when the Defense Counsel Trial Academy conducts its 21st annual program of instruction July 24-31 at the University of Colorado in Boulder.

Widely regarded as the nation's premier source of practical training for younger defense trial lawyers, the Defense Counsel Trial Academy is sponsored by the International Association of Defense Counsel (IADC). Its intensive, eight-day program of instruction, taught by a faculty of leading defense trial lawyers from throughout the United States, puts primary emphasis on "learning by doing" and employs state-of-the-art teaching methods, such as the videotaping of students' performances in a trial setting.

To ensure the maximum effectiveness of training and because the trial concept is utilized, enrollment in the Academy's program is by application only and is limited to 105 registrants. Thus, it is recommended that persons interested in participating in the 1993 program register promptly. An application brochure can be obtained by contacting the International Association of Defense Counsel, 20 North Wacker Drive, Suite 3100, Chicago, Illinois 60606.

The IADC's Trial Academy qualifies for continuing legal education credits in all states. In 1992, most students earned approximately 55 hours of state accreditation through the Academy program, the cost of which is tax deductible.

Participants in the program are assigned to groups of seven, with each group supervised by one of 15 faculty members.

According to Harvey L. Kaplan of Kansas City, Missouri, the 1993 Trial Academy Director, lectures and demonstrations by skilled lawyers expose the participants to different approaches and ideas in solving common trial problems.

In addition, Mr. Kaplan noted, videotaping student performance is a major element of the learning experience offered by the Academy. Each student is videotaped while conducting **voir dire** examination, making an opening statement and closing argument, and conducting the direct and cross-examination of witnesses. Students also are given the opportunity to examine expert witnesses

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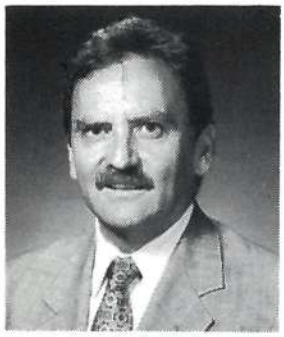
DRI STANDING COMMITTEE ON STATE AND LOCAL DEFENSE ORGANIZATIONS



By: Kevin J. Kelly

Dear Members:

I attended the fall meeting of the Standing Committee on State and Local Defense Organizations (SLDO) of DRI held on September 25 and 26, 1992 in Chicago. This is a new committee of DRI. Representatives of some forty-three state and local organizations were present and participated. I believe that the meeting was constructive since it refocused the overall objectives of the Committee and set up our method of operation.

The representatives were broken down into Sub-Committees including (1) State Liaison; (2) Legislative, Education; (3) Defense Bar Planning; (4) Meetings; (5) Communications and (6) Long-Range Planning.

During the course of the meeting, I advised the members of the Committee that DANY's primary objective was to work with other state and local organizations on activities such as (1) Expert Index, (2) CLE Programs, (3) News and Legal Magazines and Journals, (4) Social and Membership Activities and (5) Law Office Economic and Management Activities.

I was astounded at the considerable support I received from delegates from other organizations who agreed that this should be the primary objective of this Committee. I was reassigned to the State Liaison Sub-committee since its goals are closely aligned with ours.

I hope that my activities and participation with this Committee will strengthen the organizational activities of The Defense Association of New York. Any suggestions, ideas or comments regarding this organization's participation in The Standing Committee of State and Local Defense Organizations of DRI will be greatly appreciated.

INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL [Con't.]

represented by doctors from the Denver General Hospital Emergency Residency Program and by economists and graduate students in economics located in the Denver area. Each participant receives a copy of his or her videotaped presentation at the conclusion of the Academy program.

Several weeks prior to their arrival at the Academy, registrants receive, by mail, a complete set of practice materials. The set contains cases, fact-situation trial problems, and student assignments, all of which form the basis of program participation.

Accommodations and meals are provided at the College Inn Conference Center at the University of Colorado.

For further information, contact:

International Association of Defense Counsel
20 North Wacker Drive, Suite 3100
Chicago, Illinois 60606

FEDERAL COURT IS DIFFERENT [Con't.]

period, a pretrial conference will be held before the Judge where the subject of trial readiness takes priority over settlement discussions. Finally, trial could occur any time following the pretrial conference. Of course, certain Courts, such as the Hauppauge, Long Island Court in the Eastern District, or the White Plains Court in the Southern District, have a much shorter time between pretrial and trial than the more congested Courts in Brooklyn or Manhattan. In any event, it is advisable for a plaintiff or an insurance attorney bringing a subrogation action to have his or her prima facie case ready prior to the initial filing of the Summons and Complaint and not wait for the completion of discovery. It would be advisable for such an attorney who has problems with his or her case and needs to "build" a case in discovery proceedings to commence the suit in the slower moving State Courts.

DIFFERENT JURISDICTION

It is a common misunderstanding on the part of even attorneys that mere diversity of citizenship between the parties is sufficient to confer jurisdiction of the U.S. District Court over the case. Diversity between the parties means that

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FEDERAL COURT IS DIFFERENT [Con't.]

plaintiff is a citizen of a different State from **each** of the defendants. Yes, Virginia, there is such a concept as State citizenship and corporations are deemed citizens of **both** the State in which they are incorporated and the State in which they have their primary office. Also required for subject matter jurisdiction in diversity cases is that the amount in controversy exceeds $50,000.00. In addition to diversity, the other ground for Federal subject matter jurisdiction is the existence of a Federal question, such as an allegation of civil rights violations or an ERISA claim.

However, what is commonly misunderstood is that the conferring of subject matter jurisdiction in the Federal Court either by diversity of citizenship or the existence of a Federal question does not in itself give the Court **personal** jurisdiction over the person of the defendant. Congress could have made the limits of personal jurisdiction in Federal Court the entire Country but chose instead to limit it to the State in which the District Court sits. Accordingly, as in a State action, there must be some "nexus" between the defendant and the State in which the District Court sits and also proper service must be effectuated upon him, even pursuant to the State long arm statute. **CPLR 302.**

Of course, Congress has, on particular Federal questions, extended the personal jurisdiction of the District Court to encompass the entire Country. An example of this is ERISA, which has been slowly but surely expanding into the world of insurance and torts, where the statute permits a defendant to be sued "where the defendant can be found". **29 U.S.C. 1132(e)(2).**

DIFFERENT RULES OF PLEADINGS

There are many rules of pleadings and procedure set forth in the Federal Rules of Civil Procedure or elsewhere in Federal Law that make the actual practice of litigation on a daily basis significantly different from the practice in the New York State Courts. The following are some of the key areas of difference:

1) Rule 3—Filing of the Summons and Complaint commences the action and tolls the Statute of Limitations;
2) Rule 4—Service upon the defendant is made by a U.S. Marshal, mail or pursuant to State Law (e.g. CPLR 302 long arm statute);
3) There is a 120 day time limit for service following commencement of the action;
4) Rule 5—Actual filing with the Clerk is required for all subsequent pleadings;
5) Rule 11—Pleadings and motions and other papers for filing must be signed by the attorney and the last four numbers of his Social Security number must be indicated;
6) Rule 11—provides for sanctions for frivolous statements by attorneys in signed papers;
7) Rule 14—a defendant has only ten days after he answers to file a third party complaint; afterwards, the defendant must move for leave of Court to commence a third party action;
8) Rule 26 provides for broad discovery of any relevant information reasonably calculated to lead to the discovery of admissible evidence;
9) Rule 30(c)—at examination before trial, a witness is required to answer any question which is not actually covered by evidentiary privilege or is a trade secret;
10) Rule 33—Interrogatories to parties are used to obtain information not demands for Bills of Particulars; see also Civil Rule 46 of the SDNY.
11) It must be noted that Answers to Interrogatories, unlike Bills of Particulars, are evidentiary in nature and not merely an amplification of the stated claim; for further discussion see the case of **McNeese v. Reading & Bates Drilling Co.**, 749 F.2d 270 (5th Cir. 1985).
12) Rule 37—Sanctions are provided for abuse of discovery procedures;
13) Rule 28—A jury trial must be demanded in the Complaint or Answer or within ten days after the Answer is filed;
14) Many districts have established arbitration or other ADR programs, such as the Eastern District of New York where all cases where the amount in controversy is less than $100,000.00 are referred to compulsory arbitration;
15) In jury selection, questioning is by the Court and three rotating preemptory challenges are waived if not used by a party; this is true whether the more traditional Federal jury selection method is used or the newer "struck jury" system is introduced;
16) Unanimous jury verdict is required not merely the five-sixth verdict as in New York State Courts;

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FEDERAL COURT IS DIFFERENT [Con't.]

17) Rule 50—a motion for judgment as a matter of law (directed verdict) is a **pre-requisite** for a post-verdict motion to set aside (JNOV);

18) Rule 58—Judgment is entered by the Clerk and it is not necessary that it be served by a party with Notice of Entry to be effective;

19) The time to appeal runs 30 days from the entry of judgment by the Clerk, not receipt of a copy of the judgment with notice of entry; a 1991 amendment to Federal Rule of Appellate Procedure 4 provides that a party who did not receive a copy of the judgment may petition the Court by motion for within 180 days after entry of the judgment for a 14 day grace period to file a notice of appeal.

DIFFERENT RULES FOR APPEALS

Appeals from U.S. District Courts to the Circuit Courts of Appeals are governed by the Federal Rules of Appellate Procedure (FRAP), the Rules of the Circuit and, most importantly, the Scheduling Order issued almost immediately upon the filing of the notice of appeal. Since Scheduling Orders are extremely tight with their time limits and the sanction for missing a deadline is dismissal of the appeal, the provisions of the Scheduling Order, as well as the technicalities of the FRAP and the Court rules, must be scrupulously followed. To help one avoid the minefield of Federal Appeals, the assistance of an experienced appellate printing service is recommended.

PRESIDENT'S MESSAGE [Con't.]

A complete listing of all of our committees and their members follows.

If we are to remain a vital and active organization we must be aware of what is going on in our environment: legal, economic, political and social.

This awareness is enhanced through the work of our committees. This is why they are so important.

If you want to do something that is interesting and challenging I invite you to join one of our committees.

STANDING COMMITTEES
1992-93

Constitution and Bylaws Committee:

Chairperson: John E. Boeggeman
Members: James S. Conway

Court Techniques and Procedures Committee:

Chairperson: Anthony J. McNulty
Members: Paul Duffy and Michael Caulfield

Education Committee:

Chairperson: Kevin Kelly
Members: Ben Purvin, Mark Barrett and Paul Duffy

Judiciary committee:

Chairperson: Anthony J. McNulty
Members: Paul Duffy and Michael Caulfield

Legislation Committee:

Chairpersons: Eileen Hawkins, Peter Madison and Kevin F. McCormick

Membership Committee:

Chairperson: Susan Clearwater
Member: Angela Pantony

Medical Malpractice:

Chairperson: Carl M. Erman

Nominating Committee:

Chairperson: Richard M. Duignan
Members: John J. Moore, James S. Conway, Maureen Sullivan, Ralph Alio, William F. Quirk and Ben Purvin

Program Committee:

Chairperson: Kenneth Dalton
Member: Robert Devine

Publications Committee:

Chairperson: John J. McDonough
Member: Angela Pantony

Public Relations Committee:

Chairperson: Peter Madison
Member: Patricia Zincke

Seminar and Conventions Committee:

Chairperson: Kevin Kelly
Members: Ben Purvin, Mark Barrett and Paul Duffy

SPECIAL COMMITTEES

Committee on Court Crisis:

Chairperson: Mark Barrett
Member: Robert Devine

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PRESIDENT'S MESSAGE [Con't.]

Trial Advocacy Committee:

Chairpersons: Roger P. McTiernan and Kenneth Dalton

Pinckney Dinner Committee:

Chairpersons: Ben Purvin and Paul Duffy
Member: James P. Nunemaker

DRI Committee:

Chairperson: Ralph Alio

Golf Outing Committee:

Chairperson: Chris White
Members: John E. Boeggeman and Peter J. Madison

Insurance Coverages Committee:

Chairperson: Edward A. Hayes
Member: Donald Ayers

THE WAGES OF WIN [Con't.]

The Appellate Division rejected any contention that it was prejudicial error to admit into evidence proof that plaintiff's damages included loss of 22 years of salary of a New York City Police Officer, plus pension benefits of an officer with 22 years of service on the force. The Appellate Division also rejected the argument that it was prejudicial to permit the jury to consider such evidence because plaintiff had never become a police officer. The Appellate Division held, "given the fact that the plaintiff had taken all the steps necessary to become a police officer, we find that the jury's verdict concerning lost earnings (past and future) was not based on speculative evidence (cit. omit.)".

Examination of the trial record reveals that plaintiff's witnesses on damages were expertly cross-examined and admitted that they could not answer the question as to whether plaintiff would have remained on the force for any period of time. The police officers who testified on plaintiff's behalf had neither personal knowledge nor statistical evidence as to what percentage of a particular Police Academy class graduated and what number of police officers left the force prior to retirement. Based on those admissions, it was strenuously argued at trial and on appeal that plaintiff's basis for lost future earnings should not encompass her intended police career.

Curiously, the Appellate Division's decision in **Cranston** cited its own prior decision of **Naveja v. Hillcrest Gen. Hosp.**, 148 AD2d 429, ____ NYS2d ____ (1989). In **Naveja**, the Court reduced an award for future earnings because "the record reveals that the award, based on an assumption that the plaintiff would have become employed as a medical lab technician, if not for her stroke, is too speculative (cit. omit.)." The Appellate Division noted that plaintiff had never been employed in that position, nor obtained the required degree. In **Naveja**, the Court found the award for lost future earnings could not reasonably be based on plaintiff's active pursuit of a degree. In so holding, the Court cited a decision of the Appellate Division of the Third Department, **Horan v. Dormitory Auth.**, 43 AD2d 65. In **Horan**, plaintiff was a second year student at the Albany College of Pharmacy. There, the Appellate Division found that ample evidence in the record to establish that, but for the accident, plaintiff would have become a pharmacist.

The **Cranston** decision supports the argument that actual participation in a degree program is not required for a jury to consider the potential earnings of a career to which plaintiff had been merely admitted to study. Further, in **Cranston**, the absence of testimony elicited by defense experts on the likelihood of graduation and the statistical chance of completing a 22-year career, permitted the Court to give the plaintiff every favorable inference available in her expert's testimony.

The liberal admission of testimony concerning employment opportunities was also exemplified in **Kirschhoffer v. Van Dyke**, 173 AD2d 7, 577 NYS2d 512 [3d Dept. 1992 on transfer from 2d Dept.].

In **Kirschhoffer**, the jury awarded plaintiff $8,595,000.00. Plaintiff was awarded $325,000.00 for past pain and suffering; $70,000.00 for lost earnings; $7,000,000.00 for future pain and suffering, and $1,200,000.00 for impairment of future earning ability. Trial court reduced the damages to $3,395,000.00. This included a reduction to $500,000.00 for the award of impairment of future earning capacity.

The testimony in reference to plaintiff's diminished earning capacity and her intended full-time secretarial career came from two witnesses. Plaintiff sustained serious personal injuries on April 1, 1985. Plaintiff testified that prior to the accident, it was her desire to work as a full-time secretary in the Monroe-Woodbury School District when her youngest child was old enough to go to

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PINCKNEY AWARD DINNER

Corporate Claims President James P. Flood accepting the Pinckney Tribute on behalf of the Continental Insurance Companies.

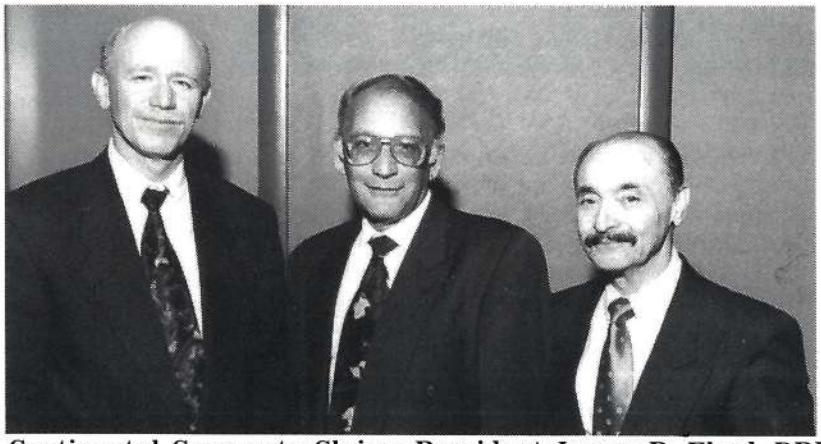
Marsha Birnbaum and Justice Bellard.

John J. McDonough explaining the finer points of Preindemnification to John Rooney.

Chris White, James Barron, James Conway, Kevin Kelly and Paul Duffy (left to right).

Thomas J. Mulligan of Windels, Marx, Davies & Ives gives presentation on "Defending Lead Poisoning Liability Claims."

Ralph Alio presents the "Pinckney Tribute" to James P. Flood, President of Continental Corporate Claims.



Continental Corporate Claims President James P. Flood, DRI Director and DANY Past President Ralph Alio, and DANY Secretary Tony Celentano.

DANY members enjoy the festivities.

THE WAGES OF WIN [Con't.]

school. Plaintiff had last worked as a full-time secretary in 1971 but had worked as a part-time secretary up to 1980 when her youngest child was born. Although no official from the school district testified, and there was no proof of a job opening; the trial court admitted the local school district contract into evidence.

Plaintiff's friend testified that she and plaintiff shared the goal of working as full-time secretaries for the school district. Plaintiff's friend was able to secure such a position. Based on such testimony, plaintiff successfully argued that she had proved the opportunity for employment as a full-time secretary in the local school district. There was a complete absence of testimony concerning whether plaintiff's secretarial skills were similar to that of her friend's, or whether the current state of her skills would have qualified her for employment with the school district. On appeal, it was argued that the award for lost future earnings was based on impermissible speculation. The Appellate Division of the Third Department rejected that argument and found that the award was established with reasonable certainty. Notwithstanding the evidence actually adduced at trial, the Court held:

> "Here, the record demonstrates that there were employment opportunities in the local school district, that Kirschhoffer did not require further training or education because she had worked as secretary in the past (cf. **Naveja v. Hillcrest Gen. Hosp.**, 148 AD2d 429, 430) and that Kirschhoffer's child began school five months after Kirschhoffer's accident."

Although it is true that plaintiff's youngest child did begin full-time school shortly after the accident, the Court inferred the availability of opportunities in the local school district based on the testimony of plaintiff's acquaintance that she had obtained such a position. Thus, the Court inferred multiple job opportunities from testimony concerning a single position. In attempting to distinguish the **Naveja, supra,** case, the Appellate Division in **Kirschhoffer** further found that plaintiff did not require further training because she had previously worked as a secretary. As noted, although this analysis **may** be true, there was simply no testimony concerning whether plaintiff's current skill level matched the requirements of the local school district. It is respectfully submitted to the readers that those factors needed to be addressed prior to and during trial. The presumption that past secretarial experience automatically qualifies one for a current secretarial position was clearly favorable to plaintiff's contentions. However, the Appellate Court was not inhibited in its use of the presumption because no contrary testimony concerning employment opportunities was presented.

It is clear that very little actual testimony is required to transform an expression of hope for a future job into a probability upon which an award for lost future earnings can be sustained. In both **Cranston** and **Kirschhoffer**, the defense strategy of demonstrating the speculation inherent in plaintiff's economic testimony no longer provided a matter of law basis upon which to challenge the award—notwithstanding apparently prior favorable case law. Therefore, in cases of severe personal injury suffered by someone who was either unemployed or employed on a part-time basis, a defense may need to be prepared to meet a claim for diminished future earning capacity predicated upon the presumption that the injured plaintiff would fulfill their employment aspirations. ▪

COMMON LAW INDEMNIFICATION RELIEF FOR STRICT OR VICARIOUS LIABILITY [Con't.]

Court of Appeals defined common law indemnification in **McDermott v. City of New York**, 50 N.Y.2d 211, 406 N.E.2d 460, 428 N.Y.S.2d 643:

> Conceptually, implied indemnification finds its roots in the principles of equity. It is nothing short of simple fairness to recognize that '[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity'. To prevent unjust enrichment, courts have assumed the duty of placing the obligation where in equity it belongs.

Indemnity rests on the principle that everyone is responsible for the consequences of their own acts. If a person is compelled to pay damages, which ought to have been paid by the actual wrongdoer, then such damages should be recoverable from the wrongdoer. The indemnitee, who is the "innocent" or passively liable party, is also entitled to recover all monies expended on account of the conduct of the culpable party.

Indemnification, unlike contribution, is the complete shifting of a loss from one party to another. Where one is held liable solely on account of the negligence of another, indemnification shifts

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COMMON LAW INDEMNIFICATION RELIEF FOR STRICT OR VICARIOUS LIABILITY [Con't.]

the entire liability to the one who is negligent. **D'Ambrosio v. The City of New York,** 55 N.Y.2d 454, 435 N.E.2d 366, 450 N.Y.S.2d 149 (1982). Thus, the indemnitee must be able to shift 100% of the liability. Contribution, on the other hand, is the right of a wrongdoer, who has paid the injured person, to compel other wrongdoers to pay a portion of the damages. **Siegel,** N.Y. Practice §109. Contribution apportions the liability between the parties according to their relative degrees of fault.

Implied indemnity is frequently employed in favor of one who is vicariously liable for the tort of another. **Rogers v. Dorchester Associates,** 32 N.Y.2d 553, 300 N.E.2d 403, 347 N.Y.S.2d 22 (1973). The law will imply a contract or impose liability on a person who has in fact committed no actual wrong, but held responsible for a loss, as a matter of social policy because he is able to spread the risk of the loss to society as a whole. **Mauro v. McCrindle,** 70 A.D.2d 77, 419 N.Y.S.2d 710 (2nd Dep't 1979) aff'd 52 N.Y.2d 719, 417 N.E.2d 567, 436 N.Y.S.2d 273 (1980); **County of Westchester v. Welton Becket Associates,** 102 A.D.2d 34, 478 N.Y.S.2d 305 (2nd Dep't 1984).

To recover based on common law indemnity, a party must prove that it was completely free of any active fault. Conversely, to defeat such a claim, one must only prove that the party seeking indemnity was actively responsible for at least 1% of the plaintiff's damages. An employer, for example, who is held liable to an injured person, based on the theory of **respondeat superior,** has a right of indemnity against the employee.

An owner of a building is frequently held liable for the acts of its tenants or contractors. Sections 240 and 241 of the Labor Law impose strict liability against the owner for the failure of the contractor to provide a safe place to work for the laborers. Unless the owner actively assumed responsibility for the work or safety in general, a claim for common law indemnity exists in favor of the owner, against one or more of the contractors. The Court of Appeals in **Kelly v. Diesel Construction Division of Carl A. Moss, Inc.,** 35 N.Y.2d 1, 315 N.E.2d 751, 358 N.Y.S.2d 685 (1974), explained the principle:

> There is no good reason to continue the artificial policy involved in denying an owner or contractor, liable vicariously only under the applicable sections of the labor law, from obtaining indemnification under common law principles . . . One who delegated a duty to another should be entitled to recover from the delegate from the harm sustained by him because of the delegate's breach of duty, namely having been cast in judgment as vicariously liable. **Id.** at 688, 690.

If the owner is at least 1% actively responsible, then the claim for indemnity fails and the owner must seek contribution.

A vehicle's owner, who is liable for injuries under Vehicle and Traffic Law § 388 solely because of the negligence of a permissive user, will also have a claim for common law indemnity against the negligent driver. **Traub v. Dinzler,** 309 N.Y. 395, 131 N.E.2d 564 (1955); **Naso v. Lafata,** 4 N.Y.2d 585, 152 N.E.2d 59, 176 N.Y.S.2d 622 (1958).

A similar right of indemnity has been implied as between landlords and tenants. A landlord has an implied right to recover against a tenant for injuries resulting from a tenant's failure to perform its obligations under a lease to exercise care or to comply with statutes, up to the amount the landlord is compelled to pay. **Richardson v. Cannold Holding Corp.,** 283 App. Div. 789, 128 N.Y.S.2d 814 (1st Dep't 1954) aff'd 308 N.Y. 932, 127 N.E.2d 85 (1954); **Merkle v. 110 Glen St. Realty Corp.,** 282 App. Div. 2d 617, 125 N.Y.S.2d 881 (3d Dep't 1953). A retailer sued in strict product liability also has an implied right of indemnity against the manufacturer when the retailer does not alter the product in any way, but merely sells the product in the same condition as when it was received. **Mead v. Warner Pruyn Division, Finch Pruyn Sales, Inc.,** 57 A.D.2d 340, 394 N.Y.S.2d 483 (3d Dep't 1977).

PLEADING THE CLAIM FOR COMMON LAW INDEMNIFICATION

As with contribution, a claim for indemnity does not accrue until the indemnitee has actually been forced to pay on a settlement or judgment. The claim may, and usually is, pled in the form of a cross-claim or in a third-party action in connection with the primary action. The pleading must specifically allege that the indemnitee's liability, if any, is solely as a result of the active negligence of the indemnitor. **Garrett v. Holiday Inns, Inc.,** 86 A.D.2d 469, 450 N.Y.S.2d 619 (4th Dep't 1982) modified on other grounds 58 N.Y.2d 253, 447 N.E.2d 717, 460 N.Y.S.2d 774 (1983); **McHugh v. International Components Corp.,** 118 A.D.2d 762, 500 N.Y.S.2d 152 (2nd Dep't 1986). A "nexus" must be pled between the liability of the indemnitee and the wrongful act of the indemnitor, if the claim is to survive a motion to dismiss.

A duty and relationship between the indemnitee and the actual wrongdoer must be

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pled. **Nielsen v. Greenman Bros., Inc.**, 123 A.D.2d 850, 507 N.Y.S.2d 641 (2nd Dep't 1986); **Salonia v. Samsol Homes, Inc.**, 119 A.D.2d 394, 507 N.Y.S.2d 186 (2nd Dep't 1986). **Garrett v. Holiday Inns, Inc.**, at 471, 450 N.Y.S. 619. Allegations which merely claim that the third party defendant was a joint tort-feasor do not state a claim for indemnity.

Indemnity is essentially a creature of contract law. Therefore, the six year statute of limitations for contract actions applies. CPLR 213. The statute of limitations for contribution is three years, similar to a negligence action.

RECOVERING ATTORNEYS FEES AND EXPENSES

New York Courts maintain that, in a claim for common law indemnification, attorneys' fees are viewed as an expense of the defense incurred solely as a result of the conduct of the indemnitor. Therefore, these expenses are recoverable. **O'Dowd v. American Surety Company of New York**, 2 A.D.2d 956, 157 N.Y.S.2d 1982 (1st Dep't 1956); **Taylor Wine Company, Inc. v. Pipe Welding Supply Co., Inc.**, 177 A.D.2d 940, 577 N.Y.S.2d 982 (4th Dep't 1991); **Owens v. Palm Tree Nursing Home, Inc.**, 89 A.D.2d 619, 452 N.Y.S.2d 670 (2nd Dep't 1982). This right of indemnification includes, not only attorneys' fees incurred in the suit brought by the injured party, but also costs, disbursements, and expenses.

THE IMPACT OF COMMON LAW INDEMNITY CLAIMS ON SETTLEMENTS

A claim for common law indemnity presents some unique implications with regard to settlements. Thus, a settling tort-feasor must carefully evaluate whether cross-claims by or against it are based in contribution or indemnity.

General Obligations Law § 15-108 provides that claims for contribution, by or against a settling tort-feasor, are barred. Claims for indemnity, based either on contract or common law, however, are not barred. Therefore, a settling party may still remain liable to a third party under a theory of contractual or common law indemnification should the facts so warrant. Similarly, a settling tort-feasor may continue to pursue his own claim for indemnification.

In order to be fully insulated in a case, and to safely close one's file, a settling party **must** secure a stipulation of discontinuance on any and all cross-claims or third-party actions, including claims for indemnity.

A similar complication exists with regard to partial settlements. A party who settles separately with the plaintiff must carefully evaluate its continued exposure to claims for indemnity. Agreements can be reached with the plaintiff protecting the settling tort-feasor from such exposure. The injured party can waive its right to recover, or reduce its recovery, by any amount of liability subsequently imputed against the non-settling tort-feasor for indemnity. This agreement does not bar the indemnification claim. Rather, the injured party waives or foregoes any recovery to the extent to which a non-settling tort-feasor receives against the settling tort-feasor. Even if such recovery is highly unlikely, the settling tort-feasor should insist on this kind of protection.

CONCLUSION

Common law indemnification is based on holding everyone responsible for the consequences of their own actions. The law will imply a contract in favor of a party who has been compelled to pay an injured party solely because of another's acts or omissions. A contract is so implied to prevent unjust enrichment or an unfair result. Thus, anyone paying damages, solely because of the acts of the actual wrongdoer, is entitled to fully recover such damages, including the attorneys' fees, costs, and expenses.

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unable to assert their subrogation rights against the promisor, even if that promisor is the wholly culpable party in bringing about plaintiff's injuries, as these rights are being extinguished by the insurance procurement. The underwriting principles of any insurance incorporate an evaluation of known or foreseeable risks a potential insured may incur. Preindemnification rules would now dictate that any contracts a potential insured enters into containing insurance procurement clauses be looked upon as virtual absolute liability agreements since if the additional insured is liable to the plaintiff in any way, e.g., statutorily, vicarious liability or active tort-feasor, the policy covering that additional insured must pay all of plaintiff's damages with no right of recovery from the culpable party through subrogation. Indeed, I would submit such a system leaves no method of evaluating the underwriting risk of any potential insured since liability for payment under the insurance contract will no longer be based on a fault analysis but rather as a matter of contract law.

The prospective insured should also oppose the adoption of the theory of preindemnification since no matter how safe a work site, for example, which that entity maintains, payment to the plaintiff will rest on the nature of the contract into which that entity has entered. General Obligations Law 5-322.1 was enacted as a response to the very kind of overreaching in contract drafting which such a fault-free payment system would promote. The claims history or loss ratio history and consequent premiums of a prospective insured would reflect the kinds of contracts which that entity had entered into as opposed to the quality and effectiveness of its operations from a safety standpoint. This is apparent that the adoption of such a theory, championed primarily by the State Insurance Fund and other volume writers of employers liability insurance is anticompetitive in that in order to get work, sell a product line, or lease space in a building the construction company, vendor or lessee will always be required to procure insurance for the promisee to the contract.

In July of 1992 the Appellate Division First Department decided **North Star Reinsurance v. Continental Insurance, et al.** ____ A.D. ____, 585 N.Y.S.2d 436. This appeal presented a situation wherein a painting contractor at a New York State owned construction site was contractually bound to procure insurance for the State in specified types and amounts. The plaintiffs were injured while working from a scaffold owned by their employer when the ropes suspending the scaffold below a bridge broke, precipitating the plaintiffs to the railroad bed below. The personal injury case was settled before trial for three million dollars and a stipulation was entered into amongst the employer's workers' compensation carrier (U. S. Fire), the employer's excess liability carrier (North Star) and the employer's general liability carrier (Continental) which reserved and preserved the rights of each carrier to seek a declaration as to which carrier was obligated to pay the settlement amount. Inexplicably, Continental had also stipulated that a policy procured by Fresh Meadows for its painting work in Albany County, New York, applied to the underlying loss, which had occurred in Suffolk County. This policy named the State as an additional insured but contained a territorial restriction that limited coverage to the State for liability arising out of Fresh Meadows' activities only in Albany County.

U. S. Fire and North Star jointly argued that the holdings in **Pennsylvania General Insurance Company v. Austin Powder Co.**, 502 N.E.2d 982, 68 N.Y.2d 465 and **Michalak v. Consolidated Edison Company of N.Y.**, 166 A.D.2d 213, 77 N.Y.2d 989 should apply to cut-off Continental's rights of subrogation against Fresh Meadows, based on N.Y. State's right to indemnification from Fresh Meadows, the only culpable party. They further argued that the policy procured for the State should be the first or primary policy applied to the loss. Continental argued the applicability of the territorial restriction as well Fresh Meadows' failure to actually procure a policy of insurance thereby distinguishing the facts from **Michalak.** Continental further argued the inapplicability of **Pennsylvania General** which held that an insurer may not subrogate against its own insured for a claim arising from the very risk for which the insured was covered and further held that the entity from whom subrogation is sought must be covered for the loss by the same policy through which the insurer had obtained its subrogation rights. In support of its argument Continental cited the rule set forth by the Court of Appeals in **Hartford Accident and Indem. Co. v. Mich. Mut. Ins. Co.**, 61 N.Y.2d 569, which negated the rule of **Pennsylvania General** where the entity from whom the insurer seeks subrogation is insured for the same loss on a separate policy. Continental also argued that because of specific exclusion, in the general liability policy issued to Fresh Meadows, Continental was not seeking subrogation from an entity that was insured for the same loss as the subrogor since the entity from whom subrogation was sought, Fresh Meadows, had not been insured by Continental for that particular loss.

The Appellate Division held that neither Continental's policy insuring the State nor the policy covering Fresh Meadows applied to the loss. The Court decided that although Continental

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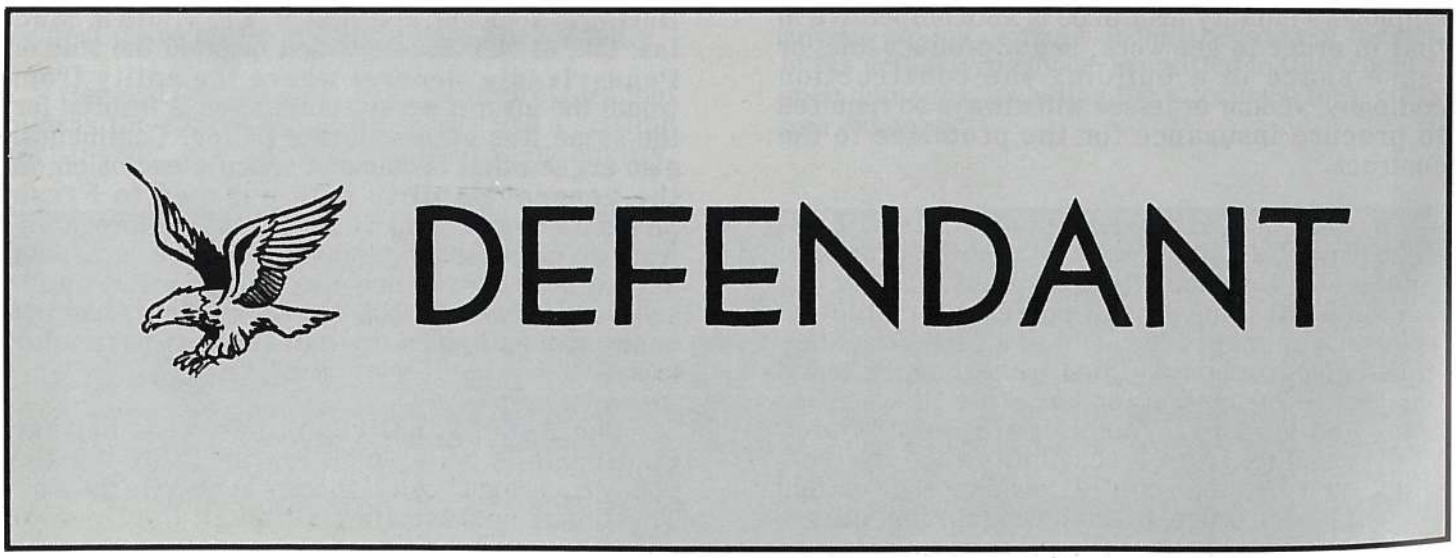
acknowledged applicability of its policy covering the State to the underlying accident, that policy could not apply because any payments on behalf of the State would be for vicarious liability alone and would subrogate Continental to the State's claim against Fresh Meadows, the actual wrongdoer. However, the court favorably cited **Hartford Accident** and indicated that the subrogation right was not lost because of Continental's separate policy insuring Fresh Meadows.

Four months later the Appellate Division, First Department was again asked to consider the preindemnification issue in **Flora Valentin, Administratrix Ad Prosequendum of the Estate of Julio Feliciano v. City of New York, et al.** 590 N.Y.S.2d 84, LEXIS 12943 (1992 N.Y.App.Div.). In **Valentin** the employee of third-party defendant EMD Construction Corporation (EMD) was killed when he fell from the roof of a building at a construction site owned and operated by New York City and the New York City Board of Education, respectively. These entities impleaded the decedent plaintiff's employer into the action for common law indemnity, as well as contribution. Pursuant to the contract between EMD and the Board of Education, EMD was obligated and had procured a liability insurance policy from National Union Fire Insurance Company with a limit of three million dollars for personal injury. In addition, EMD had purchased its own liability policy from National Union.

EMD moved for summary judgment claiming that the separate policy it had procured for the Board of Education "preindemnified" that entity to the extent of the policy obtained. In support of this argument EMD cited **Pennsylvania General** and **Michalak v. Consolidated Edison Co.** It is worth noting that in each of the cited cases only one insurance policy was involved as between the named insured and the additional insured. Furthermore, in **Pennsylvania General** there was no insurance procurement clause at issue since the party against whom indemnification was sought had not purchased coverage for plaintiff's subrogor. Due to various exclusions in the National Union policy procured by EMD itself the "claims down" would not be covered equally by both that policy and their workmen's compensation policy. (This exposure to the statutorily mandated unlimited workmen's compensation policy has been the engine driving the tortured legal arguments put forth in favor of preindemnification.) The attorneys representing the City and the Board of Education, appointed to defend both entities by National Union, argued that their indemnification rights against the culpable party should not be displaced on the basis of two separate policies insuring both the promisor and the promisee and the authority contained in **Hartford Accident.** Thus, the Appellate Division dismissed all claims against the third-party defendant, to the extent of the three-million dollar National Union policy thereby adopting the theory of preindemnification. In so doing, they specifically rejected the Court of Appeals findings in **Hartford Accident** and severely limited the scope of their holding in **North Star.**

Clearly this is an area where the general liability insurance industry, the foundation of which is risk assessment and premium allocation, and its clientele, which relies on risk management to contain insurance costs, have mutual interests in fighting the adoption of a rule of law which changes who will bear the burden for plaintiff's injuries from a fault based analysis to one based on contracts.



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